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Review of the Serious Fraud Office

Final Report

June 2008

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Executive Summary

1. This Review compares the Serious Fraud Office (SFO) to two prosecutors' offices in the US: the US Attorney's Office for the Southern District of New York (SDNY), a Federal prosecution agency, and the Manhattan District Attorney's Office (DANY), a local prosecutor's office. Both offices (whose caseload of serious and complex fraud is comparable to that of the SFO) occasionally work with the SFO.

2. This Review used statistical data, in-depth interviews of 126 individuals, reviews of documents, statutes and case law, and the review of a number of SFO, DANY and SDNY cases, in order to probe the differences between the SFO and its New York counterparts as a means of improving the SFO's performance.

3. Both SDNY and DANY are mature independent prosecution agencies that are over two centuries old. SDNY was established in 1789 and the Office of District Attorney was created in 1801. Both offices are situated in criminal justice systems that make effective use of limited criminal justice resources while honouring due process principles embodied in written constitutions, interpreted by case law and codified in statutes.

4. The SFO, along with its sister prosecution services – the CPS and RCPO – are young prosecutors' offices that are still evolving. The SFO (which began operating in 1988) and CPS (operational in 1986) are 20 and 22 years old and the RCPO (founded in 2005) is only three years old. They are situated in a rapidly modernising criminal justice system that is tackling inefficiencies while adjusting to the HRA 1998.

5. There are no fundamental differences between the role of the prosecutor and the due process rights of defendants in the US and in England and Wales. In both jurisdictions, the prosecutor is required to act as a minister of justice. Federal and NY state prosecutors have more "minister of justice" powers because they exercise investigative powers independently of the police through their role as legal advisor to the Grand Jury.

6. Using case studies and comparative hard data, the Review identified that the SFO uses significantly more resources per case than its New York counterparts and achieves significantly less for its efforts, as measured by both its productivity (the number of defendants prosecuted) and its conviction rate.

7. The differences in resources expended per case – with attendant consequences for productivity – are startling. For example, in a joint prosecution of a criminal conspiracy (the Allied Deals case) where the acts on both sides of the Atlantic were the same, SDNY used a total team of eight to convict 14 defendants in a third of the time that it took for an SFO team totalling 31 to prosecute four defendants, three of whom were convicted after an eight-month trial.

8. An analysis of comparative hard data shows that the Allied Deals case is not an exception. In 2007, the SFO employed 56 staff lawyers and spent an additional £4,227,000 on external counsel ranging from newly qualified barristers to Queen's Counsel. During the five-year period FY 2003-2007, the SFO prosecuted to conclusion a total of 166 defendants. In contrast, the DANY Frauds Bureau, the direct equivalent of the SFO, which is staffed by only 19 lawyers (slightly less than a third of the SFO's permanent legal staff) and does not contract out any aspect of its work to the external bar, concluded the prosecution of 124 defendants in the same period.

9. The discrepancies in conviction rates are also striking. During the five-year period of 2003-2007, the SFO's average conviction rate was only 61%[1] of defendants whose cases were concluded during this period. During the same period, DANY's Frauds Bureau had a 92% conviction rate. DANY has two other fraud bureaus whose caseload is a mix of SFO-style fraud cases and somewhat less complex fraud of the type prosecuted by the CPS Fraud Prosecution Service. Their conviction rates of 91% (44 defendants) and 90% (573 defendants) were similar. SDNY's conviction rate for SFO-type cases

[1] The percentages in the Executive Summary have been rounded to the nearest whole number.

prosecuted by three units during a slightly more than six-year period (1 January 2002 to 13 February 2008) was 97% of 810 defendants prosecuted.

10. The high conviction rates of DANY and SDNY for serious and complex white-collar crime cases are part of a pattern of high conviction rates for all types of indictable offences. For example, at the height of the New York City crime epidemic in 1990, when DANY obtained the indictments of 18,312 defendants, its Supreme Court (equivalent to Crown Court) conviction rate was 93%. Its current five-year (2003-2007) average Supreme Court conviction rate is 92%. SDNY's conviction rate for all crimes in 2006 was 97%.

11. To some extent, the SFO's conviction rate reflects a pattern of lower conviction rates for all indictable crimes in England and Wales. For example, 20% of Crown Court prosecutions in England and Wales are handled by CPS London. Its conviction rate for 19,384 defendants prosecuted in 2007 was 72%.

12. However, unlike the SFO, whose five-year average conviction rate has dropped from 82% to 61% since FY2002/3, CPS London's conviction rate has increased seven percentage points. This is attributable to a wholesale modernisation programme initiated by the Attorney General's Office and the Director of Public Prosecutions four years ago. The CPS units that have benefited most include the Fraud Prosecution Service, which has a conviction rate of 80%, and the Counter Terrorism and Organised Crime divisions, which have New York-style conviction rates in excess of 90%.

13. The chart below summarises conviction rates for the SFO, CPS London (Crown Court), three CPS elite specialist crime divisions, and the SFO's New York counterparts, including the latter's conviction rates for all cases prosecuted in the equivalent of Crown Court as well as the specialist white-collar crime units whose caseload is a similar mix to that of the SFO.

Summary of comparative conviction rates

Prosecuting agency		Time period	Concluded prosecutions of defendants	Conviction rate
SDNY	Total District Court	2006	1,979	**97%**
SDNY	Major Crimes, Securities Fraud and Public Corruption	1/2002-2/2008	810	**97%**
DOJ	All District Courts *	2006	88,094	**93%**
DANY	Total Supreme Court	2003-2007	28,776	**92%**
DANY	Frauds Bureau	2003-2007	124	**92%**
CPS	Counter Terrorism Division	1/2007-4/2008	77	**92%**
DANY	Crimes against Revenue	2003-2007	44	**91%**
CPS	Organised Crime Division	FY2007	176	**91%**
DANY	Special Prosecutions Bureau	2003-2007	573	**90%**
CPS	Fraud Prosecution Service	2007	85	**80%**
CPS	London total Crown Court	2007	19,384	**72%**
Serious Fraud Office		FY2003-2007	166	**61%**

* Department of Justice, 93 US Attorney's Offices.

14. The Review traced the SFO's lower productivity and conviction rates compared to its New York counterparts to a commingling of external and internal factors. External factors include laws, government policy, and legal professional rules and practices that are outside the control of the SFO. Internal factors include the SFO's own policies and practices, including insufficient innovation to mitigate some of the difficulties presented by its legal environment. While some serious and complex fraud cases do present a high level of difficulty, exceptionality is not a sufficient explanation for why the SFO is lagging behind the elite divisions of the CPS.

15. One reason for the differences in conviction rates between DANY and SDNY and, in contrast, the SFO and the CPS (excepting its elite units that are the vanguard of reform in addressing this problem) is the skills shortage in prosecutors' offices in England and Wales.

16. This skills shortage is a by-product of the "immaturity" of the independent prosecution agencies and the structure of the divided legal profession. The modern independent prosecutor in England and Wales is now responsible for initiating charges; directing and/or advising law enforcement investigations; and conducting higher court advocacy. To discharge these responsibilities effectively, prosecutors require investigative skills; case analysis skills; trial advocacy skills; team management skills; and police relationship skills. The divided legal profession does not breed in a single lawyer all of the skills required for the role of the modern independent prosecutor because it requires lawyers to specialise in a part of the process (e.g., preparation of cases versus advocacy) and, until recently, has limited the ability of prosecutors to assess the reliability and credibility of witnesses by interviewing them (which has been considered a "police job").

17. While the CPS and RCPO have recognised that there is a skills shortage issue and are taking steps to address it, the SFO is trailing behind even though its lawyers have a great need for the full skill sets because of the complexity of their caseload and their role in directing investigations.

18. In contrast, prosecutors working for the SFO's New York counterparts have the full skill sets required for the role of the independent prosecutor.

19. They develop these skill sets because:

- DANY/SDNY keep all of their higher court advocacy in-house;
- all felony (indictable) casework is handled by one lawyer from "cradle to grave", beginning pre-charge and ending with sentence and, in some cases, the appeal;
- they interview witnesses and direct investigations;
- they work closely with the police;
- they put very substantial resources into training and supervision.

20. These skill sets enable DANY/SDNY to use early case screening to weed out non-meretricious cases prior to indictment. This explains their high conviction rates for the full range of indictable crimes.

21. Early case screening is a policy whereby prosecutors identify at the earliest stage in each case the weaknesses that are fatal or can be cured. In the former event, the case is dropped with the minimum of unnecessary delay. In the latter event, prosecutors and investigators take prompt remedial action to obtain a successful prosecution.

22. Insufficient early case screening typically manifests itself in poorly focused investigations, inappropriate charges (or failures to charge), sprawling and unconvincing presentation of evidence, high discontinuance rates, and low trial conviction rates

23. The effective use of early case screening by DANY and SDNY accounts for their very low discontinuance rates – less than 1% for DANY (2003-2007) and under 3% for SDNY (2005 and 2006) – for all types of crimes in the equivalent of the Crown Court. It also accounts for their high conviction rates when a case actually goes to trial – 74% for DANY (2003-2007) and 89% for SDNY (2005).

24. In contrast, in 2007 CPS London had a discontinuance rate of 17% and a trial conviction rate of 63%. The SFO's trial conviction rate for 2003-2007 was 40%.

25. These good results for DANY were not always the case. In the mid-1970s, before DANY instituted early case screening, its total conviction rate by both guilty plea and trial for indictable offences was, at 74%, only a bit better than the current CPS London Crown Court conviction rate.

26. Although all of the independent prosecutors' offices in England and Wales have adopted the principle of early case screening, they are experiencing some implementation difficulties. This is mainly because of less effective training and supervision and the skills shortage in their lawyer ranks, which hampers instituting cradle-to-grave prosecution in all indictable cases.

27. In the New York prosecutor's offices examined for this Review, cradle-to-grave case ownership, early case screening and well-developed prosecutorial skills create the possibility of a criminal justice system in which the overwhelming majority of cases are disposed of by a guilty plea. Once indicted, the odds of conviction are so high that defendants are, in the main, willing to plead guilty at an early stage of the process in exchange for a reduced sentence which the judge indicates to the defence in advance of plea. This conserves resources for cases that merit trial. E.g., there are issues of fact that must be resolved by a jury, or a defendant has nothing to lose and decides to roll the dice, or the defendant seeks a trial for other reasons.

28. The Fraud Review examined the plea-negotiation system used by SDNY (which is similar to DANY's) and concluded that it demonstrated that "a plea-bargaining system can incorporate the non-negotiable principles of fairness to defendants, judicial independence and safeguarding the public interest by means of checks and balances". The Fraud Review recommended, inter alia, the creation of a plea-negotiation framework to facilitate early pleas in SFO-type cases. Respondents to the Fraud Review consultation process overwhelmingly supported this recommendation. The

Attorney General's Office has recently issued a consultation paper on the introduction of a plea-negotiation framework for fraud cases that is appropriate to the criminal justice system of England and Wales.

29. However, the SFO and the other prosecutors' offices handling serious fraud cases will only be able to maximise the benefits of an early plea-negotiation framework if they effectively implement early case screening. Certainty of conviction is more important to a plea-negotiation system than the possibility of a long prison sentence. DANY does not have the harsh sentencing laws of the US Federal system. Indeed, the SFO sends proportionally more convicted defendants to prison than DANY and has slightly longer median prison terms, when parole rules are taken into account. Nevertheless, DANY is still able to obtain pleas in the vast majority of serious fraud cases, often pre-charge, because defendants and their attorneys know that, if charged by DANY's Frauds Bureau, there is only an eight in 100 chance of not being convicted. In contrast, a defendant who has been prosecuted by the SFO in the last five years has, on average, about a four in 10 chance of not being convicted.

30. The criminal justice system of England and Wales is unlikely to obtain the full benefit of an early plea-negotiation framework unless the current system of disclosure is changed.

31. This system, which has created in effect a two-stage trial process for some complex document-heavy cases, not only creates disincentives for early guilty pleas. It is also an important factor contributing to the SFO's startling low productivity compared to its New York counterparts.

32. Productivity is directly related to the ability of a criminal justice system to deter crime.

33. The Fraud Review described the current disclosure law (codified in CPIA 1996 as amended by CJA 2003) as unfit for purpose in its application to serious fraud cases. The findings of this review confirm this conclusion.

34. CPIA 1996 involves a cumbersome eight-stage system that absorbs disproportionate investigative and prosecution resources, which are used to process material that most criminal justice practitioners concede has little value. At the same time, the law encourages the defence to engage in a war of attrition in order to derail a prosecution through an abuse-of-process application.

35. As a result, disclosure adds months and, in some cases, years to SFO prosecutions, tying up teams of investigators and lawyers. For example, in the joint Allied Deals SDNY/SFO prosecution referred to above, a team of three lawyers, one FBI agent and one paralegal spent a maximum of six weeks working on disclosure issues during the life of the US case. In contrast, disclosure took two years to complete in the UK Allied Deals prosecution and involved, at different times, a team of five lawyers (the case controller, a QC and three junior counsel), two investigators, and 13 paralegals. The aggregate lawyer time spent on disclosure amounted to 18.42 months; the aggregate paralegal time amounted to 148 months; and the aggregate investigator time was two months.

36. Inevitably, this has a knock-on effect on the number of cases the SFO can accept. For example, in the case study referred to above, the SFO prosecutor charged seven defendants in a five-year period compared to 50 defendants indicted by the SDNY prosecutor in the same period.

37. A criminal justice system that produces this little cannot be said to be effective in deterring, detecting or punishing criminals who commit serious white-collar crimes.

38. Disclosure's war of attrition is fuelled by confusion over what constitutes "a reasonable line of enquiry" due to lack of sufficient authoritative case law. Attorney General guidance that puts reason back into reasonableness would discourage abuse-of-process applications based on "20-20 hindsight" that inappropriately second-guesses investigators. The occasional granting of such applications discourages investigators from focusing enquiries, often against their better judgment.

39. US and NY law have the same disclosure principles as England and Wales and place the same obligations on a prosecutor. In complex white-collar crime cases or other document-heavy cases, however, SDNY and DANY use the "keys to the warehouse" system. This involves giving the defence free access to unused material in searchable electronic or other formats.

40. This system works well for SDNY and DANY because, unlike the current system in England and Wales, it nests comfortably within an adversarial criminal justice system based on the presumption of innocence. It is rational in that it vests decision-making in the party best equipped to decide what material is helpful or not. It is simple to administer and it is cost effective for the government provided that legal aid is effectively regulated, which is the case in the Federal/NY criminal justice systems. Most important, it helps innocent defendants by reducing the possibility of prosecutor error, which achieves disclosure's objective. In the last eight years, the incidence of a miscarriage of justice in a DANY prosecution that has been caused by disclosure failures has been one in 42,074 felony cases.

41. In 2005, the former Attorney, Lord Goldsmith, in conjunction with the judiciary, initiated a strict approach to enforcement of CPIA 1996. This has reduced the drain on the legal aid budget. But it has shifted the resource burden to prosecutors' offices without making disclosure a less intractable process. In the meantime, Lord Carter's Review of Legal Aid has opened the door to innovative approaches to controlling legal aid costs while the Attorney General's Office, based on the recommendation of the Fraud Review, is taking a fresh look at the current disclosure regime. All of this – coupled with the evolution of the role of the independent prosecutor since 1996 – creates the possibility of adopting a variant of the "keys to the warehouse" approach appropriate to the system of criminal justice in England and Wales. The "keys to the warehouse" approach is favoured by many criminal justice practitioners in England and Wales because it is regarded as fair and practical.

42. The government should press ahead with reform of the legal aid system to reward conscientious and effective lawyers and to break down the

culture of entitlement which has led a small minority of defence practitioners to view legal aid as a profit-making vehicle as opposed to a system of ensuring that citizens are entitled to an adequate defence irrespective of means.

43. The government could introduce significant efficiency savings into the prosecution of serious and complex cases by ending the anomaly which makes signed witness statements better evidence at trial than a Section 2 or SOCPA-compelled interview under oath. This could be achieved by legislation that gives Section 2/SOCPA interviews, as well as sworn testimony from other proceedings, the same evidential weight as a Magistrates' Court deposition.

44. In any jurisdiction, complex and serious crime cases require strong judicial management of the trial process. In SDNY, the judiciary has a culture of effective management of complex cases that is reinforced by the career path leading to the bench; a high level of administrative and legal support for judges; a "jury-friendly" trial ethos wherein judges narrow the issues, work a tight schedule and restrain the lawyers' verbosity; and statutory speedy trial rules, enacted in 1974, that set rigorous time limits for trial. In addition, Federal judges handle both civil and criminal cases. This facilitates their ability to manage litigation involving the complex technical issues often presented by serious fraud cases.

45. In contrast, while there are many outstanding judges managing complex and serious crime trials in England and Wales – and the judiciary is working hard with limited resources to improve the quality of case management across the board – there is a shortage of such judges and surprisingly little administrative and legal support for them. The notable under-resourcing of the judiciary in England and Wales, in comparison to the Federal and state judiciaries in New York, leads to long delays in the start of trials and also has an impact on the length of trials. In addition, historically, judges have been selected mainly from the independent Bar whereas, in the US, judges may be recruited directly from prosecutors' offices. This infuses the NY state and Federal judiciary with a specific and especially relevant experience.

46. In recent years, the SFO's effectiveness has been undermined by a lack of police investigative support. This results from the government not including fraud as a police performance indicator. This not only undercuts the SFO's ability to make cases, it has led to the partial decriminalisation of fraud by making it, in the main, a crime without consequences.

47. The primary internal cause of the SFO's low productivity and conviction rates compared to its New York counterparts is a lack of focus – in whole or in part – in some SFO investigations. Unfocused investigations are a matter of grave concern. They may:

- result in defendants who should have been charged not being charged;
- be unfair to victims and also to suspects who must wait too long for their reputations to be cleared;
- cause cases to collapse post-charge;
- lead to unwieldy trials that are not judge- and jury-friendly; and
- waste limited criminal justice resources.

48. Unfocused investigations are caused by the skills shortages in lawyers identified above and the lack of police skills in many SFO investigators. At the moment, there is a heightened risk of unfocused investigations because of a generational turnover at the case controller level. About a third of case controllers have less than two years' experience in this role.

49. In addition to the skills shortage in lawyers and investigators, unfocused investigations are caused by a lack of clarity about the roles, responsibilities, and qualifications of case controllers and Assistant Directors. Some case controllers do not exercise sufficient control over investigations. Most Assistant Directors do not exercise sufficient oversight of case controllers.

50. While there are some very capable senior managers in the SFO, there are others in key positions on the senior management team who lack the

operational knowledge, experience and perseverance required to supervise, mentor and problem-solve, and to command the respect of the troops.

51. These leadership deficits will need to be tackled if the SFO is to deliver to the public the high quality of service required from an elite prosecution agency.

52. As a consequence of the leadership deficits described above, a "pass the buck", risk-averse, "complaint" culture has developed in the SFO. This culture discourages robust decision-making and innovative and effective use of powers. It also leads to a culture of delay, which is reinforced by inadequate performance management. Inadequate performance management has led to a situation where some staff abuse the complaint process by filing grievances against line managers when they provide frank assessments.

53. The vast majority of the SFO's employees are capable and committed individuals who find this culture demoralising and want to see it changed.

54. The SFO's senior management team has recognised a number of the problems identified by this Review, and has taken some measures to address some of the problems, but has had difficulty coming to grips with the core issues. The advent of the new Director creates the opportunity to recruit innovators and implementers to the senior management team. This should lead to the "can do" culture that is essential to any operational agency.

55. The following are the key issues to be addressed by the senior management team:

- reform of the referral/vetting process to align it with the "golden hour" principle which calls for investigations to begin as soon as possible after an offence has been committed so as to enhance the investigator's opportunity to gather the maximum amount of relevant material;

- a staged long-term plan with milestones to bring the majority of higher court advocacy in-house by adapting one of the models used by sister prosecution agencies;
- developing a sophisticated and targeted training programme for both investigators and lawyers to improve their casework and case-management skills;
- developing a recruitment strategy that identifies the right type of lawyers and investigators and sells the Office's mission in order to attract and retain high-calibre staff.
- developing an internal career path for lawyers that will enable them to acquire the skills necessary to lead focused investigations;
- hiring more qualified ex-police;
- developing a long-term plan modelled after DANY's "detective investigator" force to obtain police powers for SFO ex-police. This will enable the SFO to make use of the full range of proactive investigative techniques;
- instituting an effective performance management system for all staff;
- replacing the Policy Division with an in-house centre of legal excellence that is required in an elite prosecution agency operating at the cutting edge of the law;
- reforming the Standards Unit to ensure across the board a high level of casework and the most efficient use of resources.

56. The Review includes 21 detailed recommendations that address the issues highlighted in the above paragraphs and provide a road map for turning the SFO into a centre of prosecutorial excellence. These recommendations are not intended to be prescriptive as there may be other routes to solving the problems identified by this Review. What is essential is that solutions are found.

57. Although the Review has identified significant areas for improvement, none of the SFO's problems are intractable. Solving them, however, will take time, legislative support, grit, and "elbow grease". The SFO is fortunate in having so many capable employees who care deeply about the Office's mission. If the SFO's leadership can connect with the aspirations of its staff and deliver the changes recommended by this Review, then the SFO's future will be secure.

Recommendations

Caveat

In light of the rapid modernisation of the criminal justice system in England and Wales, any new proposals arising out of this Review will need to be examined as a whole in the context of all of the proposals for change and reform of the criminal justice system.

Disclosure: people vs process

Recommendation 1. As recommended by the Fraud Review, there is a need for a complete review of the effectiveness of CPIA 1996 in its application to serious fraud and other complex record-heavy criminal cases. This review will want to take account of the experience of law enforcement agents, prosecutors, judges, defence practitioners, and others since the issuance of the 2005 Attorney General Guidelines and Judicial Protocols related to the management of disclosure as well as the possibilities for change created by on-going reforms initiated by Lord Carter's Review of Legal Aid.

Recommendation 2. It is recommended that the Review consider the impact of the current disclosure regime on the entire criminal justice system, including the resources and techniques available to police and prosecutors to investigate all types of crime. Investigators should not be inhibited from using legitimate and proportionate investigative techniques or be required to abstain from relevant enquiries because of the resource implications of disclosure further down the line.

Recommendation 3. It is also recommended that serious consideration should be given to:

- adopting the DANY/SDNY "keys to the warehouse" approach;

- eliminating the current scheduling requirement for cases where the prosecutor and the investigator are combined in one agency or the prosecutor directs the investigation.

CPS senior managers have benefited from observing the New York prosecution system at close hand. A disclosure review study group might similarly benefit by observing the SDNY/DANY disclosure system in practice. It is impressive that in DANY, lawyers – together with their clients – review the materials. This is the most efficient and fairest method for the defence to obtain information that will assist its case, which is not readily obvious to the prosecutor.

Recommendation 4. I recommend that one suggestion by the Fraud Review not be implemented. The authors of the Fraud Review suggest giving judges and the defence oversight of whether investigators should return material before scheduling if they decide it is not relevant. It is important, in my view, for policy-makers to appreciate that we have an adversarial system, not an inquisitorial system. Judges are not trained as investigators, and lawyers are trained to litigate. This twist to the process would simply increase the opportunities for defence attorneys to throw a spanner in the works and would give an investigative decision-making role to parties who lack investigative expertise, which is one of the causes of unfocused investigations. Moreover, this is only a problem in cases involving huge volumes of material and this problem would be cured if the "keys to the warehouse" approach were adopted.

Recommendation 5. The anomaly in powers among the three different prosecution agencies – SFO, CPS and RCPO – heightens the risk of a miscarriage of justice. The risk should be least in the SFO because it directs the investigation and routinely interviews all witnesses. While it may be premature to give the CPS and RCPO the power to direct investigations, it is not premature to empower all prosecutors, irrespective of agency, to interview witnesses in all types of cases. It may be advisable for the Attorney General, as part of her superintendence function, to issue guidance that ensures that

prosecutors interview witnesses whenever there are “red flags” for a potential miscarriage of justice.

Recommendation 6. It would be helpful to prosecutors if the Attorney General were to issue guidance on the meaning of a “reasonable line of enquiry”. The guidance should emphasise practicality, common sense, real-life limitations on resources, the nature and seriousness of the offence, and the information that was known at the time the decision was made. Absent exceptional circumstances, the failure to pursue a particular line of enquiry should be a trial issue to be argued to a jury. The fact-finder who hears all of the evidence is in the best position to evaluate the significance of any gaps in the enquiry and is routinely asked to do so. In my experience, juries do not like slipshod investigations and will “punish” the Crown by acquitting in such cases.

Legal aid: bringing Mohammed to the mountain

Recommendation 7. Up-front means-testing for legal aid in the Crown Court should be reinstituted. This would target legal aid where it is most needed and break down the culture of entitlement, an economic phenomenon created by ineffective regulation.

Recommendation 8. Legal aid lawyers should be paid for outcomes rather than for agreed tasks and hours in the vast majority of cases. This would create incentives for lawyers to work efficiently and would reward the majority of conscientious and effective lawyers.

Effective judicial management

Recommendation 9. While it was outside the scope of this review to look at the level of funding for the judiciary, it was evident that judges who try serious and complex cases on a regular basis would benefit from a higher level of legal and administrative support than they now have. Consideration should be given to providing funding to enable judges who try such cases routinely to hire a legal or administrative assistant. This cost could be paid

from the savings achieved from reductions in the number of pre-trial adjournments and the length of trials.

Recommendation 10. It should be possible for a prosecutor with high intellectual ability, integrity and good management skills to move directly from government service to the bench. This would inject a new type of experience into the judiciary, which would benefit the development of criminal procedure and law and the effectiveness of judicial administration.

Saving time and money by curing an anomaly

Recommendation 11. Where the Crown intends to call witnesses who have already provided information or testimony under oath or penalty of perjury, either pursuant to Section 2, or SOCPA, or in a foreign criminal or civil or regulatory proceeding, then:

- the transcript of their information/testimony should be deemed an adequate substitute for a witness statement and;
- be admissible at trial to the same degree as a Magistrates' Court deposition.

Since the witness's evidence will have been summarised in the Statement of Evidence, there should be no need to summarise it further unless a summary is required for the purpose of agreeing testimony for trial.

Police priorities: putting crime back into fraud

Recommendation 12. In the government consultation process following the report of the Fraud Review, 98% of respondents support the recommendation that fraud should be made a policing priority. I concur with this view.

A roadmap for turning the SFO into a centre of prosecutorial excellence

Recommendation 13. In light of the SFO's need for increased high-level legal capability, it is recommended that the post of Deputy Director be replaced with a new position entitled Chief Counsel. The Chief Counsel would sit on the Strategic Management Board and report to the Director. He or she would head up a new directorate (tentatively called the Office of Chief Counsel) that would combine the policy, training, standards and vetting functions. The Assistant Directors, who currently report to the Deputy Director, will instead report to the Director, who must keep a close finger on the casework that is the pulse of the organisation.

The role of Chief Counsel calls for an external appointment with high-level criminal fraud skills and a practical and proactive character. This lawyer would establish an ethos of close cooperation with operational lawyers, problem-solving, and delivery. He or she could fulfil the role performed by the Chief of the Appeals Bureau in DANY who is also Chief Counsel to the District Attorney. This would eliminate the need to out-source legal/policy issues to the Bar absent exceptional circumstances.

Recommendation 14. The Chief Counsel would be supported by three Legislative Assistants who could be two Grade 7 lawyers and one Grade 6 lawyer. All would be required to have recent SFO operational experience and the intellectual bent to become junior versions of the Chief Counsel. They could provide support on all aspects of policy work and bring to the Office of Chief Counsel operational understanding and high legal ability. This would assist in making the Office of Chief Counsel a centre of legal excellence, which would raise the quality and efficiency of casework throughout the SFO.

Recommendation 15. In light of the urgency of the Office's training needs, it is recommended that a new senior management post of Director of Training be created. This should be filled by a respected case controller who understands the training needs of operational staff, both legal and investigative. The Director of Training would report to the Chief Counsel and

sit on the Operational Management Board. The Director of Training, working closely with the Chief Counsel, would also be responsible for creating and implementing standards and policies. He/She would be assisted by the Human Resources professional now responsible for training who is currently located in Corporate Services.

The Director of Training's immediate priority would be developing an appropriate training programme for lawyers, financial investigators and managers to develop their investigative, case management, Crown Court advocacy, case analysis, and leadership knowledge and skills.

As part of this programme, the Director of Training might decide to send SFO staff to police training courses and/or have case controllers and principal financial investigators spend time on a major incident enquiry to learn how tightly it is controlled and to expose them to police culture and psychology.

The Director of Training might choose to upgrade quickly knowledge and skills by organising various types of learning events that could include:

- induction lectures on the role and responsibilities of a prosecutor to instil the SFO's unique corporate values;
- improving the quality of the output of the Policy Division which will be discussed further below;
- organising in-house lectures on high-priority topics;
- organising workshops based on case studies to improve investigative and case analysis;
- bringing in police and defence counsel to lecture on topics of interest.

The Director of Training should reinstate regular monthly meetings of lawyers and investigators to share operational know-how, legal developments, and best practice. He/She might want to bring in, on a regular basis, RCPO and CPS complex case lawyers to present case studies to stimulate innovation and spread best practice.

The Director of Training, in conjunction with the Chief Counsel, should improve the quality of case wash-up conferences. It is suggested that they be facilitated by someone outside of the Division who can bring a set of fresh eyes to the case. This could be a respected operational lawyer from another Division, or a respected lawyer from another prosecution agency. Case wash-up conferences could be used as a learning opportunity for a wider circle by making them a Division-wide event so that everyone can ask questions and suggest solutions. A member of the Office of Chief Counsel would attend and draft an analytical memo that summarised the lessons to be learned. This could be circulated to the entire staff.

Recommendation 16. It is recommended that a new senior management post, tentatively called Director of Investigations, be created to be filled by a capable ex-police officer with leadership and CID experience, including management of serious and complex cases. This person, who would sit on the Strategic Management Board, could take forward the body of work relating to the development of the SFO's internal investigative capability.

His/Her responsibilities would include:

- liaising and networking with police forces to ensure that the police and the SFO are providing each other with the right level of service;
- developing the office's internal investigative capability at the strategic and operational level, including improving the investigative skills of civilian investigators;
- supervising the use of proactive investigative techniques;
- advising lawyers and investigators on investigative plans, strategies and tactics;
- having ultimate responsibility for performance management of the investigative staff;
- assisting the office to identify and recruit capable law enforcement agents as civilian investigators;

- making the case to the government to authorise police powers for ex-police who are SFO investigators.

Recommendation 17. It would be helpful to all operational staff if there were an "anchoring" understanding of the role of the prosecutor which they could fall back on in making the discretionary decisions that are a prosecutor's bread and butter. To that end, it is recommended that the SFO should formulate a clear and simple vision of the role of the prosecutor that emphasises the dual dimensions of robustness and fairness.

Recommendation 18. The SFO should adopt as a policy that it will use the full range of investigative techniques to detect, prove and successfully prosecute defendants involved in serious and complex fraud, including its Section 2 powers

Recommendation 19. The SFO should create standardised processes for making maximum use of SOCPA powers to obtain reliable cooperating witnesses, and should provide training in the use of these powers. This is one of the powerful instruments in the prosecutor's tool kit.

Recommendation 20. The vetting system should be overhauled from head to toe to realign it with changes that have taken place since the establishment of the SFO. The new procedures should reduce bureaucracy to a minimum and produce a process that is aligned to the "golden hour" principle. This could include:

- outreach to police and other investigative and regulatory agencies at the operational rather than executive level, to encourage early referrals;

- direct outreach to potential complainants, such as the City law firms and banks, to obtain direct referrals;

- changing the criteria for acceptance to suspicion, to allow the use of Section 2 powers. This would involve recognising that the SFO might drop a larger number of investigations at an early stage;

- using the Director of Training or Legislative Assistants to make quick preliminary assessments and to reject cases where the waters are muddy or it is a "pass the buck" referral;

- thereafter, the case would be assigned to an Assistant Director or case controller to arrange a prompt interview with the complaining witness(es) and review whatever information was required to assess whether the SFO should accept the case for investigation.

Recommendation 21. To the extent that there have been deviations from the "cradle to grave" concept, the SFO should reinstate the principle of case ownership and extend it to the key members of the legal and investigative team. Only exceptional circumstances ought to dictate a change in the team's composition. The principle of team ownership of a case is a widely recognised mechanism for achieving accountability and high-quality results in serious and complex crime prosecutions.

Recommendation 22. The 1996 descriptions of the roles and responsibilities of case controller and Assistant Director should be reinstituted.

Recommendation 23. An agreed list of oversight tasks should be established for Assistant Directors, to enable them to fulfil their supervisory role effectively. This will also assist with performance management. Everyone would benefit if the tasks included: a) regular in-depth reviews of the caseload of each case controller, to encourage robust and sound decision-making and prevent case drift; and b) the review of key documents in a case, to quality-assure and evaluate performance.

Recommendation 24. Assistant Directors should undertake a "spring cleaning" and review pending investigations, to make robust and appropriate termination decisions.

Recommendation 25. The responsibilities of senior managers should be clarified to ensure that they are aware that they are ultimately responsible for performance management in their divisions. Their delivery on this issue should be one of the measures by which their performance is evaluated.

Recommendation 26. In light of the findings of this Review, there is a need for the SFO to reanalyse the qualities, skills and knowledge required in their prosecutors, Assistant Director and investigators.

Prosecutors handling complex white-collar crime cases require the aptitudes, knowledge and skills listed below. If this list were translated into "competencies", it could be used for both the recruitment and promotion of lawyers.

1. Good understanding of criminal law and procedure.
2. Good legal research, analytical and writing skills.
3. Good understanding of the Crown Court jury trial process, including how judges, defence counsel and juries react to evidence.
4. The ability to import jury trial knowledge into the investigation. This includes detecting potential defences and neutralising defence attacks on the process.
5. Sufficient understanding of investigative techniques and procedures, including the various forensic specialities, to be able to ask sensible questions and give sensible advice to investigative teams.
6. Good strategic and tactical sense.
7. The ability to focus on the key issues.
8. The ability to obtain credible and reliable information from witnesses.
9. Good judgment, common sense and broad life experience.
10. A combative spirit, which is necessary to lead a litigation team.
11. Perseverance and idealism.
12. Decisiveness. Decision-making is an essential prosecutorial skill. Good decisions are based on a solid foundation of knowledge, including knowing what you do not know.

Recommendation 27. The SFO has identified the need to reanalyse the competencies it requires in investigators to enable it to recruit more capable ex-police as civilian investigators. This body of work would best be undertaken with advice from serving or former police officers.

Recommendation 28. The SFO has identified the need for a career path for lawyers. It is suggested that any proposed career path be integrated with the skills- and knowledge-gaps identified in this Review. The SFO might wish to consider a career path model with the following elements:

- recruitment of barristers from the criminal bar with significant Crown Court advocacy experience, who would be employed initially as Grade 7 lawyers;
- the job of a Grade 7 lawyer would be to investigate in conjunction with the investigative staff, including interviewing witnesses and analysing evidence as well as writing statements. This would teach entry-level barristers investigative and teamwork skills;
- capable Grade 7 lawyers, who have followed this career path, would then be eligible to become in-house junior counsel or case controllers, depending on their inclinations and skills;
- Grade 7 lawyers could also spend periods of time as Legislative Assistants, which would expand knowledge and skills.

Recommendation 29. It is recommended that the SFO develop a short-term and long-term plan for bringing in-house much of its trial advocacy. In my view this would be one of the most effective methods of developing skills and knowledge and reducing case delay at all stages of the process. The different models, especially the CPS Organised Crime Division model, which the CPS intends to extend to the Counter Terrorism Division, could be considered by the SFO.

Recommendation 30. The new Director will want to make changing the office's performance management system – including the complaint culture –

a priority, and will no doubt find his own way of communicating this welcome sea change to the entire office.

Recommendation 31. The office can support line managers by expanding its use of the HR Business Partnering model that was successfully used to reform one unit.

Recommendation 32. The HR department should ensure that the appraisal criteria adequately reflect the requirements for lawyers and investigators identified in this Review.

Recommendation 33. The HR department should set up a system of exit interviews conducted by the Head of HR. Feedback on these interviews should be provided to the Director.

Recommendation 34. The information resulting from an improved performance management system should be fed into the promotion process in a way that is consistent with fair and open competition based on merit.

Introduction

"Two things develop the more time you spend here. One is a mind-set that we did it this way before, we should do it this way again, and I think that's a real burden."

Senator Tom Daschle,
Democrat, South Dakota,
describing the institutional culture of the US Senate

Terms of reference

1. The Review of the Serious Fraud Office (SFO) was commissioned as a follow-up to the Fraud Review whose recommendations were reported in July 2006. One of the topics considered by the Fraud Review was the approach to the investigation of fraud. Since the SFO is the chief investigative and prosecution agency for high-level fraud in England, Wales and Northern Ireland, a close look at how it carries out its duties was a natural progression in the government's efforts to improve the operation of the criminal justice system in this particular area.

2. Under the Terms of Reference,[2] I was asked to compare the SFO's approach to investigation and prosecution with one or more overseas jurisdictions and, in light of what could be learned from such a comparison, make recommendations to improve the SFO's performance. At an early stage, it was decided to narrow down the overseas jurisdictions to two prosecutors' offices in New York City: the US Attorney's Office for the Southern District of New York (SDNY), a Federal prosecution agency, and the

[2] In light of the Government's overall strategy for tackling fraud and taking into account the relevant recommendations from the Fraud Review;

"To consider the most effective methods of investigating and prosecuting the most serious and complex cases which fall within the SFO's statutory remit with particular reference to practice and overseas jurisdictions and any related internal organisational and structural issues and to make recommendations."

Manhattan District Attorney's Office (DANY), a local prosecutor's office. Both NY offices have worked jointly with the SFO, currently and in the past. A recent example is the UN-Iraqi Oil for Food fraud enquiry.

3. I was asked to conduct this Review because of previous assistance provided to the CPS that has helped it to develop a proactive prosecution culture, including a new approach to managing casework. I have also taught CPS prosecutors the investigative and case analysis skills required for charging. It was felt that the SFO might benefit from a fresh set of prosecutorial eyes belonging to an independent lawyer who understood the American system well and had knowledge of the system in England and Wales.

Maintaining perspective

4. Throughout this Review, I have borne in mind that the English and Welsh independent prosecution agencies are infants compared to their American cousins. The first prosecutor to head up SDNY – a one-man show – was appointed by President George Washington in 1789. Twelve years later in 1801, the New York State Legislature established the Office of District Attorney. In contrast, the CPS and SFO became operational in 1986 and 1988 – making them 22 and 20 years old respectively – and RCPO (founded in 2005) is only three years old. If DANY and SDNY are streets ahead of the SFO, it is because they have had a running start of about 21 decades.

5. DANY and SDNY also had the advantage of putting down roots in virgin soil. At their birth, American prosecutors did not face competition or hostility from the police or the Bar or from judges who were inclined to protect the latter's privileges. Nor did DANY or SDNY have to take their stumbling first steps in the glare of the media.

6. It is difficult for those who have not sat in the prosecutor's chair to appreciate the complexity and arduousness of the prosecutor's job, especially in the English and Welsh criminal justice system which is weighed down by bureaucracy. Monday morning quarter-backing is, after all, an effortless

sport.[3] The SFO's critics are apt to lose sight of the fact that this specialist prosecution agency is a revolutionary concept in England and Wales. It has an unusually complex caseload and has always had to operate at the cutting edge of the law. Many of the defendants prosecuted by the SFO have been represented by the best lawyers in the land, who have used every tool at hand to stop the SFO in its tracks. In spite of this, over the last 20 years the SFO's successes have more than outweighed its failures.

Grounds for optimism

7. The Review has involved providing on-going feedback to the Office, which has led to some positive changes. The case controllers especially, who are so committed to their job, have welcomed a fresh approach to their casework. As will be seen, the internal organisational issues highlighted by this Review are essentially related to the senior management team's inability to deliver some basic reforms.

8. Although the Review has identified areas for improvement, I am optimistic about the SFO's future. None of its problems is intractable, although solving them will take time, legislative support, grit, and "elbow grease".

9. Throughout this Review, I have been impressed by the dedication and competence of the SFO's staff. In the face of odds that their US counterparts have difficulty fathoming, SFO case teams succeed in bringing in hard-won victories. One example among many is Independent Insurance. This prosecution was of high public importance and unusual technical complexity. A smooth-running trial, founded on a solid investigation, thorough case preparation, and jury-friendly presentation of the Crown case, resulted in the conviction and a seven-year prison sentence for its former Chief Executive, and convictions and prison terms for his top two subordinates.

10. During the course of this Review, I have seen many examples of outstanding casework, including the trial testimony of the chief financial

[3] Discussing Sunday's American football game on Monday morning; i.e. a person who criticises or passes judgement from a position of hindsight.

investigator in the UK Allied Deals case. Another instance is the innovative use of information technology to master the huge volume of electronic data and paperwork associated with an SFO drugs pricing fraud investigation and prosecution. I have felt humbled in witnessing the unflagging endurance of investigators and prosecutors fighting disclosure's war of attrition. It is of paramount importance to the criminal justice system as a whole for the government to reform the law on disclosure.

11. More than anything else, I have been impressed by the desire for self-improvement evinced by the SFO's staff. Now it is up to the SFO's leadership to connect with their aspirations, and implement this Review's recommendations. If that happens, the SFO's future will be secure.

12. I realised when I undertook this Review that it would be a challenge, and I could never have fulfilled my remit without a high level of support from the SFO and the Attorney General's Office as well as from judges, police officers, prosecutors and lawyers in the UK and in the US, who have given generously of their time and knowledge. I especially appreciate the former Director's support. From time to time, I had to deliver difficult messages that he took on the chin. He was integral to the internal reorganisation of the SFO in 1996 that advanced the SFO's casework abilities by improving the integration of the SFO's professional disciplines (police, lawyer, and accountancy), creating new roles and clarifying their responsibilities. At various times, I will recommend returning to some of the wise thinking generated by the 1996 reorganisation that provides a solid foundation for future development. I also recommend new ways to improve the quality of casework and reduce delay. These include an approach to restructuring the senior management team that has benefited from the former Director's advice and consultation.

13. Indeed, the conclusions of this Review are, in many respects, a distillation of the collective wisdom of the SFO. If there are errors in this Review, they are my own.

Part I

Overview

Chapter 1. The SFO's New York counterparts

"For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done'. He is the 'servant of the law', the twofold aim of which is that guilt shall not escape or innocence suffer."

Judge John Paul Stevens, Associate Justice, US Supreme Court,
US vs Agurs 427 U.S. 97 (1976)

1. Like the SFO, both SDNY and DANY are joined-up prosecution and investigation offices in which lawyers and investigators (including in-house staff and law enforcement agents) work together in teams directed by lawyers. The latters' investigative powers derive from the role of the prosecutor as adviser to the Grand Jury. Acting on behalf of Grand Juries that are convened and supervised by judges, prosecutors issue subpoenas to compel the production of evidence, both documentary and testimonial. [4]

2. In the United States, there are several thousand prosecutors' offices including both Federal and local prosecutors. For example, SDNY is one of 93 US Attorney's Offices. In New York State alone, there are 62 counties each with its own autonomous elected District Attorney. The quality of US Attorney's Offices is reasonably uniform because they are subdivisions of a

[4] The Grand Jury system, which is embedded in the Federal/NY Constitutions that forbid prosecution for a felony unless there has been an indictment by a Grand Jury, is derived from English law. Grand Juries are investigative and charging bodies consisting of 23 citizens empanelled and supervised by a judge. A quorum of 16 jurors, with an affirmative vote of 12 jurors, is required for an indictment.

central authority, the US Department of Justice (DOJ). But there is a great deal of variability in the quality of local prosecutor offices. [5]

3. Within the multitude of American prosecution services, SDNY and DANY are recognised as the premier white-collar crime investigation and prosecution agencies. Both have a high volume of serious fraud cases, many with international ramifications and/or involving official corruption, that are comparable to the weightiest matters in the SFO's caseload. For example, in March 2005, SDNY obtained the conviction of Bernard Ebbers, CEO of WorldCom, who was sentenced to 25 years in prison for the second largest accountancy fraud – the first was Enron – prosecuted in the US. (Ebbers masterminded a scheme to overstate the value of the company's books by $5 billion.) Three months later, DANY obtained the conviction of Dennis Kozlowski, CEO of Tyco International, who is also now serving a 25-year term, for a complex asset-stripping fraud that diverted company monies for his personal benefit. Both DANY and SDNY successfully prosecuted companies involved in the UN-Iraqi Oil for Food scandal, now under investigation by the SFO.

4. SDNY, which covers Manhattan plus seven other counties, is headed by a US Attorney who reports to the Attorney General. The latter heads the Department of Justice, which also includes the FBI, a national police force. Like the Attorney General (a cabinet position) and members of the Federal Judiciary (an independent branch of government), US Attorneys are appointed by the President with the advice and consent of the Senate. On average, US Attorneys serve for a four-year term. They are responsible for enforcing Federal laws enacted by the US Congress.

5. DANY is responsible for enforcing laws when actions related to the crime take place in Manhattan. It obtains jurisdiction in complex global white-

[5] The National College of District Attorneys was founded in 1970 in an effort to reduce this variability. It provides training to local prosecutors' offices throughout the country to enable them to fulfil their responsibilities "efficiently, effectively and ethically". See http://www.ndaa.org/ncda/ncda_about.php

collar crime cases due to the number of financial transactions that take place through Manhattan's banks.

6. For example, in 2006, DANY, working with Brazilian and Federal law enforcement agencies, obtained the indictments of 34 individual defendants and 16 BVI companies in connection with a money-laundering scheme that laundered nearly $65 million through one Manhattan bank between 1997 and 2006. After successful prosecutions in this case, the Brazilian authorities sought DANY's help to investigate public corruption in Brazil. In March 2007, DANY obtained the indictment of the former governor and mayor of Sao Paulo, Brazil, and four co-conspirators, for crimes related to the theft of millions of dollars from a Brazilian public works project. The stolen money was laundered through a secret account in a Manhattan bank which had been used to transfer a total of $200 million in an 18-month period.[6]

7. Unlike the US Attorney for SDNY, the District Attorney (DA) is elected every four years by the residents of Manhattan. Since 1935, there have been only four DAs in Manhattan. The current incumbent, Robert Morgenthau, has been the DA since 1975.[7] Previously, he had served as US Attorney for SDNY. He had been appointed to this position by President John F. Kennedy and was then fired by President Richard Nixon for refusing to drop an investigation into Swiss bank accounts related to a Nixon campaign contributor.

8. As will be seen in Chapter 4, SDNY and DANY use substantially fewer resources per case than the SFO to prosecute many more cases. They also bring their cases to completion much more quickly in both the investigative and trial phases. Finally, they obtain many more convictions.

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[6] For further information on DANY prosecutions of money-laundering by Manhattan financial institutions, see the testimony of Assistant District Attorney Arthur D. Mittlemass on offshore banking, corruption and terrorism before the US Congress House Committee on International Relations, Subcommittee on Oversight Investigations.
See http://commdocs.house.gov/committees/intirel/hfa26777.000/hfa26777_0.HTM

[7] There are other examples of elected District Attorneys of long-standing tenure, e.g. the District Attorney of Portland, Oregon (Multnomah County), has been continuously re-elected since 1981.

9. The result is a criminal justice system that is significantly more effective than the criminal justice system in England and Wales in detecting, deterring and punishing white-collar criminals.

10. Although their outcomes are broadly similar, SDNY and DANY do not play on a level field. The Federal legal environment is more hospitable than that of New York to white-collar crime investigations and prosecutions. In the Federal system, potential sentences are tougher. The Federal judiciary has a culture of effective management of complex white-collar crime cases that produces more consistent good practice than is found in the state judicial system. Federal prosecutors have greater powers to obtain evidence. The Federal government has a witness protection programme, and Federal grand juries require less evidence to hand down indictments.

11. Nevertheless, the two prosecutors' offices both obtain good results because they operate in criminal justice systems that have got the "basics" right. The "basics" include:

- a critical mass of high-calibre, well-trained and well-supervised prosecution personnel;
- a proactive and independent prosecution culture; and, very importantly,
- a criminal justice system that makes effective use of limited resources to protect the public and to achieve justice for victims and the accused.

12. As will be seen in the chapters that follow, the markedly different outcomes obtained by the SFO result from the fact that it lacks some of the basics.

Chapter 2. Methodology

"Question: What do you want this review to achieve?"

"Answer: Keep the SFO but put in place a framework against which investigations are conducted and staff operate and are judged. And that will be all staff, including the Director, Deputy Director, everybody."

Interview of a case controller

1. To carry out this Review, I used a methodology familiar to readers of other UK criminal justice system reviews, e.g., the Glidewell Commission, the Butterfield enquiry, the Jubilee Line enquiry, the Fraud Review, etc. I interviewed 126 individuals to bottom-out perceptions; obtained and reviewed documents to substantiate or refute perceptions; reviewed and analysed statutes and case law; analysed in depth aspects of SFO, SDNY and DANY cases; reviewed UK government enquiries into relevant topics; and obtained and analysed comparative statistical data.

The twin Allied Deals cases

2. Two of the cases that were reviewed in depth were parallel SFO and SDNY prosecutions related to a criminal conspiracy involving a metals trading group of companies headed by two brothers who were based in London and Metropolitan New York. The SFO variant of this case is referred to as the UK Allied Deals case and the SDNY variant is called the US Allied Deals case. The twin Allied Deals cases proved a powerful analytical tool. The acts were the same on both sides of the Atlantic and the SFO and SDNY investigations began at the same time, in May 2002, with raids of premises in England and Metropolitan New York.[8] After these raids, however, their courses diverged.

[8] The UK raids were on 3 May and the US raids were 11 days later, on 14 May 2002.

The US Allied Deals case

3. Within two weeks of the raids, SDNY had obtained indictments of five defendants and another 12 defendants were indicted within a year of the raids, bringing the total to 17. Within 25 months of the raids, a total of 14 defendants had been found guilty in New York.[9] Nine pleaded guilty at an early stage of the court proceedings, including four who agreed to cooperate and did cooperate with the US and UK authorities by, inter alia, testifying in both countries. Six defendants went to trial. The trial lasted three and a half weeks. One defendant was acquitted. The remaining five were convicted. Excluding the searches, which in both countries involved the deployment of large police teams, the SDNY case team that conducted the investigation and trial consisted of a core of two lawyers and an FBI agent. During spurts of high activity, this three-person team was supplemented by an additional lawyer, an FBI agent, two in-house investigators and an analyst.

The UK Allied Deals case

4. In contrast, in England, charges related to the main crime were not filed until 41 months after the raids, in October 2005. This is 29 months after the last indictments in the US case and 16 months after the trial convictions in the US case. Equally important, only four defendants – compared to 17 in the US case – were charged. The trial did not commence until September 2007, 23 months after charge. One of the four defendants was discharged at the end of the Crown's case. Finally, although the trial had been predicted to take four months – compared to the US trial which lasted three and a half weeks – it lasted eight months. During the five years and 10 months that this case was pending, a team of eight police officers, thirteen civilian investigators/para-legals, two SFO lawyers, five counsel and three law clerks worked on it at various times.

[9] Of the 17 US defendants, two fled the country and have not been tried.

Chart I

	US ALLIED DEALS CASE	UK ALLIED DEALS CASE
Number of defendants charged	17 defendants	4 defendants
Time between raids and Charge/indictment	5 defendants, 2 weeks; 12 defendants, 11 months[10]	41 months
Number of defendants convicted	14[11]	3
Time between raids and conviction of last defendant	25 months	70 months
Time between charge/indictments and start of trial	12 months	23 months
Duration of trial	3.5 weeks	8 months
Number of defendants acquitted/discharged	1	1
Size of prosecution team	3 lawyers 2 FBI Agents 2 in-house investigators 1 analyst	2 SFO lawyers 5 counsel 13 civilian investigators/paralegals 8 police officers 3 law clerks

Allied Deals is not unique

5. As will be seen from the analysis of comparative data in the next chapter, the startling discrepancies in the amount of resources expended per case are not unique to Allied Deals, nor are the discrepancies in the length of

[10] A superceding indictment was filed charging the original five defendants and 12 additional defendants.

[11] Two defendants absconded: one has not been arrested; the other is waiting extradition.

time for investigation and finalisation. The DANY/SDNY investigation and prosecution of companies implicated in the Oil for Food scandal began in June 2004 and was finalised two and a half years later in December 2007 with the convictions of two companies who paid restitution in the amount of $47 million. A third company, Chevron Oil, agreed to pay $27 million in restitution in exchange for a non-prosecution agreement. In contrast, the investigative phase alone of SFO's Oil for Food case is expected to take three years.

Group interviews of the "engine drivers"

6. The people interviewed for this Review included 88 current members of the SFO's staff of all grades ranging from the caseworkers who prepare the trial bundles to the current Director.

7. Every interview of SFO staff contributed something useful and new but two group interviews – with the principal investigators and case controllers – were especially important. This small cadre of about 45 SFO staff is the engine that pulls the SFO's cases. In their group interview, the principal investigators identified systemic internal problems that were impacting on cases. The case controllers (the lawyers who direct SFO investigations and prosecutions) confirmed key elements of the investigators' analysis by using a case study of a successful DANY complex white-collar crime investigation and prosecution to evaluate how the SFO manages investigations.

8. Using the methodology described in Paragraph 1, I have identified what I believe to be the root causes of ineffective SFO outcomes. "Ineffective outcomes" is defined as the comparatively small number of defendants charged, delays in the investigative and post-charge processing of cases, and low conviction rates. I have divided these causes into:

- external factors outside the control of the SFO such as laws and government policy, which are discussed in Part II; and
- internal factors that are influenced by the SFO's policies and practices, which are discussed in Part III.

9. At the end of Part III, I make a number of detailed recommendations – some quite simple to put into effect – that will help the SFO address the problems identified in the Review. These recommendations are informed by solutions developed by DANY to address similar problems including:

- upgrading the skills of inexperienced staff;
- development of internal investigative capability; and
- recruitment and retention of qualified staff.

10. My recommendations are also informed by solutions developed by the CPS and RCPO, who have had to deal with problems similar to those that confront the SFO.

11. On occasion, I will recommend that the SFO reinstitute policies and procedures developed during the 1996 reorganisation. This process generated several internal documents containing much good sense. After reading these documents I was struck by the fact that the SFO in 2008 was struggling with problems identified back in 1996 and, at that time, had come up with some good solutions. It is not uncommon for organisations to lose their bearings. In this case, the SFO appears to have been overwhelmed by the loss of police support and the resource implications of disclosure. But it has also lost its bearings because its senior management team has not been able to lift its head above the waves. Some of my recommendations will revive the good thinking of the past while laying the foundation for the next 20 years of the SFO's development.

Chapter 3. The architecture of the Federal/NY criminal justice systems

"We have looked at the position in the United States which has fully developed plea bargaining systems in place. It is illuminating to go into this model in some detail as in our view it demonstrates that a plea bargaining system can incorporate the non negotiable principles of fairness to defendants, judicial independence and safeguarding the public interest by means of checks and balances."

Fraud Review, Final Report 2006

1. The analysis of comparative data shows conclusively that SDNY and DANY use fewer resources than the SFO to prosecute and investigate many more defendants, and the former two offices obtain much better results. The differences are not marginal – they are startling. Some non-specialists may speculate that the US system does much better because it is less "just". This chapter lays this notion to rest by explaining the architecture of the Federal and New York criminal justice systems.

2. The architecture of the Federal and New York criminal justice systems is constructed on four pillars:

- the immoveable constitutional due process rights of criminal defendants;
- the institution of the independent prosecutor;
- early case screening – a management system used to organise prosecution resources to produce efficient and fair outcomes;
- a fair and transparent system of plea-bargaining – a criminal justice system management tool that conserves resources so that defendants with cases that merit a jury trial are ensured a timely trial.

Constitutional due process rights

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

Associate Justice William O. Douglas,
US Supreme Court,
Brady vs Maryland, 373 U.S. 83 (1963)

3. All US prosecutors, whether Federal or local, must work within statutes and case law governed by the Federal Constitution (adopted 1787) and the Bill of Rights (ratified 1791). DANY prosecutors are additionally bound by the New York Constitution (adopted in 1777, 10 years before the Federal Constitution).

4. The US and NY constitutions include all of the rights in the European Convention on Human Rights (adopted 1950) and the UK Human Rights Act (1998), which are, to some extent, derivative documents. E.g.: trial by jury; protection against unreasonable and warrant-less searches and seizures (warrants must be issued upon probable cause supported by oath or affirmations); indictment by Grand Jury for crimes punishable by a prison term in excess of one year; double jeopardy; the privilege against self-incrimination; due process of law; speedy trial; right to a public trial; right to confront witnesses; right to counsel; right to compel witnesses in one's favour; right to notice of accusation; right to a local and impartial jury, etc.

5. In certain respects, Federal and New York law give criminal defendants greater protection than the law of England and Wales. For example:

- trial by jury in criminal cases is a fundamental constitutional right applicable both to Federal and state prosecutions in all cases where the defendant faces a potential prison sentence in excess of five

months.[12] Under Federal and New York law, conviction for a crime that carries a potential prison sentence of 12 months or more must be by the unanimous verdict of 12 jurors.

In contrast, there is no constitutional right to trial by jury in England and Wales – hence the ability of the government to attempt to substitute judge for jury trials in complex fraud cases and the use of lay magistrates or judges to try cases in the Magistrates' Court. Moreover, in indictable offences, a guilty verdict may be delivered by 10 out of 12 jurors, which makes it easier to obtain convictions in England and Wales than in the US;

- if an American defendant refuses to answer police questions, this cannot be used against him under any circumstances because to do so would violate a defendant's Fifth Amendment right to silence.

  In contrast, if a defendant in England and Wales offers no comment after being interviewed by the police, his silence may be used against him if he is warned of this fact in advance;

- under New York law, a witness who testifies in front of a Grand Jury automatically receives "transactional" immunity. This bars prosecution for any crime (except perjury and contempt) that relates to any aspect of a witness's testimony.

  In contrast, under the law of England and Wales, compelled witnesses receive "use" immunity. This only bars prosecutors from using their statements in a subsequent prosecution in the case in chief. However they can be used if defendants take the stand and give evidence that is inconsistent with what they said when they provided information pursuant to a Section 2 or SOCPA interview.

[12] *Duncan vs Louisiana* 391 U.S. 145, 1968.

The role of the independent prosecutor

"Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done . . . [T]he prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. Whether one seeks promotion to a judgeship, as many prosecutors rightly do, or whether he returns to private practice, he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just . . ." [13]

US Attorney Robert H. Jackson

6. The above quote is from a speech on the role of the Federal Prosecutor given by US Attorney Robert H. Jackson to the second annual convention of US Attorneys held in Washington DC in April 1940. At the time, Jackson, originally a trial lawyer from Western New York, had only been US Attorney for three months. He would later be appointed a Supreme Court Associate Justice and also serve as Chief US Counsel at the first Nuremberg trial.

7. Justice Jackson's speech is part of the training material for newly inducted DANY and Federal prosecutors. The Assistant United States Attorney (AUSA, a role equivalent to a case controller except an AUSA also handles the advocacy), who was in charge of the US Allied Deals case, was echoing Justice Jackson when he said in interview:

> "It is drilled into us that we are the good guys. We don't play games. We get paid for doing the right thing – not for winning cases. It is a big part of the culture of the office."

[13] Published in 31 Journal of Criminal Law & Criminology 3-6 (1940) and 24 Journal of the American Judicature Society 18 (1940).

8. Justice Jackson's speech has been codified as Canon EC7-13 of the New York Lawyer's Code of Professional Responsibility.

> "The responsibility of a public prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused."

9. This last sentence is the equivalent of CPIA 1996's Code of Practice proscription that investigators (which includes prosecutors in New York) must "pursue all reasonable lines of enquiry whether these point towards or away from the suspect".[14]

10. It is no accident that two (one Democrat, the other Republican) of the three US Senators who led the legislative battle to provide habeas corpus rights to Guantanamo Bay detainees are former prosecutors.[15] Nor is it a coincidence that it was information provided by prosecutors that forced the resignation of US Attorney General Alberto Gonzales after he had been

[14] CPIA 1996 Code of Practice, under Part II, Paragraph 3.5.

[15] Senator Patrick Leahy, Vermont, and Senator Arien Spector, Pennsylvania. "The truth is casting aside the time-honored protected of habeas corpus makes us more vulnerable as a nation because it leads us away from our core American values." "Senate vote on rights in terror cases falls short", International Herald Tribune, 20 September 2007.

accused of subverting the principle of prosecutorial independence. One of those who bore witness against him was James Comey, a career prosecutor who was the US Attorney for SDNY at the time of the Allied Deals indictments. In May 2007, Comey testified before the Congressional committees that were investigating claims that Alberto Gonzales had improperly dismissed prosecutors for political reasons. Comey stressed that even though the Attorney General is a political appointee, the Justice Department had to be perceived as non-partisan and non-political. "My people had to stand up before juries of all stripes, talk to sheriffs of all stripes, judges of all stripes. They had to be seen as the good guys, and not as either this administration or that administration." [16]

Early case screening

11. In January 1975, when Robert Morgenthau was inaugurated as Manhattan District Attorney, he took over leadership of an office that was collapsing under the weight of the violent crime epidemic that began in the mid-1960s. The office's internal structure and management systems had not changed fundamentally since the 1940s, a low crime period. Over 90% of the Office's felony (indictable) caseload was prosecuted in an assembly-line fashion by three Bureaus that reflected the different stages of case processing. This resulted in different prosecutors working on different parts of a case, and the most junior prosecutors (with no felony trial experience) working on the earliest phases of a case, including analysing the police evidence and directing further enquiries. Inadequate knowledge and skills, coupled with lack of accountability, resulted in poor case analysis and poor case preparation at the outset of many cases. This had a knock-on effect post-indictment and resulted in a high rate of ineffective outcomes and long delays in the Supreme Court, Criminal Term (Supreme Court). (Supreme Court is the equivalent of the Crown Court; an indictment is the equivalent of transfer, sending or committal.)

[16] Washington Post, 7 May 2007.

12. The ineffectiveness of this system is captured in the data set out in Chart II, below, which shows DANY's Supreme Court outcomes for 1974.

Chart II

Manhattan Supreme Court Dispositions 1974

Felony arrests	Estimated 35,000
Indictments	5,926
Dispositions[17]	6,042
Average number of appearances from first Supreme Court appearance to final disposition	16.4
Misdemeanour pleas as a percentage of dispositions	12%
Percentage of cases dismissed or acquitted after trial	26%
Total conviction rate	74%
Total effective outcomes rate	62%

13. Of the nearly 6,000 indictments prosecuted by DANY in 1974, 26% were either dismissed or resulted in trial acquittals. Another 12% resulted in misdemeanour pleas. In all probability, the latter were cases that inexperienced ADAs had evaluated as felonies but which were, in fact, misdemeanours that could have been resolved by plea in the Criminal Court (Magistrates' Court). When these cases are factored in, the percentage of

[17] All DANY statistics were obtained from DANY's case-tracking database or the NYS Office of Court Administration. Each disposition represents a defendant's finalised case. There is a discrepancy between indictments and dispositions because not all indictments are resolved in the year that an indictment is filed.

ineffective outcomes in felony cases was 38% and the percentage of effective outcomes was 62%.[18] An effective outcomes rate of 62% is shockingly low given the amount of serious violent crime in New York City during this era.

14. The best barometer of the incidence of violent crime is the incidence of homicide. In 1975, there were 661 homicides recorded in Manhattan, which then had a population of about 1.2 million. To put this in perspective, many Londoners now perceive their city as crime-ridden and dangerous. In 2007, London, which has a population of 7,200,000, had only 160 recorded homicides. This is a per capita homicide rate of .22 for every 1,000 people compared to Manhattan's 1974 per capita homicide rate of 1.82 per 1,000 people, which was over eight times London's current rate.

15. District Attorney Morgenthau's first priority was to improve Supreme Court performance by instituting early case screening in May 1976.

16. Early case screening is a policy whereby prosecutors identify at the earliest stage in each case the weaknesses that are fatal or can be cured. In the former event, the case is dropped without delay. In the latter event, prosecutors and investigators take prompt remedial action to obtain a successful prosecution.

17. The chief element of DANY's early case screening programme was cradle-to-grave prosecution of all felony cases from charge to final conclusion. Cases were assigned to senior prosecutors with felony trial experience in the Complaint Room (the equivalent of CPS Charging Stations). It was their responsibility to evaluate the case and direct further investigation as required and then do all of the follow-up work. This included presenting the case to a Grand Jury, obtaining an indictment, and conducting all of the Supreme Court casework, including pre-trial hearings and trials.

[18] A misdemeanour plea in the Supreme Court is "ineffective" because it could have taken place in the Criminal Court (Magistrates' Court) without applying all of the resources involved in indictment.

18. To improve Supreme Court felony conviction rates, the Office adopted a much tougher burden of proof for indictments. Instead of the statutory requirement of "reasonable cause to believe that a person has committed an offence",[19] the Office adopted the trial standard of proof "beyond a reasonable doubt". This often involved additional focused investigative effort to obtain the evidence required for convictions. Effective early case screening injected credibility into indictments. Faced with strong cases, defendants began pleading guilty early in the process.

19. Over the years, the District Attorney also obtained an increase in funding from Federal, state and local government which enabled the office gradually to increase its staff. However – as the recent history of the NHS has shown – staff increases alone do not improve performance. The decisive factor is effective management of increased resources. The most authoritative analysis of declining crime rates in the latter part of the 20th century identified that crime in New York City dropped at nearly double the rate of the rest of the country because of innovative law enforcement policies.[20]

20. Chart III on the next page shows DANY Supreme Court data in 1984, seven and a half years after the kick-off of early case screening and after staff increases. DANY filed 4,463 more indictments than in 1974. It reduced the percentage of acquittals and dismissals from 26% to 13% and the percentage of misdemeanour pleas from 12% to 3% while also cutting the average number of Supreme Court appearances in half. In sum, the data in Chart III shows how "cradle to grave" case ownership and early case screening, which made effective use of additional resources, enabled DANY to nearly double its caseload while substantially increasing its rate of effective outcomes.

[19] Reasonable cause "exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgement and experience that it is reasonably likely that such offence was committed and that such person committed it." See Article 70.10, New York Criminal Procedure Law.

[20] See Franklin E. Zimring, The Great American Decline, Oxford University Press, 2006.

Chart III

Manhattan Supreme Court Dispositions, 1984

Felony arrests	41,378
Indictments	10,389
Dispositions	11,220
Average number of appearances	9.7
Misdemeanour pleas as a percentage of depositions	3%
Percentage of cases dismissed or acquitted after trial	13%
Total conviction rate	87%

21. Over the years, as the system has bedded in and been refined, this upward trend in high-quality outcomes has continued. Even at the height of the crime epidemic in 1990, when DANY obtained indictments of 18,312 defendants, it still maintained a total conviction rate of 92.7%. Its dismissal rate was only 5.6%. Its trial conviction rate was 76.4%.

22. It is revealing to compare DANY's 1990 outcomes with the current outcomes of CPS London, which has comparable resources to DANY and also prosecutes the full range of crime. Comparing CPS London in 2007 with DANY in 1990, the chief differences are:

- DANY's caseload included much more violent crime; and
- DANY had, by 1990, an embedded system of early case screening.

23. In 2007, CPS London prosecuted a total of 19,384 defendants in the Crown Court, which is a little over 1,000 more cases than DANY's 1990 Supreme Court caseload.[21] Since instituting its variant of early case screening, CPS London's conviction rate has climbed slowly but steadily from 65.48% in 2003 to 72.1% in 2007. However, this is still 20% below DANY's 1990 conviction rate. Moreover, CPS London has a discontinuance (dismissal) rate of 17.2% – over three times higher than DANY's 1990 dismissal rate – and the CPS London Crown Court trial conviction rate is 62.5% compared to DANY's 76% conviction rate.

24. Significantly, DANY's performance has been much the same for nearly 20 years irrespective of the number of cases prosecuted or their mix. As crimes rates have plummeted,[22] the number of DANY indictments has also dropped to, on average, 5,287 per year. This has enabled DANY to divert resources to white-collar crime and other complex casework that is resource intensive. But, as shown in Chart IV on the next page, DANY's average conviction rate by plea and trial is still 92%. Juries in Manhattan (which are considered to be among the most sceptical in the nation) still convict almost three quarters of the defendants who are tried before them. And DANY's discontinuance rate is a mere .06%.

[21] All CPS London statistics were obtained from the CPS London Area Secretariat.

[22] In New York City as a whole, crime has dropped 75% since 1993. "NYPD Blues", *The Economist*, April 5, 2008.

Chart IV

DANY Supreme Court Dispositions, 2003-2007

Supreme Court	2003	2004	2005	2006	2007	Total	Average
Indictments filed	5351	5185	5010	5725	5164	26435	5287
Convictions	5718	5274	5140	5111	5214	26457	5291
Guilty pleas	5396	4943	4817	4824	4915	24895	4979
Number of defendants tried to verdict	429	460	428	385	412	2114	423
Convicted after trial	322	331	323	287	299	1562	312
Dispositions	6191	5777	5581	5526	5701	28776	5755
Dismissal rate	0.059	0.065	0.06	0.057	0.066		0.06
Conviction rate	92%	91%	92%	92%	91%		92%
Trial conviction rate	75%	72%	75%	75%	73%		74%

25. In a system such as this, where indictments have credibility, a defendant has good reason to plead guilty early because there is minimal prospect of the prosecution folding its tent on the eve of trial and there is a three in four chance of a jury conviction.

26. As will be seen in the next chapter, the logic of a defendant facing a serious fraud indictment brought by either a DANY or a SDNY prosecutor is

no different because his or her calculations will be based on the same hard numbers.

Chapter 4. Comparative resources and outcomes

1. There are differences in the remit of the SFO, DANY and SDNY, which must be accounted for in any comparisons. For example:

- the two New York offices have a broader remit than the SFO in that they prosecute a wider range of crimes;
- SDNY, like the SFO, is a small office that does not have plenary jurisdiction. It is selective about its intake, concentrating on, inter alia, cases of significant public interest where there is a high likelihood of conviction. This is reflected in its high conviction rate;
- each of the three offices has access to different levels of police support. Whereas the SFO and DANY draw heavily on their own employees for investigations, the SDNY relies almost entirely on the FBI and other law enforcement agencies;
- the SFO out-sources its trial and appellate advocacy whereas DANY and SDNY keep all advocacy in-house.

2. However, even after these structural variations are taken into account, the statistical differences are so great that one cannot but conclude that the SFO uses substantially more resources to achieve significantly fewer and less effective outcomes.

The SFO's remit

3. The SFO is a selective investigation and prosecution agency. It limits its intake to the most serious and complex criminal activity involving fraud by applying criteria that assess the level of harm, public interest, potential complexity of the investigations and potential quality of evidence. Although the SFO has some quite difficult fraud cases such as Independent Insurance, its caseload also includes some of the less complex fraud that is prosecuted by the CPS Fraud Prosecution Service and by DANY's Special Prosecutions Bureau. Through its Policy Division and its Mutual Legal Assistance Unit

(MLA), the office provides important training and investigative support to foreign jurisdictions. The Office puts considerable resources into both functions, and to excellent effect. Good work done for counterparts in foreign jurisdictions has enhanced the SFO's reputation abroad and enables it to claim reciprocity when seeking evidence from foreign countries.

SFO's budget and staff

4. The SFO's total budget in 2006/7 was £43,200,000. This is the sterling equivalent of approximately $84,500,000.

5. As at May 2007, the SFO had a total civil service staff of 311 that included 56 lawyers and 128 civilian investigators. However, this number substantially understates the SFO's actual workforce because, unlike DANY or SDNY, the SFO relies heavily on external contractors. It uses contract paralegals, forensic accountants, and investigators, whose numbers are not included in the staff figure.[23] Most importantly, it spends several million pounds a year – the sum of £4,227,000 in FY2006-7 – on contract barristers who conduct all of its Crown Court and appellate advocacy, including preparatory hearings and disclosure.

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SFO's caseload and outcomes

6. For the five-year period from FY2002/3 to 2006/7, the SFO finalised the prosecution of a total of 166 defendants, which is an average of 33 defendants per year. Its average conviction rate by plea or jury verdict was 61%, which amounts to approximately a four-in-ten chance of acquittal. For FY 2006/7, its conviction rate, including those cases in which defendants were "not proceeded against" in the Crown Court, was 60%.

[23] For example, the majority of the UK Allied Deals case team were external contractors.

DANY'S remit

7. DANY is both a selective and non-selective prosecution agency. Its caseload ranges from minor summary offences[24] such as prostitution, gambling, petty larceny, etc., to the most serious indictable crimes. Police arrests are automatically referred to DANY, which decides whether or not to charge. Often these cases involve additional investigation. This is usually done by the arresting officer or detective in the case pursuant to an Assistant DA's (ADA's) instruction. Cases initiated by police arrests are DANY's non-selective caseload and are prosecuted by the Trial Division. Independently, DANY may investigate matters pre-arrest, present evidence to a Grand Jury, obtain an indictment, and thereafter the defendant is arrested and arraigned in the Supreme Court. DANY refers to these cases as "investigations", although most casework, even when initiated by a police arrest, involves some prosecutor-directed investigation.[25] DANY's investigative work is handled by:

- investigative units within the Trial Division, such as the Fire Arms Trafficking Unit, the Homicide Investigation Unit, the Identity Theft Unit, etc.; or
- the Investigation Division, which deals with white-collar crime, organised crime, and official corruption.

8. Unlike the SFO, DANY does not train or investigate on behalf of foreign authorities (this is a Federal responsibility) but it has a large community outreach programme, involving education and liaison.

9. Unlike the SFO but like SDNY, DANY is a vertically integrated prosecution agency. It does not sub-contract out any portion of the prosecution process, including its trials and appeals. Its appellate caseload is high because under New York law, every defendant has an automatic right of appeal to the first level of appeals court (the Appellate Division, First

[24] Unlike the CPS, DANY is not responsible for prosecuting traffic offences or administrative code violations.

[25] Neither the police nor DANY expect that the former will bring them the perfect case.

Department). The Appellate Division may reverse a conviction in the interests of justice. Appeals to the highest court (the Court of Appeals) are on matters of law.

10. Like the SFO, but unlike SDNY, DANY has a large staff of civilian investigators. Unlike the SFO, DANY's civilian investigators have police powers. While DANY works with local, state and Federal law enforcement agencies, it will often use its own investigators to conduct the investigative work on complex white-collar crime cases. For example, DANY investigators handled the Brazilian public corruption, fraud and money-laundering case described above.

DANY's total budget and staff

11. In FY 2007, DANY's total budget was $76 million.

12. In FY 2007, DANY's total staff numbered 1,306, including 518 lawyers and 99 investigators. The remaining employees included other casework support staff as well as corporate services and administrative staff.

Total caseload

13. In FY 2006, DANY prosecuted:

- 89,434 defendants charged with summary offences (prosecuted in the equivalent of the Magistrates' Court);
- 5,526 defendants charged with indictable offences, including its serious white-collar crime caseload; and
- 725 appeals to the Appellate Division and Court of Appeals, plus federal Habeas Corpus petitions.[26]

[26] When a defendant has exhausted his State appellate rights, he may file a Habeas Corpus petition to the Federal Court challenging his conviction on federal constitutional grounds.

DANY's Investigation Division staff

14. The prosecution of serious and complex white-collar and organised crime is handled by DANY's Investigation Division, which is divided into seven Bureaus: Frauds; Crimes against Revenue; Special Prosecutions; Investigation Division Central; Labour Racketeering; Official Corruption; and Rackets.

15. The caseload of these seven Bureaus is of equivalent or greater complexity to that of the SFO with the exception of Special Prosecutions.[27] This Bureau handles some SFO-type cases (such as the Oil for Food prosecutions) but also handles less serious fraud that might be prosecuted by the CPS Fraud Prosecution Service.

16. Like the SFO, DANY's Investigation Division is staffed by a mixture of lawyers, investigators, accountants, paralegals and other casework support staff who develop cases from referral to the point of charge and then take the case to trial.

17. In 2007 the Investigation Division was staffed by 82 lawyers, 77 investigators and 103 other support staff. During the five-year period between 2003 and 2007, it prosecuted a total of 1,161 defendants and had a conviction rate of 86%.

18. The median time between indictment and disposition for defendants prosecuted by the Investigation Division during the five-year period was eight months. DANY does not systematically collect data on the length of time between referral and indictment but it is unusual for this period to exceed one year.

[27] The Rackets, Labour Racketeering, and Official Corruption Bureaus prosecute government officials and police officers as well as "mafia-style" organised crime cases. This includes use of the state RICO law (called OCCA), which requires the prosecution to prove a criminal enterprise.

DANY's Frauds Bureau

19. The Frauds Bureau is the direct equivalent of the SFO. It is staffed by 19 lawyers whose experience ranges from seven to 23 years in the office. During the period 2003-2007, it prosecuted a total of 124 defendants and had a conviction rate of 92%.

20. Significantly, the other two Bureaus focusing on fraud – Crimes Against Revenue (major tax fraud) and Special Prosecutions – had comparable five-year average conviction rates of 91% and 90% respectively.

SDNY's remit

21. SDNY, which is one of the busiest prosecutors' offices in the Federal system, has approximately 170 lawyers in its Criminal Division and files over 1,000 criminal cases each year.[28] Like the SFO, the SDNY is a selective prosecution agency that does not have the plenary jurisdiction exercised by local prosecutors' offices, although it has a broader jurisdiction than the SFO (see paragraph 23 below). It prioritises the type of cases accepted for prosecution based on the nature of the crime, the available resources, and the quality of evidence. It may refer cases to local authorities when there is concurrent jurisdiction.

22. SDNY relies on the FBI and other Federal law enforcement agencies to conduct investigative work. However, SDNY prosecutors are involved at an early stage, giving investigative advice and drafting warrants for searches and electronic surveillance and interviewing witnesses and suspects. SDNY also has a small number of in-house investigators – approximately two per unit – that provide support in conflict-of-interest situations where, for example, SDNY is prosecuting law enforcement agents. Like DANY, SDNY handles all of its own appellate work.

23. SDNY's Criminal Division is divided into 12 units: Asset Forfeiture; Narcotics; International Narcotics Trafficking; General Crimes; Appeals;

[28] http://www.usdoj.gov/usao/nys/divisions.html All SDNY statistics were obtained from SDNY and the Federal Justice Statistics Resource Center.

Organised Crime; Terrorism and National Security; Violent Crimes; White Plains Division; Major Crimes; Securities Fraud; and Public Corruption. The last three units handle cases that are the equivalent of the SFO's caseload. For example, the Major Crimes Unit prosecuted the Allied Deals case. Together, these three units are staffed by 47 lawyers, 16 paralegals, nine investigators and five other support staff. SDNY's budget is not public information.

SDNY's outcomes

24. During the six-year period January 2002-February 2008, the three SDNY units that are the equivalent of the SFO prosecuted in the District Court (the equivalent of Crown Court) a total of 810 defendants. The conviction rate in these cases was 97%. SDNY's average conviction rate for all crimes in the period 2002 through 2006 was 96.5%.

25. The median time for disposition from the point of referral to sentence was 11.5 months. The short period between referral and sentence reflects the fact that the FBI (and other law enforcement agencies that refer cases to SDNY) work up the case to a high standard before referral, that indictments are based on hearsay, and that strict Federal speedy-trial rules apply.[29]

26. It is interesting to place SDNY's conviction rate for serious fraud type cases in the broader context of all Federal prosecutions throughout the US. In 2006, the 93 US Attorney's Offices prosecuted a total of 88,094 defendants with a conviction rate by plea and trial of 92.71%. This is comparable to DANY's conviction rate for all felony prosecutions.

[29] See Chapters 6 and 7.

SFO outcomes compared to the outcomes of four CPS elite divisions

27. In order to shed a broader beam of light on SFO outcomes, I also compared them to the outcomes of four of the CPS elite divisions that were reorganised in 2006 to improve the quality of casework.

28. The Counter Terrorism Division has a conviction rate of 92.1% for 77 cases concluded between January 2007 and 14 April 2008.

29. The Organised Crime Division has a conviction rate of 90.91% for 176 defendants whose cases concluded in FY 2007/2008.

30. The Fraud Prosecution Service has a conviction rate of 80% for 80 defendants whose cases were concluded in calendar year 2007.

31. The Special Crimes Division has a conviction rate of 63% for 46 defendants whose cases were concluded in the seven-month period of July 2007 through February 2008. Thirty-five per cent of the acquittals are due to one case involving six defendants.

32. While acknowledging once again the complexity of some SFO cases, the results of other prosecution units in England and Wales that have specialist caseloads that also present difficulties, albeit sometimes of a different nature, show that it is possible to improve the SFO's conviction rate.

Part II

The External Factors

Chapter 5. Disclosure

"Time is not unlimited."

Lord Justice Sir Igor Judge, R. vs Chaaban
[2003] EWCA Crim 1012
20 March 2003

"Why does England and Wales have a system that assumes that the defence knows nothing? Surely, the defendant has some ability to apprise his counsel of what is in the documents which he probably created. Is the defendant helpless? Especially in a sophisticated case where you are dealing with a sophisticated businessman, the defendant has some responsibility to know what is going on in his company and we can presume that frequently he does."

Judge Barbara Jones,
Presiding Judge, SDNY
US vs Bernard Ebbers

1. The most important factor explaining the great disparity in the number of cases prosecuted by the SFO compared to its New York counterparts is the system of disclosure in England and Wales. Unlike its New York counterparts, the SFO must divert huge resources to implementing the disclosure regime of England and Wales in both the investigation and pre-trial

phases of a case.[30] This directly affects the number of cases that the SFO can investigate, which has a knock-on effect on the number that result in charges.

2. Disclosure is one of a number of mechanisms to reduce the risk of an innocent person being convicted of a crime.[31]

3. The disclosure laws of England and Wales and the US require prosecutors to give to the defence any information that is, or should be, in their possession that is "reasonably capable of undermining the prosecution case or assisting the defence". Federal/NY case law often uses the phrase "exculpatory information", which is defined as "information favourable to the defendant and material to the issue of guilt or punishment". All three phrases amount to the same thing.

4. In both countries, disclosure principles were developed first by case law and then codified. The landmark US Supreme Court decision is Brady vs Maryland, decided by the Warren Court in 1963.[32] Brady was a death-penalty murder case in which the prosecution had withheld a co-defendant's confession stating that the defendant had not done the actual killing. This was material to sentence although not to guilt. The landmark Court of Appeal decision is R. vs Judith Ward, decided in 1993, 30 years after Brady vs Maryland. This also was a murder case wherein the police suppressed information undermining the reliability of the defendant's confession and the forensic evidence corroborating the defendant's confession.

[30] "Pre-trial" is a US term referring to the activities in a case between sending/transfer/committal (indictment) and the commencement of the trial.

[31] Disclosure rules for England and Wales are codified in CPIA 1996, amended by CJA 2003. In US Federal and New York state law, a prosecutor's disclosure duties are set out in the "Discovery" sections of their respective criminal procedure statutes, and also in case law.

[32] The Warren Court revolutionised criminal procedure in the 1960s. This process was integral to the Civil Rights movement, in which the Warren Court also played a pivotal role, because African-Americans were disproportionately the victims of due process failures.

5. US prosecutors, like their UK counterparts, are required to err on the side of caution in deciding whether or not to disclose potentially exculpatory information. In the US, the types of information required to be disclosed include, inter alia:

- information implicating someone else in the crime;
- the identity of eyewitnesses who failed to identify the defendant in an identification proceeding;
- information that casts doubt on a witness's ability to accurately perceive or recall critical events, etc.;
- information undermining a prosecution witness's expertise;
- prior convictions or pending criminal charges against a prosecution witness;
- parole or probation status of the witness;
- prior bad acts of a witness;
- information contradicting a prosecution witness's statements or reports, including prior inconsistent oral or written statements;
- a finding of misconduct by a Board of Rights or Civil Service Commission, that reflects on the witness's truthfulness, bias or moral turpitude;
- evidence that a witness has a reputation for untruthfulness;
- evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group;
- promises, offers or inducements to a witness, including a grant of immunity;
- a witness's intention to sue the defendant in civil proceedings.

Comparative resources devoted to disclosure

"Due process has common sense limits. Why not give a defendant 24 jurors instead of 12? Why not give a defendant a trial de novo?"

DANY Chief of the Appeals Bureau

6. In the complex fraud cases prosecuted by the SFO's New York counterparts, disclosure is implemented in a matter of weeks by a small team made up of lawyers, investigators and paralegals. In contrast, the disclosure system in England and Wales ties up lawyers, investigators and counsel for months and even years.

7. In the SDNY prosecution of the Allied Deals case, a team of three lawyers, one FBI agent and one paralegal spent a maximum of six weeks working on disclosure issues during the life of the case. In addition, a clerk was employed to "babysit" defence lawyers when from time to time they required access to material. (This was an insignificant cost.)

8. In contrast, disclosure took two years to complete in the UK Allied Deals prosecution and involved, at different times, a team of five lawyers (the case controller, a QC and three junior counsel), two investigators, and 13 investigator/paralegals. The aggregate lawyer time spent on disclosure amounted to 18.42 months; the aggregate investigator/paralegal time amounted to 148 months; and the aggregate investigator time was two months.

9. This is typical of SFO cases – both big and small. For example, in rising stock markets, organised crime groups and other professional criminals will set up "boiler room" fraud operations that prey on unsophisticated investors. Currently, the SFO is prosecuting a variant of this type of fraud where primary disclosure alone has taken six months and has required on a full-time basis the deployment of three junior counsel and eight investigators. The latter have been pulled off other investigations that are now sitting on the back burner. The material under review includes 1.2 million pages of hard

copy documents, 1.5 million pages of documents held by the liquidator, and the contents of 88 computers.

10. Inevitably, the amount of resources absorbed by disclosure has an impact on the SFO's productivity. For example, during the period May 2002 through March 2008, the SFO case controller in charge of the UK Allied Deals prosecution handled only five other cases not related to Allied Deals. These cases have resulted in the convictions of six defendants.[33]

11. In contrast, during the same period, the SDNY prosecutor has obtained the indictments of 50 defendants. This is not a reflection of the professional competence of the Federal and SFO prosecutor; both are able individuals. Rather, this huge difference in productivity – seven versus 50 defendant indictments – results primarily from differences in their criminal justice systems, especially their disclosure regimes.

12. In 1992, Mr. Justice Henry wrote in a forward to an authoritative text on fraud, "The indications are that serious fraud is on the increase. We have to be able to deal with it: to deter it, to detect it, and to punish it. Our criminal justice system must play its proper part in this. It must be fair but inevitable."[34]

13. A criminal justice system that produces so little does not deter, detect or punish criminals and cannot be regarded as inevitable.

14. In 2001, Lord Justice Steyn said in the matter of Attorney General's Reference (No 3 of 1999), "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

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[33] One case was dropped; two cases are still pending; one defendant was tried and acquitted.

[34] David Kirk and Anthony J.J. Woodstock, Serious Fraud: Investigation and Trial, 1st Edition 1992, Foreword by the Honourable Mr. Justice Henry.

15. In my view, the current system of disclosure in England and Wales does not triangulate the interests of the accused, the victim and his or her family and the public in a manner that reconciles due process with justice.

The SFO has limited scope to reduce the resources devoted to disclosure

"Going back to the era of BCCI, there were truck-loads of government records that were ultimately made available to DANY and other law enforcement entities. If we had had to read and evaluate every single piece of paper, there never would have been a prosecution."

An ADA from the DANY BCCI prosecution team

16. One of the SFO's major successes was obtaining the conviction of Abbas Gokal for his role in the BCCI case. This case would not have come about without an earlier investigation and prosecution by DANY that began in 1989. Word of DANY's imminent indictment of BCCI (filed in 1991) triggered the Bank of England to close down the bank.

17. During the Review, I interviewed several criminal justice practitioners who asserted that the SFO could reduce the resources consumed by disclosure by managing the investigative and post-charge prosecution process more effectively.

18. While there is some truth to this, it is by no means the whole story. There is indeed much scope for the SFO to improve its casework, a topic to be discussed in Part III. But for the reasons set forth below, these improvements will have a marginal impact on the resources consumed by disclosure.

- The disclosure law of England and Wales requires investigators to record and retain any information acquired during the investigation that

is potentially relevant. Potential relevance is broadly defined as any information or material that has some bearing on any offence under investigation, or any person being investigated, or the surrounding circumstances of the case, *unless it is incapable of having any impact on the case*.[35] Experienced investigators know that material acquired early in the investigation that is not obviously relevant may become relevant at a later stage. Accordingly, it is sound investigative practice to seize and retain a larger volume of material than may ultimately be required if there is a risk of taint, destruction or loss. The latter is a significant risk in company fraud because of changes to business ownership, management, and record-keeping systems.

- In any enquiry – including scientific and medical – the enquirer must be diligent, thorough and keep an open mind. For police enquiries, this requirement is codified in the law of England and Wales in CPIA 1996 Code of Practice, which states that investigators must "pursue all reasonable lines of enquiry whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances".[36]

- Whether a line of enquiry is reasonable or not is a case policy decision that ought to be based on the information known at the time, the available resources, and the nature and seriousness of the offence. There is a lack of definitive case law or statutory guidance on this issue, including the circumstances under which the failure to pursue a reasonable line of enquiry should result in the extraordinary measure of staying a trial. This is due to the fact that cases are usually stopped in the Crown Court and are not necessarily reported. Investigative sprawl is the SFO's defensive response. This sometimes leads to the accumulation and retention of more material than necessary.

- Sophisticated criminals, whether white-collar criminals, terrorists, or members of organised crime groups, make full use of modern

[35] Paragraph 2.1 CPIA 1996 Codes of Practice, revised on 4th April 2005.

[36] Ibid, Paragraph 3.5

information technology. As a result, evidence of criminal activity may be stored among millions of records on laptops, work stations, servers, pen drives, cell phones, Blackberries, etc. Investigators in any jurisdiction would be remiss if they did not seize IT devices allegedly used by or under the control of targets. In the SDNY Allied Deals investigation, the FBI seized over 100 computers, a number of fax machines and computer discs, as well as 1,600 boxes of documents. Once seized, the law requires the SFO to review the material to determine its relevance, and, if potentially relevant, this material must be retained.

19. A current SFO prosecution demonstrates that disclosure will still consume extraordinary resources even when the SFO follows best practice. The case is a complex drugs-pricing fraud prosecution of high public interest. Inevitably, price-fraud cases, whether prosecuted in the US or England and Wales, involve the collection and analysis of massive amounts of documentary material in paper and computer form. The SFO team deployed to this case is experienced and able. At the outset, it targeted its searches to limit the amount of material seized, and developed cutting-edge technology and rigorous systems and processes to comply with disclosure. In addition, the team followed to the letter the Attorney General's 2005 disclosure guidelines that were intended to make disclosure manageable. As the SFO's principle investigator on the case said, "If we haven't cracked disclosure, nobody can." After reviewing how disclosure has been managed in this case, I agree with his assessment.

20. Yet it is estimated that by the time this case is finished, disclosure will have added several million pounds to its cost and around two years to the life of the case.

Proportionality

"Experience shows that a tiny fraction of the unused documents that are disclosed are really actively used."

A prosecuting and defending QC in SFO cases

21. If, occasionally, these mammoth disclosure exercises revealed material that reliably showed that the prosecutor had the "wrong man", then they would be worth the effort provided there were no more cost-effective system for achieving the same result. However, there was widespread agreement among those interviewed that the current disclosure system rarely produces a nugget of gold. This means that the cost in manpower and time is not proportionate to the result.

22. Indeed, the amount of resources spent on this process is counter-productive. Ultimately, it is people, not process, that produce justice. As the President of the Court of Appeal, Sir Igor Judge, said in interview, "A Mini can get you safely from London to Birmingham if it is well driven."

23. The surest safeguard against miscarriages of justice is a highly motivated and skilled investigative and prosecution team committed to doing justice. In the words of Associate Justice Robert H. Jackson: "The citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

24. Both DANY and SDNY dedicate a much higher level of resource than the SFO and other English and Welsh prosecution agencies to recruiting, training and supervising lawyers to enable them to fulfil Justice Jackson's ideal. As will be seen below, DANY's internal training programme is the equivalent of a prosecution college and, unlike much of the prosecution

training in England and Wales, it is not "virtual". In the SFO, resources that ought to be devoted to recruiting the best staff, and training and supervising them, are now being diverted to disclosure.

25. The current disclosure regime is actually affecting the SFO's ability to retain good staff. Both lawyers and investigators are demoralised by the amount of time spent on "an expensive, time-wasting, resource-intensive, box-ticking exercise that ultimately doesn't achieve very much for anybody in the case (prosecution, defence or court)".[37] A capable case controller said in an interview that he did not think he could last through another disclosure exercise.

Implementing disclosure under Federal/NY law

"With these frauds, often the defendants know more about the documents than we could possibly know. The defendants in Tyco were the CEO and CFO. They knew more about the inner workings of their corporation that we could possibly ever know."

DANY Senior Trial Counsel

People vs Dennis Kozlowski and Mark Schwartz

26. Although the law of England and Wales and Federal/NY law require prosecutors to disclose the same types of information, their delivery systems for disclosure are quite different. Federal/NY law delivery systems are "outcome orientated". The law tells prosecutors what they should do, not how they should do it. It is up to prosecutors' offices to create their own internal management systems to ensure that their employees fulfil disclosure obligations. For example, the scheduling mechanism codified in CPIA 1996 would be regarded in the US as a discretionary management tool that an office might or might not decide to use depending on whether it was regarded

[37] An SFO case controller.

as a cost-effective method of achieving the ultimate objective. The Los Angeles District Attorney's Office, which works with the LA Police Department, a force that historically has had a poor reputation, does not use scheduling to prevent miscarriages of justice. Instead it has developed a system of intensive supervision and review of cases for Brady issues, and a computerised database of allegations of misconduct by police and other witnesses. Prosecutors use this information to evaluate cases, and disclose it in the event of prosecution.

27. Federal/NY law does not distinguish between "used" and "unused" material. Instead, Federal/NY law requires prosecutors to turn over to the defence prior to trial – and at a time when the information can be put to effective use – certain categories of information that will always be relevant and are most likely to contain exculpatory information. These categories include:

- a defendant's statements, whether written, recorded or oral, made to anyone acting under the authority of law enforcement (e.g., a CHIS pursuant to the instruction of a police officer);
- a defendant's criminal record;
- reports of examinations or tests;
- anything obtained from or belonging to a defendant or a co-defendant;
- cooperation agreements and information about other benefits offered in connection with a witness's evidence;
- previous statements of witnesses, including Grand Jury testimony, testimony at other civil or criminal proceedings, notes of interviews, etc.;
- the criminal records of any prosecution witness.

28. On top of this, the prosecutor is obliged to provide the defence with any other favourable information material to the defendant's guilt or punishment that does not fall within the above categories.

29. In the US, prosecutors have a duty to learn of exculpatory information known to others acting on the government's behalf, including the police. The defence may also undertake its own investigations and may refer the information to the prosecutor if it so chooses. To that end, it is common for the defence to employ private investigators, usually former police detectives, which the government pays for in legally aided cases. Witnesses (including the police) do not belong to either side and the court may direct the prosecution to make its witnesses available to the defence for interviews. The defence may also obtain court subpoenas for witnesses or documents.

30. With regard to "unused material", the defence may request any document, object, or item in the government's possession that the prosecution does not intend to use at trial, which the defence can show is material to its case. As a practical matter, in cases that involve voluminous paper or electronic material, the prosecution uses the "keys to the warehouse" system, and makes its unused material available to the defence without any showing of materiality. Prosecutors may also help the defence to search through this material by providing their own navigational instruments, e.g., inventories, schedules, search diagrams, and other audit trails.

31. For example, DANY's Frauds Bureau provides imaged computer drives of electronic material to defendants and co-defendants, eliminating privileged material. In the case of paper documents, protocols are drafted that are approved by the judge, enabling defence lawyers to look at material in DANY's office. The defence attorneys, who are usually privately retained, will come to the office with their client to look through the material together. If defendants are in jail pre-trial, DANY will have them produced at the office so they can work with their lawyers. Sometimes, lawyers will send defendants into the office on their own. (In one such case, the defendant was caught by a paralegal, trying to remove original documents from the office.)

32. The "keys to the warehouse" approach has many advantages. It nests comfortably within an adversarial criminal justice system based on the presumption of innocence. It is rational in that it vests decision-making in the party best equipped to decide what material is helpful or not. It is simple to

administer and cost-effective for the government, provided that legal aid is effectively regulated, which is the case in the Federal/NY criminal justice systems. Most important, it helps innocent defendants by reducing the possibility of prosecutor error, which achieves disclosure's objective.

33. As explained by the Chief of the Frauds Bureau,

> "This is really the only practical method with voluminous material. Good lawyers do not try to stretch this out. They do it as quickly as they can. If they have a theory of the defence, they know what they are looking for. The judges like this system because it reduces the bickering. Pre-trial motion practice is then fairly straightforward, and limited to motions to inspect and dismiss indictments for insufficient evidence or to suppress evidence on the basis that it was unconstitutionally obtained."

34. If disclosure omissions emerge before or during the trial, a Federal/NY judge will consider the impact of the new information in light of all of the evidence and use the trial process to remedy any prejudice – by, for instance, striking the evidence of a prosecution witness or giving the defence an adjournment to interview new witnesses.

35. Post-conviction, whether by plea or trial, a defendant may exercise his automatic right to appeal to the first court of appeals (the Appellate Division, First Department, for defendants convicted in Manhattan; the Second Circuit Court of Appeals, for SDNY). Legal aid is available for all defendants who cannot afford counsel.

36. Alternatively, a defendant may apply to the trial judge to vacate his conviction because of Brady violations. If the judge rules adversely, there is still a right to appeal.

37. The standard for vacating a conviction post-trial, or reversing a conviction on appeal, is the same. There must be a reasonable probability that, had the evidence been disclosed to the defence, the result of the

proceeding would have been different. A "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceeding.[38]

38. A Brady violation that results in vacating a conviction or its reversal on appeal is the equivalent of a miscarriage of justice.

DANY and SDNY have a low incidence of miscarriages of justice

"We don't just take whatever package has been handed to us by the police. We always tell ADAs that their job is to get to the bottom of it and get to the truth. If there is a fact that you are afraid of, you have to evaluate whether your conclusion is correct. Are we perfect? I'm positive we're not."

DANY Chief of the Trial Division

39. The efficacy of the US disclosure system depends on the effective governance of the prosecutor's office. This varies, but the system works in well-regulated offices like DANY and SDNY.

DANY Brady violations

40. During the period January 2000 through January 2008, DANY obtained the convictions by plea or trial of a total of 42,074 defendants in the Manhattan Supreme Court. During the same period, 5,451 defendants filed appeals to the Appellate Division, First Department. In only one case did the Appellate Division reverse a DANY conviction for Brady violations, which is .018% of appealed outcomes.[39]

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[38] *US vs Bagley*, 473 U.S. 667 (1985).

[39] The number of appeals does not exactly correspond to the number of convictions as there is a time lag between conviction and appeal. However, given the number of years analysed to obtain this data, it is unlikely there would be a significantly different result if the appeal for each conviction were tracked.

41. This amounts to less than a one in 5,000 incidence of miscarriages of justice based on a disclosure violation if the baseline is the number of defendants who appealed their conviction. This baseline, however, actually overstates the incidence of a miscarriage of justice because of a disclosure violation since only 5,451 out of 42,074 defendants appealed their convictions even though all defendants have an automatic right to appeal. If the baseline for calculating the incidence of miscarriages of justice for disclosure violations is the number of defendants actually convicted in Supreme Court, then the chance of a miscarriage of justice from a Brady violation becomes in the region of .00236, which equates to less than a one in 40,000 chance of a miscarriage of justice caused by a disclosure violation.

42. DANY does not collect data on the results of motions to vacate a trial conviction. However, the Chief of the Trial Division (which handles the bulk of the caseload) says that a successful motion on Brady grounds is extremely rare. Indeed, she could not recall any in her 20-year tenure as Chief and Deputy Chief of the Trial Division, although she could recall two occasions when the office had moved to vacate convictions after new evidence was brought to its attention. One case involved a double homicide based on eye-witness evidence, which was re-investigated after the police learned from a CHIS that the wrong man had been convicted.

43. The other case involved the conviction of five defendants in the Central Park jogger case which the Chief of the Trial Division re-investigated. Eventually she recommended, over the opposition of the police, that the convictions be vacated. At the time of the original investigation, there was independent uncontested evidence that the five defendants had been on a violent rampage in the park that included two separate brutal assaults. Four of the five defendants made videotaped confessions in the presence of their parents, the police and a prosecutor. They were sentenced to prison terms ranging from seven to 11 years. Subsequently, a serial rapist and murderer, Matias Reyes, serving a life sentence, confessed to prison officials that he was the perpetrator of the crime. Prison officials referred this information to DANY. On its own initiative, it reopened the case and matched this

individual's DNA to unidentified DNA from the crime scene. It also conducted an exhaustive search for evidence to eliminate the possibility that Reyes had acted in concert with the defendants who had been convicted – the police theory of the case – and that his confession exonerating them was a conspiracy to free the remaining defendant who was still in prison.

SDNY Brady violations

44. Federal judges and prosecutors interviewed for this Review could not identify any miscarriages of justice in the Southern District as a result of Brady violations. One judge said, "Ten out of ten AUSAs are not a 'Naifong'." This is a reference to a North Carolina District Attorney who was removed from his job and disbarred because of an egregious Brady violation.[40]

45. The rarity of Brady violations is confirmed by the latest (2004) Annual Report issued by the Department of Justice's Office of Professional Responsibility (OPR), which investigates allegations of misconduct by DOJ employees.[41] OPR receives allegations from a variety of sources, including private individuals and attorneys, and other federal agencies, but the majority of its investigations are based on its review of judicial opinions or as a result of a judicial referral.

46. As noted above, there are 93 US Attorney's Offices. In 2004, OPR investigated 144 allegations of misconduct, of which 12 involved a failure to comply with disclosure obligations. Their dispositions are unknown.

Why does this system work for DANY and SDNY?

47. Not every prosecutor's office in the US has the same good record as DANY and SDNY for preventing miscarriages of justice.[42] It is therefore

[40] See "Duke Prosecutor jailed; Students seek settlement", New York Times, September 8, 2007.

[41] http://www.usdoj.gov/opr/annualreport2004.htm

[42] "Reflections on Brady vs Maryland", Bennett L. Gershman, South Texas Law Review, Vol.47, p.688, footnote 16.

important to identify the reasons why DANY and SDNY have a low risk of Brady violations.

- Both offices have a strong culture of prosecutorial independence that emphasises the prosecutor's role as minister of justice.
- High professional standards are maintained by recruitment, training, mentoring, and supervision.
- Both offices have case ownership from cradle to grave. The investigating prosecutor is also the court room advocate and directly accountable to the court for his or her mistakes.
- Both offices make the charging decisions.
- Both offices effectively control investigations even when they are conducted by external law enforcement agencies..
- As legal advisors to the Grand Jury, prosecutors have the authority and power to investigate allegations of criminal activity, including by the police. Through the Grand Jury, both offices can subpoena police records if required.
- Prosecutors are subject to judicial disciplinary sanctions for disclosure violations.[43]
- Both offices are vigilant about detecting and reacting to Brady violations. According to an SDNY Federal Judge, OPR "rakes prosecutors over the coals" if there is an allegation of a violation. E.g., in 2006, OPR obtained the indictment of a federal prosecutor in Michigan for obstructing justice and lying to a judge. The charges were related to the failure to disclose exculpatory information in a terrorism trial.[44]
- The criminal justice system in New York is a small world and prosecutors move in and out of the private and public sectors, including

[43] See *Matter of Stuart,* 22 AD 3rd 131 (2nd December 2005), where a prosecutor was suspended for three years for telling the court that he had no knowledge of the whereabouts of a certain exculpatory witness, when this was not the case.

[44] The ex-prosecutor was acquitted by a jury on 31 October 2007.

high appointed or elected public office. The reversal of a conviction for disclosure violations is a serious stain on a prosecutor's reputation and will have adverse career consequences.

Implementing disclosure in England and Wales

"You can use the 'scorched earth' approach or you can use judgment. The latter is less expensive."

Chief SDNY Prosecutor,
The US Allied Deals case

48. One of the defence counsel interviewed for this Review described the Court of Appeal Protocol on Disclosure of February 2006 as "envisioning a world that does not exist". This is a fair critique of CPIA 1996, which the Protocol was intended to enforce.

49. For CPIA 1996 to work, the criminal justice system of England and Wales would require prosecutors with money to burn; a well-resourced judiciary; an embedded judicial culture of effective trial management; and non-adversarial defence teams content to deliver guilty clients into the arms of the law. Most practitioners agree that these conditions do not exist. Prosecutors are facing declining budgets over the next few years. The judiciary is under-resourced. Interventionist judicial management of cases is a relatively new concept. Finally, it is unrealistic to think that a twist in the law will change the adversarial legal culture that is the bedrock of the British common law criminal justice system.

50. Unlike the American system that permits prosecutors to develop their own systems and processes for managing their disclosure obligations or suffer the consequences, CPIA 1996 mandates a cumbersome "one case fits all" eight-stage process that is unsuited to: a) complex fraud investigations; b) 21st-century criminals who use IT to commit crimes; and c) 21st-century

methods of criminal investigation that rely on covert electronic surveillance and CCTV.

51. In cases involving a large volume of paper, electronic or video/audiotape material, this process stretches prosecution resources to the limit while providing the defence with ammunition to attack the prosecution for a failure to implement one or another stage of the process. This process has created in some complex cases what is, in effect, a two-stage trial. In the words of a Senior Circuit Court Judge,

> "In Stage 1, the defence says, 'Let us see if we can get this prosecution stayed for abuse of process for whatever reason.' Stage 2, 'If we have to, let us defend the case before a jury.'"

CPIA 1996 requires prosecutors to do the thinking for defence attorneys

"We have some lawyers who want us to tell them what to look at and we tell them, 'We're prosecutors, we don't know how you think, we don't run the defence, and we don't want to be accused later on of misdirecting you or missing something you think is important.'"

DANY Chief of the Frauds Bureau

52. CPIA 1996 requires the prosecution to disclose any material that is obviously exculpatory when it serves the trial bundle. In carrying out this on-going duty, the prosecution must stand guard at the warehouse door and deny the defence access to its unused investigative information unless it determines that specific items undermine the prosecution case or might assist the defence case. The latter requires the prosecution to put on the defence lawyer's cap and review each document as though it were representing the defendant. In one SFO case, this has involved reviewing over a million documents, wearing the cap of multiple defence attorneys representing defendants with different and sometimes conflicting defences. The likelihood

of inadvertent "operator error" is directly correlated to the volume of material required to be reviewed. Understanding this, some defence attorneys will barrage the SFO with letters repeatedly requesting new material, seeking to force additional reviews. If a prosecutor makes a mistake, the defence accuses it of misconduct and uses this to mount an abuse-of-process application to stay the trial.

Defence statements are not an antidote

"Defendants facing serious charges frequently have little inclination to cooperate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay."

R. vs H. and C.
Appellate Committee
House of Lords

53. Since it is clear that prosecutors cannot discharge this obligation without adequate knowledge of the defence case, stage five of the disclosure process requires the defence to file a detailed defence statement. While it may be in the interests of an innocent defendant to provide the prosecution with as much information as soon possible,[45] the converse is true for guilty defendants.

54. A reputable defence counsel explained,

> "I'm not in the business of helping the prosecution to prosecute my client. I would be mad to give the prosecutor the opportunity to disprove my defence. I can work with a blank piece of paper. I can't work with a problem. Moreover, in a complex case, it's difficult to divine what your defence might be and how you want to deploy it. No matter how much

[45] This proposition assumes the defence has confidence in the integrity of the prosecution system.

the judge bangs on, I'm not going to be drawn into making premature decisions about evidence, tactics, what I want to disclose, what I want the prosecutor to give me. Moreover, defendants in white-collar crime cases do not hurry me on because they are on bail. They know just as well as everyone else that the longer things sit on the back burner, the greater the chance of things going wrong, witnesses disappearing, documents getting lost, people losing interest, moving on, getting new jobs. The passage of time is quite detrimental to a case."

55. The only thing novel or startling about this counsel's remarks is their candour. This was motivated by the barrister's concern that the cost of criminal litigation, and inappropriate dispositions resulting from the abuse of CPIA 1996, might enable the government to dispense with trial by jury.

56. Although it is acknowledged that CPIA 1996 can only work with adequate defence statements, insufficient defence statements are a system-wide problem reported by prosecutors from the SFO, CPS and RCPO. This has been confirmed by the Very High Cost Case Review Board (VHCC Review Board), a cross-departmental group set up in 2005. According to one Ministry of Justice civil servant working with the VHCC Review Board, "Many defence statements spend many pages not saying a lot. Another was half a page and said, in effect, 'My client is a housewife and is not capable of committing a fraud.'" Tardy and inadequate defence statements (which the judge later characterised as "a cynical manipulation of the processes of the court") delayed and prolonged the trial of six defendants accused of participating in the 21/7 failed mass bombing attack in central London.[46]

57. Although the disclosure process provides for sanctions, the presumption of innocence restricts the ability of a judge to punish uncooperative defendants and their lawyers. Unlike the parties in civil litigation

[46] *R vs Ibrahim, Asiedu, Osman, Omar, Mohammed and Yahya.*

who can be struck out of a case, a defendant cannot be found guilty because of his obduracy.[47]

Scheduling

"I love the current disclosure system because it is so unwieldy. I can make a lot of hay. I agree with the Americans who say it is a monumental waste of time. In the vast majority of cases, the schedule will have material that is of no interest to either side."

Defence Counsel specialising in terrorism and white-collar crime cases

58. Stage three of the disclosure process requires investigators to create a schedule of all potentially relevant information. Scheduling was introduced as an oversight mechanism to enable prosecutors to stay on top of the information being collected by the police, but also it has become a mechanism for the defence to ride herd on prosecutorial compliance with the disclosure law. Each item on the schedule must be described in sufficient detail to enable the defence to decide its potential usefulness.

59. The burden of creating schedules in serious and complex cases should not be underestimated. For example, in the drugs-pricing case described above, the schedule of unused material is 10,877 pages long – this is 10 times the length of War and Peace – and contains 135,716 items. Single items may consist of a multi-page hard-copy document or the electronic data files of a computer or server. According to the principal investigator in the case, it took a team of 20 people working full time for six months, and an additional team of four people working part time for four years, to create this schedule. Altogether, putting together this schedule consumed, at a conservative estimate, 18,214 person hours or nearly 13 person years (allowing for vacation and training).

[47] For this reason, the proposed amendment to Section 6A (1) of CPIA 1996 contained in the Criminal Justice and Immigration Bill is unlikely to have a significant impact.

The judge as arbiter

"Judges are only human and can only take so much."

A Senior Circuit Court Judge

60. If the prosecution declines to provide warehoused material and the defence disputes this decision, the latter may apply to the court for a Section 8 hearing. This requires the judge to read the disputed material and decide: 1) its relevance; and 2) whether it will assist the defence. In some cases, the defence may neutralise the judge's ability to arbitrate effectively by demanding to see thousands of items (over 6,000 in a current SFO prosecution). The judge is then required to evaluate the requests individually if the prosecution determines that the requested documents do not meet the disclosure criteria. Although the Court of Appeal discourages speculative requests for items listed on the schedule, defence teams in some serious and complex document-heavy cases continue to use the schedule for fishing expeditions, hoping to wear down the judge and/or the prosecutor.

61. The Lord Chief Justice has stated that judges must have "almost as good a knowledge of the case as the parties" if they are to manage the "intractable" system of disclosure in a manner that is fair to both sides.[48] However, the historical system for selecting judges, which has drawn primarily from candidates from the independent Bar who may not consistently have ample management experience and skills, as well as the underfunding of the judiciary, does not always support the Lord Chief Justice's requirements. Some judges continue to direct prosecutors to turn over material "because it is easier or it would not do any harm", notwithstanding the Attorney General's

[48] Lord Chief Justice's Protocol on the Control and Management of Heavy Fraud and Other Cases, 22nd March 2005.

2005 Guidelines on Disclosure and guidance from the Chief Judge and the Court of Appeal.[49]

62. For example, in 2007, the CPS obtained the conviction of Terence Adams, the alleged head of an organised crime family. SOCA had run a covert electronic surveillance operation for two years, resulting in many thousands of hours of tape-recorded conversations. Only a portion related to the criminal operation. The defence argued that the prosecution should provide transcripts of all of the recorded conversations. Although the prosecution argued that most of the material was irrelevant, the judge ordered the police to transcribe 15,000 hours (which equates to 1,250 12-hour days or 3.42 years) of tape-recordings of unused material at a cost of about £2 million. When the transcripts were delivered to the defence, they argued that it would take years to review the material, and to proceed without having reviewed it would be an abuse of process. Accordingly, the judge was requested to stay the indictment. The judge denied their abuse-of-process application, acknowledging, in effect, that the material obtained with such cost and delay was not material to their case. Terence Adams then pleaded guilty. This is not a one-off event. It has happened in other SFO and CPS cases.

The current disclosure regime discourages early guilty pleas

"Faced with a strong-looking case, the defence here will not say, 'Let's plea-bargain.' They'll say, 'I wonder if I can trip them up?' This is because of the financial aspect. It doesn't do a defence firm any harm if they look at 45,000 pages of disclosed documents courtesy of some Australian paralegals in the meantime. The other motivation is there is not much to gain from plea-bargaining and because the pre-trial abuse arguments are much more often successful, the relative attractiveness of this route is raised."

A prosecuting and defending QC on SFO cases

[49] See, for example, *R vs Jisl* [2004] EWCA Crim 696. The Appellate Committee House of Lords said in *R vs H and C*, "The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good."

63. The law of England and Wales increasingly recognises the value of plea-negotiation to resolve cases where the defendant is willing to accept his guilt at an early stage of the process.

64. A system of plea-negotiation can only be effective and fair if there are sufficient incentives and benefits for both the prosecution and the defence. Although about half of SFO convictions are obtained by plea, these typically occur at the courthouse door after the defendant has fully litigated disclosure. This results in the maximum benefit for the defendant with insufficient benefit to the prosecution.

65. The Fraud Review has fully considered comparative sentencing between the US and England and Wales and the role of "tough" sentences in inducing pleas. It has recommended that the maximum sentence for fraud be aligned with the maximum sentence for money-laundering – 14 years in prison – to provide judges with sufficient sentencing scope. This very sensible recommendation is unlikely to affect the size of the prison population, given the small number of defendants prosecuted for fraud and the likelihood that the overwhelming majority will not be sentenced to the maximum prison term.

66. What is often missed in discussions about Federal fraud sentences is that although sentences "on the book" appear draconian, in practice they are much lower.[50] US Sentencing Commission data for all (nation-wide) Federal fraud convictions[51] shows that only 68.8% of the 6907 defendants convicted of fraud in 2006 were sentenced to prison (61.3%) or prison/community split sentence (7.5%), and the median prison sentence was only 18 months. Federal sentences are determinate, meaning there is no parole. Instead, all

[50] For a good discussion that demystifies Federal white-collar crime sentences, see Andrew Weissmann & Joshua A. Block, White-Collar Defendants and White-Collar Crimes, 116 YALE L.J. POCKET PART 286 (2007). Andrew Weissmann was the Director of DOJ's Enron Task Force.

[51] A fraud conviction is defined as a conviction where the most serious offence charged in the indictment was fraud. Fraud is defined as "odometer laws and regulations, insider trade and fraud and deceit." The national median sentences for forgery/counterfeiting, bribery and tax crimes were 15 months; for embezzlement 12 months, and for money-laundering 30 months.

defendants are required to serve 85% of their sentence. This means that the actual median sentence served by Federal defendants convicted of fraud in 2006 would have been 15.3 months.[52]

67. The overwhelming majority of Federal defendants convicted of fraud would have pleaded guilty and therefore could have expected a lighter sentence. However, even when defendants are convicted by trial, fraud sentences are well below their theoretical maximum. Bernard Ebbers is the exception not the rule. Much more typical are the sentences meted out to the defendants convicted in the US Allied Deals trial where the most culpable non-cooperating defendant, who faced 25 years, was sentenced to five years imprisonment.[53]

68. New York sentences for fraud follow the same pattern. Like Bernard Ebbers, Dennis Kozlowski is an exception. Of the 114 defendants convicted by DANY's Frauds Bureau during the period 2003-2005, less than two thirds (63.16%) were sentenced to prison. The median sentence was a minimum of 18 months and a maximum of 49 months. Under New York state law, this means that a defendant would have to serve 18 months before being considered for parole but could not serve more than two-thirds of the maximum, e.g., 32.34 months

69. It is interesting to compare SFO and DANY Frauds Bureau sentences since their defendants are cut from much the same cloth. The median sentence differences are small when considered in conjunction with parole. A greater proportion of SFO defendants received prison sentences (82.07% compared to DANY's 63.16%). Their median sentence is somewhat less than the DANY median – 42 months compared to 49 months. However, on a median sentence of 42 months where the offence was committed prior to April 2005, an SFO defendant would be required to serve half of the sentence (21

[52] The 2006 median sentence for fraud in SDNY was even less – 16 months. United States Sentencing Commission, Office of Policy Analysis, 2006 Datafile, OPAFY06 http://www.ussc.gov/JUDPACK/2006/2c06.pdf.

[53] The co-leader of the conspiracy, who cooperated and testified in the UK proceeding, was sentenced to seven years in prison.

months) before being eligible for automatic conditional release whereas DANY defendants would serve a median of 18 months before being eligible for parole.[54]

Realigning disclosure with the 21st-century criminal justice system

"Fairness is a constantly evolving concept . . . [I]t is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another."

R. vs C. and H.
Appellate Committee, House of Lords, 2004

70. The Fraud Advisory Panel has described the CPIA 1996 disclosure regime as "unfit for purpose" for the prosecution of serious fraud cases.[55] It is difficult not to agree with this assessment. The Fraud Review recommends that the continued suitability of CPIA for complex fraud cases be reviewed in 2008. I concur with this recommendation and also suggest the need for radical thinking rather than tinkering with the mechanics. Whatever system is created must be built on the realistic acknowledgement that no matter what prophylactic measures are put in place, miscarriages of justice will sometimes happen. The current system did not prevent the conviction and imprisonment of Sally Clark based on expert evidence whose scientific basis was later discredited.

[54] The SFO sentencing data is based on an analysis of 176 defendants whose cases were concluded between FY2002/3 and FY2006/7. For sentences in excess of four years on crimes committed prior to April 2005, conditional release is discretionary at the halfway point and mandatory after a defendant has served two-thirds of his sentence. For offences committed post-April 2005, a defendant sentenced to a custodial sentence of one year or more is entitled to conditional release on licence at the halfway point.

[55] Fraud Review, Final Report, 206 Paragraph 22, p.12.

Looking backwards

"Baroness Blatch expressed the view that the system of disclosure in operation before CPIA was neither fair, nor efficient, nor effective. It was thought that the obligations imposed on the prosecution were too extensive and the CPIA was intended (my words, not hers) to try to put the genie back in the bottle. In my view the attempt has failed and prosecutors and courts are now faced with the worst of all possible worlds."

The Honourable Mr. Justice Butterfield,
Review of Criminal Investigations and Prosecutions
Conducted by HM Customs and Excise, July 2003

71. If the government is to undertake a root and branch review of the current disclosure law, it would be helpful to revisit the miscarriage of justice cases[56] that are the paradigm for the current disclosure regime, as they have a common leitmotif.

- They involved serious violent crime (IRA terrorism bombings that resulted in multiple deaths and injuries; murder; rape; arson and serious assault). The primary evidence-gathering techniques were witness interviews and forensic evidence collection and analysis. While some of these cases involved numerous manually generated documents, they did not involve covert electronic surveillance which may generate tens of thousands of hours of recording, CCTV surveillance, or millions of records stored on IT devices.
- The failures to disclose were egregious, involving evidence that any reasonable investigator or prosecutor in this day and age would objectively perceive as exculpatory and which, in light of all of the other evidence in the case, may well have caused a jury to acquit the defendants had they had the opportunity to learn of the evidence. For

[56] The Guildford Four, Maguire Seven, Birmingham Six, Judith Ward, Stefan Kiszko, Lazio Virag, Maxwell Confait, etc.

example, in the Judith Ward case, one of the investigating officers thought she was innocent.

- They occurred at a time (mainly in the 1970s) when the police made charging decisions and employed solicitors and barristers to prosecute on behalf of the police. The concentration of so much power in the hands of the police and the lack of joint working at the investigator stage with prosecutors directly accountable to the court was an invitation to abuse.

72. The 30 years since Judith Ward was erroneously convicted – indeed, in the 15 years since the Court of Appeal overturned her conviction – the criminal justice landscape of England and Wales has been transformed beyond recognition. The most important change has been the creation of independent prosecution services whose powers are still evolving.

Realigning disclosure with the 21st-century office of the independent prosecutor

"My decision to request that these convictions be set aside was based upon an extensive, complex and painstaking investigation of newly discovered evidence and the probable impact of that evidence on the outcome of the original trials in this case. I made that decision, after careful consultation with senior prosecutors in this office, to fulfil my obligation to uncover the facts, to apply the law without fear or favour, and to see that justice is done."

Robert M. Morgenthau,
Manhattan District Attorney,
explaining his recommendation to vacate the convictions in the Central Park Jogger case, 19 December 2002.

73. An innocent person's most important safeguard is the competence of the individual who guards the charging gate. The criminal justice system of

England and Wales requires independent, highly skilled and motivated proactive prosecutors who understand that they are responsible for the outcome of a case and are therefore accountable if there is a miscarriage of justice that could have been foreseen and prevented because they are the guardians of the charging gate.

74. Since the enactment of CPIA 1996, all three prosecution agencies now have the power to charge. The SFO has had this power from the outset; the CPS acquired it in 2004; and RCPO obtained the power six months ago. The charging power requires English and Welsh prosecutors to evaluate critically the sufficiency of the evidence gathered by law enforcement agents.

75. In the SFO, prosecutors direct the investigation. While the CPS and RCPO do not have the power to direct investigations, they effectively have oversight of the investigation through the requirement of the Code of Crown Prosecutors that they proactively advise law enforcement officers and should not bring charges unless they are satisfied with the quality of the evidence.

76. The CPS is moving towards the policy of case ownership "from cradle to grave" in indictable-only cases to create accountability and ensure that cases are thoroughly investigated and properly charged. The SFO, within the limits imposed by the fact that it out-sources all of its trial advocacy, has this policy for case controllers and for case teams in some but not all Divisions. I will be recommending that team case ownership apply to all Divisions.

77. The CPS and RCPO are gradually bringing in-house much of their Crown Court advocacy so that they can control the process from start to finish, which, inter alia, will enhance the case evaluation skills of charging lawyers. I will be recommending that the SFO follow in their path.

78. The ability of prosecutors to interview witnesses is one of the most important safeguards against miscarriages of justice. It enables prosecutors to evaluate independently the reliability and credibility of witnesses and gives them direct access to information sources that may lead them to exculpatory evidence. The SFO has this power. The CPS is piloting witness interviewing, and early results have shown its value.

79. The risk of a miscarriage of justice would be greatly reduced if all prosecutors routinely interviewed witnesses. As one of the defence counsel interviewed for this Review said,

> "I trust prosecutors more than I trust police officers so I wouldn't have a problem with them interviewing witnesses. My view is that if an investigation is going to be bent, that's more likely to happen at a stage long before a lawyer gets involved, when the case is under police control. It seems to me much better to have someone who has a professional reputation among other lawyers involved in an investigation, because she/he is not going to want to risk that. I don't really understand why there is such a clear demarcation between solicitors, investigators and counsel."

80. Because of the changes described above and the reform of legal aid – to be discussed below – the private practice of criminal law is not as lucrative or attractive as it once was. This is making prosecutors' offices increasingly the employer of choice for junior – and some experienced – talented criminal lawyers.

81. If the CPS and RCPO continue to progress in this direction there will be little difference between them and an American prosecutor's office.

82. With the exception of the fact that it out-sources its trial advocacy, the SFO has always been like an American prosecutor's office, which integrates investigators and prosecutors. In the SFO, they literally work side by side in joined-up teams, on the same floor. They report to the same "boss" – the Director, a lawyer who is superintended by the Attorney General. When the SFO obtains evidence, it is safeguarded within the SFO's office.

83. The primary reason for scheduling evidence does not exist in the SFO. First and foremost, scheduling is intended to prevent investigators from inadvertently or deliberately failing to reveal to the prosecution information that would be favourable to the defendant. However, the SFO is the investigating authority and the evidence is physically under its control.

84. The second reason for scheduling – to provide defence oversight of prosecutors – would not exist if England and Wales used the "keys to the warehouse" system.

Realigning disclosure with the reform of legal aid

"Disclosure is used as a delaying exercise and a money-making exercise. This is the real problem. If you give lawyers a year, they will take a year. If you give lawyers a limited budget, they will find what they need to conduct an adequate defence."

A prosecuting and defending counsel in SFO cases

85. When the former Attorney in 2005 opted to give strict enforcement of CPIA 1996 an opportunity to work, he and others were concerned that defence teams in complex cases were running up exorbitant bills on the legal aid budget to obtain massive amounts of marginally relevant material. This was then being used to overwhelm and distract judges and juries in order to obtain a stay of the trial or acquittal.

86. The Attorney reasoned that prosecutors could prevent the bleeding of the legal aid budget and protect the fact-finding process by robustly guarding the gate to the warehouse. What was not predicted was the ability and motivation of capable defence litigators, whose clients face imprisonment, to seek and create new grounds to wear down the prosecution and judge in a war of attrition. Nor was there a full understanding of the prosecution's costs in disclosure. However, three years of strict enforcement of CPIA 1996 by the SFO have been sufficient to demonstrate the difficulties of bringing the mountain to Mohammed. They have also demonstrated that it is possible to bring Mohammed to the mountain.

87. The Carter Review was commissioned in 2005 to address the skyrocketing costs of legal aid, which increased from £1.5 billion to £2 billion between 1997 and 2004. By 2004, England and Wales was spending more

per capita on legal aid than any other country in the world. A large portion – 25% of the budget (which includes civil and criminal legal aid) – went to defence solicitors and counsel representing Crown Court defendants. In the Crown Court, half of legal aid expenditure was on one per cent of the cases.[57]

88. What I found most surprising when I looked into the relationship between legal aid and disclosure is that legal aid is not means-tested in the Crown Court. I am told that this is not because of ideological reasons. Rather, the previous system of means-testing was dropped because it was not regarded as cost-effective. As a result, any defendant prosecuted in the Crown Court in England and Wales for an indictable offence is entitled to have the government pay the costs of legal representation, irrespective of means. It is possible for the government to try to collect costs from convicted defendants, but this process is not especially effective. In the financial year 2005/2006 a total of £96 million was spent on Very High Cost Cases, but only £2.1 million – 2.18% of expenditure – was recovered in costs.[58]

89. In addition, until recently, hourly rates were not capped, nor were there any limits on the number of hours that defence lawyers could work on a case.

90. The Carter Review recommended major reforms which are being implemented now. But there is still a culture of entitlement in which a small minority of defence practitioners view legal aid as a profit-making vehicle instead of a system for ensuring that citizens are entitled to an adequate defence irrespective of means. Moreover, there are still incentives for lawyers to drag out cases in order to extract more money from the legal aid budget. Hence, there is room for more change.

91. Change might take place more quickly if there was wider recognition of the fact that using legal aid funds to cause the staying or collapse of trials through abuse of the disclosure law jeopardises the jury system.

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[57] Legal Aid, a Market-Based Approach to Reform, Lord Carter's Review of Legal Aid Procurement, Executive Summary, p. 3, 2006.

[58] This was an improvement of £800,000 over the previous financial year of 2004/2005.

92. The Carter Review looked at the legal aid systems in Canada and the US but did not examine how legal aid interfaces with the "keys to the warehouse" system of disclosure in complex white-collar crime cases. In SDNY, they mesh comfortably because the judiciary controls the legal aid system, and the system, which was set up in 1964, has always been focused on the "indigent". This is defined as those who cannot pay the full costs of their defence.

How the Federal/NY system integrates legal aid and the "keys to the warehouse" system

"We asked them to think of the CJA as a boss or a managing partner and to conduct themselves in a way that was fiscally responsible and they have been very responsive. No one becomes wealthy off of legal aid."

Case Budgeting Attorney for legal aid cases, Southern District of New York, describing a recent meeting between the judiciary and legal aid lawyers.

93. In Gideon vs Wainwright 372 U.S. 335 (1963), another Warren Court landmark opinion, the US Supreme Court ruled that indigent defendants had a Sixth Amendment constitutional right to government funding of their defence costs. In 1964, Congress passed the Criminal Justice Act which created a private sector legal aid system (the CJA panel). CJA was subsequently amended to establish a parallel system provided by non-profit criminal law offices employing salaried lawyers, the Federal Defender Services Unit (Federal Defenders).

94. In the Southern District of New York, Federal Defenders represent about 60% of legally aided defendants; CJA panel lawyers represent the remainder. The typical profile of a Federal Defender is a young idealistic lawyer with a good resume from a good law school, who is interested in public service and whose philosophical orientation is anti-government. As salaried

employees, Federal Defenders have no financial interest in prolonging a case beyond its normal life expectancy.

95. CJA lawyers are deployed when there are multiple defendants and a Federal Defender cannot handle the case because of a conflict of interest or its complexity. The typical profile of a CJA panel lawyer is an older experienced litigator and "graduate" of the Federal Defenders' Office or of a Federal or state prosecutor's office, who is a solo practitioner or member of a small firm. However, some of the major criminal white-collar defence firms and Wall Street firms (equivalent to "Magic Circle" firms) supply lawyers to the CJA panel on a "pro bono" basis. The Southern District judiciary – through sub-committees of its governing body, the Board of Judges – actively supervises CJA panel lawyers for quality of representation and cost.

96. Legal aid is means-tested at the start of the process. Applicants are required to submit an affidavit, signed under penalty of perjury, stating that they cannot afford to pay for their legal fees and listing their income and assets.

97. The hourly rates of CJA lawyers are capped at $100, which is less than a quarter of the rate of the handful of small to medium-sized criminal defence firms who dominate the private legal market for white-collar crime in Manhattan.[59] Typically these firms charge upwards of $450 per hour. Despite the relatively low rate of pay, the overall quality of the lawyers on the Southern District's CJA panel ranges from quite good to excellent. CJA panel work provides a steady stream of business for lawyers who like criminal litigation but do not like the business end of law, which requires lawyers in the major white-collar criminal defence firms to bring in clients and chase them for fees. For all participants, panel membership provides access to challenging work and the opportunity to try cases before good judges.

98. In the Southern District, immediately after indictment (sending), cases are randomly assigned to the trial judge who is responsible for the case "from

[59] Presumptive rates are also set for the various ancillary service providers – investigators, paralegals, associates, mitigation experts, mental health experts, interpreters, etc.

cradle to grave". This includes authorising legal aid expenditures for investigators, forensic experts and other litigation support as well as authorising the lawyer's invoice at the end of the case. Judges have a good idea of the number of hours a case requires and also can compare invoices across their caseload. If a judge knocks down an invoice and the lawyer disagrees, the judge refers the matter to the CJA Case Budgeting Attorney, a new position created a year ago in order to monitor costs in death penalty-eligible cases and "Mega" cases. The latter are the equivalent of a VHCC.[60] The CJA Case Budgeting Attorney will only conduct a detailed audit if the invoice does not pass "the laugh test". In one recent case, where invoices supplied by one lawyer consistently failed the laugh test and were audited, the lawyer was dropped from the panel. This, of course, acts as a deterrent. The CJA panel is a small community – there are about 200 lawyers on the CJA Panel for the Southern and Eastern Districts of New York, which cover Metropolitan New York City.

99. In Mega cases, the Case Budgeting Attorney provides defence lawyers with a spreadsheet listing various tasks. This requires the lawyer to take an early look at the case and say, "Where am I going with this case and how am I going to do it?" The judge and the Case Budgeting Attorney then review the proposed budget. According to the Case Budgeting Attorney, as a result of reducing some proposed budgets, "Budgets are now right on the money as word gets out as to what is acceptable."

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[60] In the 2nd Circuit, the definition of a Mega case is one where the costs of representing one defendant exceed $30,000 or 300 hours of a lawyer's time, which represents 37.5 days from arraignment on the indictment to sentence. In England and Wales, the definition of a VHCC is one where the trial alone is likely to last for more than 41 days.

Disclosure: people vs process

Recommendation 1. As recommended by the Fraud Review, there is a need for a complete review of the effectiveness of CPIA 1996 in its application to serious fraud and other complex record-heavy criminal cases. This review will want to take account of the experience of law enforcement agents, prosecutors, judges, defence practitioners, and others since the issuance of the 2005 Attorney General Guidelines and Judicial Protocols related to the management of disclosure as well as the possibilities for change created by on-going reforms initiated by Lord Carter's Review of Legal Aid.

Recommendation 2. It is recommended that the Review consider the impact of the current disclosure regime on the entire criminal justice system, including the resources and techniques available to police and prosecutors to investigate all types of crime. Investigators should not be inhibited from using legitimate and proportionate investigative techniques or be required to abstain from relevant enquiries because of the resource implications of disclosure further down the line.

Recommendation 3. It is also recommended that serious consideration should be given to:

- adopting the DANY/SDNY "keys to the warehouse" approach;
- eliminating the current scheduling requirement for cases where the prosecutor and the investigator are combined in one agency or the prosecutor directs the investigation.

CPS senior managers have benefited from observing the New York prosecution system at close hand. A disclosure review study group might similarly benefit by observing the SDNY/DANY disclosure system in practice. It is impressive that in DANY, lawyers – together with their clients – review the materials. This is the most efficient and fairest method for the defence to obtain information that will assist its case, which is not readily obvious to the prosecutor.

Recommendation 4. I recommend that one suggestion by the Fraud Review not be implemented. The authors of the Fraud Review suggest giving judges and the defence oversight of whether investigators should return material before scheduling if they decide it is not relevant. It is important, in my view, for policy-makers to appreciate that we have an adversarial system, not an inquisitorial system. Judges are not trained as investigators, and lawyers are trained to litigate. This twist to the process would simply increase the opportunities for defence attorneys to throw a spanner in the works and would give an investigative decision-making role to parties who lack investigative expertise, which is one of the causes of unfocused investigations. Moreover, this is only a problem in cases involving huge volumes of material, and this problem would be cured if the "keys to the warehouse" approach were adopted.

Recommendation 5. The anomaly in powers among the three different prosecution agencies – SFO, CPS and RCPO – heightens the risk of a miscarriage of justice. The risk should be least in the SFO because it directs the investigation and routinely interviews all witnesses. While it may be premature to give the CPS and RCPO the power to direct investigations, it is not premature to empower all prosecutors, irrespective of agency, to interview witnesses in all types of cases. It may be advisable for the Attorney General, as part of her superintendence function, to issue guidance that ensures that prosecutors interview witnesses whenever there are "red flags" for a potential miscarriage of justice.

Recommendation 6. It would be helpful to prosecutors if the Attorney General were to issue guidance on the meaning of a "reasonable line of enquiry". The guidance should emphasise practicality, common sense, real-life limitations on resources, the nature and seriousness of the offence, and the information that was known at the time the decision was made. Absent exceptional circumstances, the failure to pursue a particular line of enquiry should be a trial issue to be argued to a jury. The fact-finder who hears all of the evidence is in the best position to evaluate the significance of any gaps in the enquiry and is routinely asked to do so. In my experience, juries do not

like slipshod investigations and will “punish” the Crown by acquitting in such cases.

Legal aid: bringing Mohammed to the mountain

Recommendation 7. Up-front means-testing for legal aid in the Crown Court should be reinstituted. This would target legal aid where it is most needed and break down the culture of entitlement, an economic phenomenon created by ineffective regulation.

Recommendation 8. Legal aid lawyers should be paid for outcomes rather than for agreed tasks and hours in the vast majority of cases. This would create incentives for lawyers to work efficiently and would reward the majority of conscientious and effective lawyers.

Chapter 6. The impact of judicial management on SFO prosecutions

"My strategy in a Federal case is to cut a pre-indictment deal. In the state system, you can sometimes get an indictment dismissed. State judges aren't really very familiar with securities issues. They're not used to heavy paper so you can do a little bit better. But federally – once you're indicted, it's tough."

A Manhattan white-collar crime defence attorney

1. One of the reasons for SDNY's effectiveness is that it operates in a criminal justice system underpinned by an unusually capable judiciary. Its overall quality is higher than the overall quality of the state judiciary where Supreme Court judges are elected.[61] Despite low rates of pay in comparison to the private sector, outstanding lawyers apply to become Federal judges because of the prestige of the Federal bench. The multi-layered screening process is rigorous. Federal judges are responsible for both criminal and civil litigation and they handle each case from cradle to grave. This makes complex fraud cases less daunting.

2. As a result, it is possible in the Federal system to assign all cases, including complex white-collar crime trials, on a random basis. This occurs immediately after the foreman of the Grand Jury files the indictment with the supervising Magistrate. The Magistrate spins a wheel and pulls out an envelope with a judge's name, which is notified to the AUSA handling the case. The latter then obtains a date for the first pre-trial conference, which is also notified to the defence.

3. The Lord Chief Justice's Protocol on the management of complex cases recognises the importance of cradle-to-grave assignment of judges at an early stage. But, according to SFO data, this does not happen in a

[61] Many of the best state Supreme Court judges are actually appointed judges who are temporarily presiding over indictable cases. Their "temporary" status may last for years due to a chronic shortage in the number of elected judicial posts. This shortage is caused by legislative inaction for party-political reasons.

significant number of SFO cases. In Independent Insurance, it took nine months to assign the trial judge. In five other current SFO cases, it has taken on average 5.5 months for a trial judge to be assigned.

4. The High Cost Case Review Board recently completed a study of seven case studies of Very High Cost Cases concluded between 2005 and 2007, which confirms the importance of early case assignment of a cradle-to-grave judge. In five of the seven cases, there was uneven compliance with the Lord Chief Justice's Protocol until the assignment of a cradle-to-grave judge, who then took matters in hand. In the two cases where there was strict adherence to the Lord Chief Justice's Protocol, including early assignment of a cradle-to-grave judge, the cases finished on time, at a reasonable cost and, "more importantly, delivered effective justice outcomes".[62]

5. One aspect of an effective judicial system is the speed with which an indictment is tried. The length of time between charge and trial in the UK Allied Deals case – 23 months – is common in SFO cases. It is due to the shortage of judges able to manage complex cases, which hampers the judiciary's efforts to implement in all cases the sound guidance of the Lord Chief Justice and the Court of Appeal on effective trial management.

6. Both the New York and Federal criminal justice systems have statutory speedy-trial rules designed to implement the constitutional right of defendants to a speedy trial. The Federal Speedy Trial Act of 1974 requires indictments to be filed within 30 days of arrest and trials to begin within 70 days of indictment. While there are exclusions in the calculation of time limits – e.g., time taken up by pre-trial hearings, unavailability of witnesses, etc. – administrative delay is not excluded. Due to under-resourcing of the judiciary, it would be difficult to set equivalent time limits in England and Wales today.

7. Another aspect of effective judicial management of cases is the duration of trials. The Lord Chief Justice's protocol set a target outer limit of three months for Very High Cost Cases. As of January 2008, of the 77 cases

[62] "A Review of Case Studies by the High Cost Case Review Board Secretariat", January 2008.

on the VHCC Register, 32 had time estimates of between three and six months, and nine had time estimates of six months or more. I.e., over half of the cases were in breach of the target outer limit.

8. In England and Wales, judges are selected by and large from the Bar. Historically, it has not been possible for an independent prosecutor to move directly to the bench. In contrast, it is quite common in the US for prosecutors to be appointed directly from a Federal or state prosecutor's office to a judgeship. For example, Judge Barbara Jones – quoted below – was appointed directly to the bench from DANY where she served as Chief Assistant District Attorney. Previously, she had been Chief of the Criminal Division of SDNY.

9. Judge Jones, who presided over the trial of Bernard Ebbers (which lasted six weeks), made the following comments about her approach to trial management:

> "I expect the trial to go continuously, swiftly – big gaps and three-day openings are counter-productive. I tell lawyers up front that I expect them to be ready with the next witness. At the end of each day and in breaks in the case, I ask them how much time they expect to spend on cross-examination. I lean on lawyers in open court and in front of the jury if I think they are wasting everyone's time. Cross examination that is excessively repetitive and irrelevant confuses everyone and is not helpful to finding the truth. When I really get exasperated and they have asked a question for the fourth time, I will say, 'Mr. So-and-so, we have heard that before. Move on.' Never once has a conviction been reversed because of a case management issue."

10. In the US judicial selection process, prosecution experience of managing complex criminal litigation is regarded as an asset – 40% of SDNY judges are former prosecutors although not all are appointed to the bench directly from a prosecutor's office. There is no empirical basis for believing that former prosecutors are less independent or fair as a result of this experience. (Indeed, courtroom folk wisdom has it that former defence

attorneys are more prosecutorial on the bench and former prosecutors bend over backwards to be fair to defendants.)

11. The remainder of SDNY judges are former partners in prominent civil firms with experience of managing complex litigation projects, and/or they may have had other experience relevant to effective case management. For example, Judge Richard M. Berman, who presided over the US Allied Deals trial, worked as an Executive Assistant for a US Senator; was a corporate law partner in Dewey Leboeuf Lamb (a Magic Circle firm); obtained a Masters Degree in Social Work; then worked as a Family Court judge in New York City. As explained by Judge Berman, "In Family Court, there is no luxury to waste time because the system is so overwhelmed. You learn at the end of the day what it takes to prove the case – the rest is fluff."[63]

12. Southern District judges are well resourced. Each trial judge has a suite of rooms, up-to-date IT, and a four-person support staff that includes a Court Room Deputy (who performs clerical functions in the court, communicates with lawyers, and looks after the needs of jurors and witnesses) plus three lawyers ("law clerks") selected for academic legal ability. The law clerks help with legal research and drafting opinions.

13. In contrast, judges who try complex white-collar crime cases in England and Wales are, literally and figuratively, on their own. They are provided with negligible support yet they are asked to know complex serious fraud cases "almost as well as the parties" and implement a disclosure law that the Lord Chief Justice has described as "intractable". The fact that very talented judges with exceptional intellects are able to keep their heads above water does not recommend this system.

[63] Family Court is a high-volume court where juveniles under the age of 16 are prosecuted for serious crime and also divorce and child custody cases are heard.

Effective trial management preserves the jury system

"In the Southern District, judges sometimes talk to jurors after their verdict without the lawyers being present in order to thank them for their service. Inevitably, we ask them what they thought about the trial – not the evidence but the process. Were they well cared for? Did it move along? The jury will always tell us, 'Judge, we like the way you kept those lawyers in line.'"

Judge Richard M. Berman,
Presiding Judge,
US Allied Deals case

14. One of the factors in prolonged trials in complex criminal cases in England and Wales is the reluctance of some judges to curtail prolix counsel. There is no appetite in the US for removing juries from complex trials which would, in any event, require a constitutional referendum by two-thirds of the 50 states. As a result, in both the Federal/NY systems, judges make the trial process fact-finder friendly by restraining the lawyers' verbosity.

15. In the US Allied Deals case, Judge Berman pared down the trial from the prosecutor's three-month estimate to three and a half weeks by urging the parties to narrow the issues, agree on undisputed evidence, and by rigorously adhering to a full-day, five-day-a-week work schedule. He encouraged the defence to divide up the areas for questioning so that all six lawyers did not ask the same questions.

As explained by Judge Berman,

> "Like the other judges, I am very jury-conscious. The juries will tell you time and time again that they don't mind jury service, they like it, but they don't want people to waste their time. They hate long jury recesses in the jury room while lawyers argue."

16. The senior Circuit Court judge who presided over the Independent Insurance trial approached trial management in the same spirit as Judge Berman.

> "I believe that I understand juries and I hope that I am very sensitive to the jury's understanding of the case, the need to simplify the case for them, which actually aids me to understand it."

He used the Lord Chief Justice's protocol to require prosecution counsel to give a "mini-opening" statement. This forced prosecution counsel to explain the case in simple terms, which assured the judge that both he and the jury would be able to grasp all the issues. It also enabled him to "press the pause button and turn to the defence counsel and say, 'Is this agreed or not?'". The Judge's efforts were assisted by cooperative defence counsel and a seasoned serious fraud prosecuting QC with the same trial philosophy and jury-friendly approach as the Judge. The prosecuting QC, on his own initiative, pruned the prosecution case to make it digestible by providing clarity and focus.

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Effective judicial management

Recommendation 9. While it was outside the scope of this review to look at the level of funding for the judiciary, it was evident that judges who try serious and complex cases on a regular basis would benefit from a higher level of legal and administrative support than they now have. Consideration should be given to providing funding to enable judges who try such cases routinely to hire a legal or administrative assistant. This cost could be paid from the savings achieved from reductions in the number of pre-trial adjournments and the length of trials.

Recommendation 10. It should be possible for a prosecutor with high intellectual ability, integrity and good management skills to move directly from government service to the bench. This would inject a new type of experience into the judiciary, which would benefit the development of criminal procedure and law and the effectiveness of judicial administration.

Chapter 7. Streamlining the "indictment by sending" process

1. As noted above, the criminal justice system in England and Wales discourages early guilty pleas in serious fraud cases. In addition, when there are guilty pleas in such cases, the Crown does not achieve the full benefit because of the amount of work that is required to enable a case to be sent to the Crown Court for trial. A simple change would help reduce the burden on the Crown without altering the fundamentals.

Indictment by sending

2. In recent times, the law of England and Wales has made radical changes in the indictment process by eliminating for the most part committal hearings in the Magistrates' Court. This enables the Crown to send (or in the case of some SFO prosecutions, transfer) an indictable-only case directly to the Crown Court. There, the prosecution serves a "trial bundle" that contains sufficient evidence to make out a prima facie case in support of the indictment. E.g., the signed statements of the witnesses that the prosecution intends to call at trial, the trial exhibits, and a Statement of Evidence. The latter, which is almost the equivalent of a summation in a US trial, details each substantive witness's evidence and explains the inferences to be drawn from the evidence. In Allied Deals, the trial bundle consisted of a 196-page Statement of Evidence, 288 witness statements and 3,154 exhibits.

3. This system, when coupled with abuse of process arguments, creates, in effect, a three-stage trial. First, the Crown tries its case on paper; second, it defends its case against an abuse of process application; third, it presents oral testimony to a jury.

4. This is more resource intensive than the US Grand Jury system of indictment, which enables prosecutors to prepare cases to a trial standard only when they are confident that the case will go to trial rather than being resolved by plea.

Indictment by Grand Jury

5. As noted earlier, indictment by Grand Jury is a fundamental constitutional right. The defence is not a party to Grand Jury proceedings, which are secret. This latter provision is vital to SDNY/DANY's success in investigating and prosecuting many serious crimes ranging from gang murders to organised crime cartels where witnesses will not cooperate without the cloak of protection provided by Grand Jury secrecy. There are insufficient law enforcement resources to protect every witness (and their families) who are at risk – or perceive themselves to be at risk. The Grand Jury secrecy provision is an efficient method of mitigating the real risk and allaying fears arising from the perceived risk.

6. In the Grand Jury, the prosecutor examines witnesses, and Grand Jurors also have the right to ask questions. A full stenographic record is made of the proceeding and the foreman of the Grand Jury reports directly to the judge. Post-indictment, the judge reviews the Grand Jury minutes to determine the sufficiency of the evidence and the propriety of the prosecutor's conduct. Federal and NY state judges are very strict in this regard.

7. The burden of proof to obtain an indictment by Grand Jury is "reasonable cause" to believe that an offence has been committed and that the defendant committed the offence. This is a lower standard of proof than a "prima facie case". [64]

8. In the Federal system, hearsay evidence may be presented to a Grand Jury. In a complex fraud case, this reduces the Grand Jury proceeding to a few days, as an FBI agent walks the Grand Jury through the case by eliciting the evidence that proves the various elements of the crimes against each

[64] See Footnote 19 for the definition of "reasonable cause".

defendant. This system enabled the SDNY prosecutor in the Allied Deals case to obtain indictments against five defendants within two weeks of the raids.

9. In the New York system, reasonable cause must be established through non-hearsay evidence, which involves calling witnesses. However, to conserve resources, the law permits the prosecution to put certain types of evidence before the Grand Jury through paper certifications. For example, instead of calling the laboratory technician who tested a gun to determine that it is operable, or a hospital administrator to prove that hospital records were made in the ordinary course of business, the technician or administrator may send a document certifying the above facts.

10. While theoretically the "reasonable cause" burden of proof creates the risk of a high dismissal rate in the felony trial court, this does not happen in the Federal/NY systems because early case screening requires the prosecutor to ensure that, as a practical matter, there is a realistic prospect of conviction.

11. The lower burden of proof, coupled with the use of hearsay to a greater or lesser degree, means that there is a considerable saving of case preparation resources if a defendant pleads guilty in the equivalent of the Crown Court. If a defendant does not plead guilty, then the prosecutor will prepare the case for trial. Because of case ownership and the trial advocacy skills of prosecutors, they have a good sense of which defendants are likely to plead – for example, obtaining a plea from the CEO of a listed company such as WorldCom or TYCO is most unlikely – and what measures are required to ensure the availability of evidence not called before the Grand Jury.

12. In addition, both Federal/NY law allow prosecutors and defence counsel to negotiate a disposition pre-indictment, subject to judicial approval. In these instances, there are mechanisms that allow a defendant to waive his right to indictment by Grand Jury and be prosecuted instead on the basis of prosecutor's "Information". This is an accusatory instrument that does not

require presentation of evidence to a Grand Jury, which is a very considerable saving of prosecution resources.

13. It is also possible for both SDNY and DANY prosecutors to negotiate, pre-indictment, deferred prosecution agreements whereby companies agree to pay very substantial fines and accept an internal monitor to ensure that regulations are in place to prevent a recurrence of criminal activity.

14. The advantage of the system described above is its efficiency. Prosecutors do the appropriate quantum of work required to reach the objective. They take the Rolls Royce out of the garage when it is necessary.

Streamlining the "sending" system

15. It is possible to simplify the burden of indictment in complex cases without changing the burden of proof or reducing the defendant's right to notice of the charges and thus affecting his/her ability to prepare a defence by making a simple change in the law.

16. Although Section 2 provides compulsory powers to give information, a witness cannot be compelled to sign a witness statement. After a professional witness has been interviewed under Section 2, it may take months to obtain a signed witness statement if there is actual or potential related civil litigation. In these situations, private lawyers step in and deliberate over the content of the witness statement. This creates unnecessary delay in SFO cases. For example, it took a year to obtain the signed witness statement of the chief professional witness in the UK Allied Deals trial because his firm anticipated being sued by the Allied Deals liquidator.

17. It is not unusual for the SFO to call witnesses who have given sworn testimony in other proceedings. For example, a cooperator who had testified in the US Allied Deals trial also testified in the UK proceeding. SFO investigators and lawyers interviewed her before her UK testimony. An SFO lawyer was then required to convert the results of her interview and the transcript of her trial testimony into a 176-page witness statement for the UK proceeding.

> "For weeks, I took everything and put it together in a chronological narrative, not as she would have said it because her words were often inappropriate because of her English. After producing this, I sent it to the cooperator and her lawyer and she had to check it to make sure it was utterly correct because I probably got things wrong. The irony is that this statement is not her evidence – these are not her words."

18. To spend three months (which is how long this process took) to convert the best evidence – what the witness actually said in court – into a UK lawyer's words is not a productive use of scarce criminal justice resources. A more efficient approach would have been to submit a witness statement with any new information acquired through the SFO interviews, coupled with the transcript of her trial testimony.

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Saving time and money by curing an anomaly

Recommendation 11. Where the Crown intends to call witnesses who have already provided information or testimony under oath or penalty of perjury, either pursuant to Section 2, or SOCPA, or in a foreign criminal or civil or regulatory proceeding, then:

- the transcript of their information/testimony should be deemed an adequate substitute for a witness statement; and
- be admissible at trial to the same degree as a Magistrates' Court deposition.

Since the witness's evidence will have been summarised in the Statement of Evidence, there should be no need to summarise it further unless a summary is required for the purpose of agreeing testimony for trial.

Chapter 8. Police support for SFO cases

"Sometimes I feel as though I've been asked to climb Mount Everest with only a pair of flip-flops and shorts."

An SFO case controller

1. When the SFO was established in 1987, it was envisioned that its investigative work would be carried out by police forces working with SFO civilian financial investigators. In 1992, between 50 and 60 officers from the City of London and the Metropolitan Police fraud squads occupied two floors of the SFO's current headquarters at Elm Street. Outside London, provincial forces supplied a full complement of fraud detectives to staff their SFO cases. For example, the Castlegate Securities Fraud successfully prosecuted by the SFO in the first half of the 1990s was staffed by six Thames Valley officers, including a Detective Inspector, while Operation Palisade (which did not result in charges) was staffed by a Detective Sergeant and four Detective Constables for three years.

2. However, since the mid-1990s, there has been a steady decline in the quantity and quality of police investigative support for the SFO. For example, the drugs-pricing fraud investigation mentioned above, one of the most important serious fraud cases since BCCI, is only nominally a joint police enquiry. While there was a massive turnout from four forces for the searches, the only investigative contribution from the police has been the equivalent of one detective constable for a year and a half. Whereas Allied Deals was well staffed by the police at the outset, the quality of their contribution was disappointing. SFO lawyers and investigators were required to redo a number of the police statements and interviews. (I reviewed some of the police statements, and indeed the quality was poor.)

3. The decline in the quantity and quality of police support for the SFO is a by-product of central government policy, which excludes fraud from the list

of police performance indicators. As a result, the police have positive incentives not to investigate fraud. As explained by a City of London Detective Sergeant,

> "Fraud is a diminishing field of business. Police commanders do not want to send resources to the SFO because they want them to stay at home and deal with performance indicators. For example, if they are missing their warrant target, they will have the Fraud Squad chase warrants for two weeks. The ones who are in Fraud are focused on money-laundering and confiscation because they get 17.5% of confiscations."

4. Given the SFO's dependency on external police investigative resources, the lack of police resources has taken a toll on its effectiveness.

5. It is not accurate to categorise fraud as a "victimless" crime – as some do. In one of the SFO cases considered in this Review, an elderly couple committed suicide after they lost their pensions as a result of an alleged fraud. The victims of "boiler room" frauds are often vulnerable individuals who lack the sophistication and strength to resist high-pressure sales. I know from experience that it is frightening to be robbed – this happened to me twice when I was a student in Chicago in the late 1960s. But in comparison to the loss of one's life savings, the injury from a robbery may be small and the fear transitory compared to the suffering caused by a life sentence of penury. The exclusion of fraud as a police performance indicator has contributed to the decriminalisation of fraud. This undermines the citizen's confidence in the criminal justice system and the state.

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Police priorities: putting crime back into fraud

Recommendation 12. In the government consultation process following the report of the Fraud Review, 98% of respondents support the recommendation that fraud should be made a policing priority. I concur with this view.

Part III

Internal Factors

Chapter 9. Unfocused investigations

"An investigation is an effective search for material to bring offenders to justice."

Practice Advice on Core Investigative Doctrine,
ACPO Centrex 2005

1. Prosecutions rise and fall on the effectiveness of investigations. One of the issues that I was asked to consider was whether or not SFO investigations were "unfocused". The answer is: "Yes. Some SFO investigations are unfocused."

2. Unfocused investigations are a matter of grave concern. They may:

- result in defendants who should have been charged not being charged;
- cause cases to collapse post-charge;
- lead to unwieldy trials that are not judge- and jury-friendly;
- lead to investigative delays that are damaging to the case, and unfair to victims and suspects; and
- waste limited criminal justice resources.

In short, the end product of an unfocused investigation is likely to be injustice. Correcting the problem of unfocused investigations in some cases should be at the top of the SFO's agenda. Accordingly, I have made a number of detailed recommendations, including specific training measures, to address this issue.

3. The causes of unfocused investigations are:

- a skills shortage at the case controller level;
- a lack of clarity about the role and responsibilities of case controllers;
- a skills shortage at the Assistant Director level;
- a lack of clarity about the role and responsibilities of the Assistant Director;
- a skills shortage at the Strategic Management Board level;
- a skills shortage among investigative staff;
- a lack of clarity about the SFO's investigative requirements;
- insufficient use of proactive investigative techniques; and
- the case referral and vetting process.

Skills shortage at the case controller level

"To make a good investigative lawyer, you need trial experience because this enables you to focus on the evidence you will need to obtain a conviction."

A DANY Assistant Director

4. As the developing prosecution agencies of England and Wales have undertaken new responsibilities, they have realised that a number of their lawyers do not have all of the skills necessary to fulfil the full role of the modern independent prosecutor. This role is most developed in the SFO where case controllers direct complex white-collar crime investigations and prosecutions. To do this to maximum effect, SFO case controllers require investigative skills, case analysis skills, trial advocacy skills, team management skills, and police relationship skills.

5. The SFO's New York counterparts acquire these skills by interviewing witnesses, working closely with the police in joined-up teams, charging cases, trying cases themselves, and by managing cases from beginning to end.

6. In England and Wales, it is difficult to find all these skills in one lawyer because of the divided legal profession and the immaturity of the independent prosecution systems. Lawyers who join the SFO from the Bar will not have project management or investigative skills because barristers try cases off of a paper file prepared by others and do not interview witnesses except in very limited circumstances. Solicitors, on the other hand, usually lack Crown Court advocacy experience and are unlikely to have obtained complex case management experience unless they are partners in a firm. Lawyers joining from the CPS or RCPO are also unlikely to have the full complement of skills because:

- until recently non-SFO prosecutors did not interview witnesses (a "police job"), although this is now changing with the national roll-out of the CPS witness interview pilot programme;
- charging is a recent CPS/RCPO power;
- until recently, the CPS and RCPO have out-sourced most of their advocacy to the Bar.

7. Few lawyers joining the SFO from either the private sector or other prosecution agencies will have "police relationship skills". (In the CPS and RCPO, joined-up police/independent prosecutor team work is a relatively new concept; in the CPS, it was introduced in 2004.) The relationship between independent prosecutor and police is complex but potentially very productive. Building this relationship requires mutual respect and an appreciation of cultural differences. The police often mistake a lawyer's caution for lack of commitment, whereas lawyers may interpret the police officer's passion and desire to succeed as obstinacy.

8. An SFO ex-police civilian investigator who has worked on both sides of the Atlantic made the following observation about DANY police–prosecutor relationships:

> "It was an absolute pleasure to go into the ADA's office. There was the same camaraderie that I had found in the police. We were one team, we had a shared vision. Even if there were differences of views, they wanted to listen to our opinions. They were interested to hear what we had to say and took various things on board. That's not to say we didn't have our arguments. The DANY detective-investigator and I would walk out of the ADA's office and he would say, 'Bloody lawyers . . .'"

9. Because they have not had sufficient experience working with the police, some SFO lawyers do not appreciate what the police can bring to a case or how to obtain the best from the police. One former case controller aptly commented, "Poor work is not representative of the police, it is representative of people who do poor work."

10. The SFO's biggest challenge at the moment is to recruit and develop lawyers with the full complement of case controller skills. The SFO's current structure does not lend itself to this because:

- it out-sources all of its trial advocacy;
- it lacks a settled career path that would enable lawyers to acquire these skills internally;
- it does not handle small cases;
- in recent times, SFO cases have taken so long to complete that lawyers may not have lived through the full life cycle of a case before promotion to case controller;
- the SFO puts insufficient resources into training and supervision;
- there are insufficient across-the-board effective working relationships between the SFO and the police.

11. Currently, one-third of case controllers have been in their post for less than two years. This heightens the risk of unfocused investigations. While the "junior" case controllers are most in need of development, in my view all case

controllers would benefit from additional training; and, to their credit, they are the first to acknowledge this.

DANY and SDNY do not have unfocused investigations because their lawyers learn "focus" on the job

"When you are talking to a witness for the first time, part of your mind is in the courtroom already."

DANY Chief of the Special Prosecutions Bureau

12. In contrast, "unfocused investigations" are not an issue in DANY or SDNY. Indeed, the phenomenon was new to me when it was first mentioned by the former Attorney. This is because the SFO's New York counterparts have a settled career path that enables prosecutors to acquire case controller skills through an organic process that is similar to a child learning a foreign language.

13. The career path for a DANY prosecutor begins in the rough-and-tumble world of the high-volume Magistrates' Court, where young lawyers get their first taste of life. Their experience is similar to that of Judge Berman.

14. From Magistrates' Court, prosecutors graduate to lower-level Crown Court work (serious theft, burglary, assaults, grand larceny, etc.), then higher-level Crown Court work (major drugs, rape, robbery, murder, etc.).

15. En route, they obtain investigative experience from interviewing witnesses and working with the police. The latter also teaches "police relationship skills". They develop advocacy experience because they try the cases. They develop decision-making, team leadership and case management skills through cradle-to-grave ownership of cases.

16. DANY prosecutors are only eligible to join an elite Investigation Bureau if they have had a minimum of five years' experience. The experience composition of DANY's Frauds Bureau ranges from seven years (the

equivalent of a mid-level junior counsel) to that of a QC. The three lawyers who investigated and prosecuted Dennis Kozlowski, CEO of Tyco, had among them a total of 80 years' experience.

17. The recommendations at the end of Part III will suggest recruitment strategies, an internal career path, and training solutions to remedy skills shortages at the case controller level.

Lack of clarity about the role and responsibilities of the case controller

"The execution of the role of the Case Controller tends to be personality-led . . . there is a much greater breadth in style than one might expect with the difference in case controller styles being likened to the difference between a Reliant Robin and a Chieftain tank".

A member of the Case Management Reform Programme Team

18. The problem of skills shortage is compounded by a lack of clarity about the role and responsibilities of the case controller. The degree of oversight, drive, energy and momentum required to bring large and complex investigations to a successful conclusion cannot be overstated. The forces of entropy are such that nothing can be left to chance. The current senior management team has not defined the role, responsibilities, tasks and qualifications of the case controller with this understanding at the forefront of its mind.

19. In 1996, the former SFO Director, who then held the post of Assistant Director, helped to develop a good description of the case controller's role and responsibilities, including specific tasks. The 1996 description has fallen out of use. If reinstituted and updated, it would assist case controllers to: 1) perform their leadership function effectively; and 2) develop and retain the skills and knowledge required in effective case controllers.

Skills shortage at the Assistant Director level

"There is reasonable delay and unreasonable delay. Unreasonable delay usually results from lack of supervisor attention to the Assistant District Attorney who may not be doing his or her job."

DANY Chief Counsel to the Investigations Division

20. In both DANY and SDNY, there is a high level of supervision even of experienced lawyers. The purpose of supervision is to quality control, assist with decision-making, mentor, and ensure that work is done in a timely fashion.

21. The latter is an issue in SFO cases. A culture of delay has been allowed to develop. Assistant Directors can change this by instilling an ethos of "not letting things sit around". To do this, Assistant Directors will need to lead by example. This includes robust decision-making at all stages of a case, and demonstrating that the "buck stops here".

22. Senior managers require a higher level of operational capability than their staff in order to inspire respect and confidence and deliver their units' operational objectives. Not all of the SFO's senior managers have sufficient operational capability. The need for high-level operational experience, as well as proven leadership ability, needs to be borne in mind in future SFO appointments to supervisory level positions.

Lack of clarity about the role and responsibilities of an Assistant Director

23. Some of the problems that have arisen at the Assistant Director level result from a lack of clarity about the role and responsibilities of this critical leadership position. This includes the degree of supervision. For example, one of the documents I examined for this Review was a poorly drafted "information" for a search warrant that had not been reviewed by the Assistant

Director before it was submitted to court. As a result, the Assistant Director would not have addressed the case controller's development issues nor detected that the case controller was producing sub-standard work that would reflect poorly on the SFO. This was unfortunate because there are other Divisions that produce a high standard of submissions. Indeed, one judge commended the quality of the SFO's written product.

24. The Director prepared a good description of the role, responsibilities and tasks of Assistant Directors in 1996 that sets out the appropriate level of superintendence. Reinstituting this description would help Assistant Directors to perform their duties.

Skills shortage at the investigator level

"Just like Joseph and his coat of many colours, I want an investigation team of many skills. And no one individual will possess all the required skills. The strength is in the whole as opposed to in the individual."

A veteran detective, senior investigating officer and Acting Chief Constable

25. It would be impossible for either the SDNY and DANY to pull off their white-collar crime achievements without excellent police support. The SDNY is supported chiefly by the FBI but also by the Securities and Exchange Commission, the Secret Service, and Postal Inspectors. DANY works with Federal law enforcement agencies and the New York City Police Department, but many of its investigations are staffed by "detective investigators" with full police powers – salaried employees assigned to its Investigation Bureau.

26. Like DANY, the SFO has a large complement of 118 staff investigators; but unlike DANY, the SFO's salaried investigators do not have police powers. They perform a wide range of tasks from data entry on spreadsheets to complex witness interviews, suspect interviews, taking statements, and financial analysis. Many have high-level financial investigation expertise.

Others are young and eager civilians who are learning the ropes. But few come from a police background.

27. Because the SFO model was based on the assumption that its "police" investigative needs would be supplied by external police forces, there is little in-house institutional police knowledge. For example, there is no one at the senior management level with police experience, although one of the SFO's Non-Executive Directors is a former Chief Constable. There is only one ex-policeman at the principal financial investigator level. And there are only a handful of ex-police at the senior investigator level who are based in London. In contrast, 50% of DANY's detective investigators are former top-echelon detectives. This lack of institutional police knowledge has had a knock-on effect on how the SFO has tried to solve the problems created by the withdrawal of the police.

Building up institutional police capacity through training

"I would sacrifice three graduates for one retired police officer because one retired police officer will do more in terms of the experience and knowledge that they bring, can work unsupervised and get the job done. I don't have time to spoon-feed a junior staff member about what a witness statement should look like."

SFO investigative lawyer

28. The SFO has recognised that its young civilian investigators require more experience and training, and it has tried to supply the latter need. Civilian investigators now have the opportunity to take seven days' worth of training courses on a voluntary basis. This is highly beneficial and greatly appreciated by the young civilian investigators. They have also had the opportunity to participate in a mock trial to help them appreciate the difference between fact, speculation and opinion, and the amount of detail required in a good interview.

29. But both investigators and lawyers recognise that this is insufficient to bridge the gap because it does not expose young civilian investigators to "old police heads". Nor can it equal the depth of training provided by police forces. A UK police officer begins his/her career with a 13-week residential induction programme and then spends two years on the beat as a PC before applying for CID. Applicants are accepted into the CID programme on a probationary basis during which they attend a two week non-residential detective training course. After promotion, they attend a 10-week residential detective law programme. There are further follow-up specialist courses in fraud, money-laundering, confiscation, etc.

30. The SFO has recognised the need to recruit experienced investigators into its civilian "force", but it has encountered some difficulties in identifying its investigator needs. Its original expectation was that it could find everything in one person who would combine the numerical aptitude of a good financial analyst and the high emotional intelligence of a good cop. In fact, such investigators are very rare.

31. In my view, the SFO's immediate need is for experienced ex-police with high emotional intelligence who have the "soft power" skills that enable police: a) to get people to do what they do not want to do – tell the truth, sign a witness statement, come to court, etc.; and b) to find out what people will not tell them through techniques such as infiltration, covert surveillance, developing informants and cooperators, etc.

32. A sufficient contingent of ex-police with these skills would increase the range and variety of SFO investigative techniques and remove some of the minor stumbling blocks resulting from lack of "street knowledge" that now delay investigations unnecessarily.

The DANY model

"I'm still learning every day. I keep my mouth shut and my eyes open and listen to what the older guys say. They are excellent. Because this is such a good office, it has the pick of retired guys."

A five-year DANY detective investigator

33. DANY has also experienced difficulty obtaining adequate police staffing of its white-collar investigations. The New York Police Department (NYPD), like the Metropolitan Police Force, has many conflicting demands. Although it is not distracted by targets, it does measure productivity by the number of arrests. Consequently, it does not like tying up a team of police officers on an extended white-collar crime investigation. The NYPD does assign a squad of detectives to the DA's Office to work on investigations but their numbers are not sufficient to deal with all of the Investigation Division's caseload. DANY's solution was to set up an internal Investigations Bureau staffed by "detective investigators". About 50% of its staff are former NYPD detectives or come from other law enforcement agencies such as the Internal Revenue Service.

34. Civilians recruited into the Investigations Bureau, such as the young man quoted above who worked at Merrill Lynch before joining DANY, receive the same training as police officers. This includes a four-month induction programme at the NYC Police Academy and follow-up courses such as Advanced Narcotics, Interview/Interrogation, Criminal Investigations, Money-laundering and Financial Crimes, etc. This is followed up by on-the-job training and mentoring. There is a separate unit of forensic accountants who are deployed to cases as required.

Proactive investigation techniques

35. Complex white-collar crimes are invariably conspiracies where a cabal of individuals (often the inner circle of a company) hatches and executes a criminal scheme. One of the secrets of the success of the SFO's New York

counterparts is that they do not treat white-collar crimes any differently from other criminal conspiracies. On a case-by-case basis, DANY and SDNY decide which tools in their "tool kit" are likely to crack the case. In complex fraud cases, they have used cooperators, undercover agents, covert human intelligence sources, and covert electronic surveillance, including wiretaps.

36. They also make full use of their Grand Jury compulsory powers to obtain documentary and testimonial evidence, including obtaining indictments for perjury and contempt in appropriate circumstances.

37. The drugs-pricing fraud case initiated in 2002 is a good example of the SFO making innovative use of proactive techniques. The experienced Assistant Director, who was also the case controller, along with the experienced principal investigator, decided to use the SFO's common law powers to turn minor co-conspirators into cooperators. The SFO is beginning to use SOCPA powers to develop cooperators, and in a few cases (including Allied Deals) it has used US cooperators. But in general the SFO does not avail itself of proactive investigative techniques to the same degree as its New York counterparts. For example, last year the senior management team decided to pilot the use of covert consent tape-recordings because it was at risk of losing its RIPA covert surveillance powers due to non-use.

38. A number of lawyers and investigators believe that SFO investigations are unnecessarily delayed because Section 2 powers are not used robustly. I saw some evidence of this in two of the cases I examined. In fact, these powers are essential to investigations of criminal conspiracies, which is why Parliament has extended them to the CPS and RCPO through the Serious Organised Crime and Police Act 2005.

39. A significant number of investigators and lawyers expressed the view that SFO investigations were impeded by the senior management team's "risk-averse" ethos. There were too many comments about lack of robust decision-making to dismiss this view. To some extent this risk-averse attitude results from the lack of institutional in-house police capability and lack of operational experience in the senior management team, which diminishes

self-confidence. But it was also clear from my conversations with large numbers of operational staff and members of the senior management team, that there was some confusion about the SFO's role.

40. As an investigative agency, the SFO should have the same duty to the public as the police, including:

- "to pursue and bring to justice those who break the law";[65] and
- to deploy the full range of investigative techniques to detect, prove and successfully prosecute defendants involved in serious and complex fraud.[66]

41. As a prosecution agency, the SFO should be governed by the principles articulated in the CPS Code for Crown Prosecutors. The Code states that "Fair **and effective** prosecution is essential to the maintenance of law and order." Like the CPS, the SFO is responsible for **"bringing offenders to justice".**

42. One member of the senior management team attributed the SFO's risk-averse attitude to unfavourable resolutions of several high-profile cases in the 1990s. It is unfortunate that these happened just as the SFO was getting on its feet. But such events do take place in every prosecutor's office and they happen for a variety of reasons. When they occur – as invariably they will – the prosecutor's office has a "duty to learn from experience",[67] not pack up its tent or say, in effect, "We're not going to stick our heads over the parapet again." This is an abdication of the prosecutor's duty to the public. The public wants fair prosecutors, not timid prosecutors.

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[65] This is one of six UK Police Service "purposes". The others are: to uphold the law fairly and firmly; to prevent crime; to keep the Queen's Peace; to protect, help and reassure the community; to be seen to do this with integrity, common sense and sound judgement. See the Police Service Statement of Common Purpose.

[66] See Practice Advice on Core Investigative Doctrine, ACPO Centrex 2005, p. 18.

[67] "The Army has a duty to learn from experience" is allegedly a phrase in an internal Army report that criticises aspects of the British Army's conduct of the war in Iraq. "Iraq war was badly planned and poorly funded, says Army", The Sunday Telegraph, 4 November 2007, p.6.

43. As part of the 1996 reorganisation, a good document on Policy and Procedures was issued that supports robust use of SFO powers. For example:

> "Section 2 is a vital weapon in the Office's armoury; it should be used without hesitation where someone who needs to be interviewed will not cooperate voluntarily. Parliament did not intend its use to be constrained in such a way as to delay an investigation or make it more difficult."

The referral and vetting process

"Starting an investigation as soon as possible after an offence has been committed will enhance the investigator's opportunity to gather the maximum amount of material (the Golden Hour principle)."

ACPO 2005

Practice Advice on Core Investigative Doctrine

44. The SFO's current referral and vetting process has developed into an added layer of bureaucracy that detracts from effective investigations. This is partly due to the process, but also due to a lack of prompt and robust decision-making.

45. The vast majority of SFO cases are referred by another investigating or regulatory authority, or liquidators. This means that by the time that the SFO enters the field, it may not have a clear run: witnesses may have lost enthusiasm; there may be conflicts of interest; evidence may have grown stale or gone missing.

46. Upon referral, cases are routed to a separate vetting unit where they are housed until a preliminary investigation is conducted and a decision made on whether to accept the case. Often it is felt that there is insufficient information. The vetting unit does not use Section 2 powers to obtain more information

because it has not yet decided to take the case. This makes the SFO dependent on other agencies that may drag their feet because the case is no longer "their problem". Foreign enquires involving Mutual Legal Assistance Treaty requests for evidence are always extended.

47. When the vetting unit obtains enough information to make a recommendation, this is forwarded to the Deputy Director and then the Director. The layer in between the vetting unit and the Director adds additional unnecessary delay. While some cases whiz through, they are the exception. During 2007, there were 50 cases warehoused in the vetting unit. The median time for a decision to be made on acceptance or rejection was 5.6 months.

48. For the SFO to accept a case, the Director must be satisfied that there are "reasonable grounds that the suspected offence appears to involve serious or complex fraud". The SFO has interpreted this to mean "some evidence", but this may be raising the bar too high. Another interpretation, supported by case law, is that the Director must have formed a genuine suspicion. This could include anonymous information or hearsay information which is later established to be untrue.[68] The standard used by the SFO is important: once a case is accepted, it can use Section 2 powers to speed up its preliminary enquiries.

49. In contrast, DANY uses a streamlined process designed to begin the investigation immediately upon referral. As explained by the Chief Assistant DA, "These cases take so long as it is. It is important to get on them while everyone is interested."

50. Cases are referred to DANY in a variety of ways. For example, a US Senate Staff Attorney, Jack Blum, frustrated by DOJ's inactivity, referred BCCI to DANY. Paul Volcker, the chairman of the UN enquiry into Oil for Food, paid the District Attorney a visit because compulsory powers were required to gain evidence. Occasionally, another investigative or regulatory agency will refer the case. But, unlike the SFO, most cases arrive at DANY's doorstep through

[68] O'Hara vs Chief Constable of the Royal Ulster Constabulary [1997] AC 286.

a member of the public. Typically, a lawyer representing a company will reach out to someone they know in the office – the Chief of the Investigation Division or a Bureau Chief.

51. DANY accepts cases based on suspicion. For example, it began a recent successful investigation and prosecution of fraud and public corruption involving a State Republican Party official, based on a credible allegation contained in an anonymous letter.

52. When a case comes in, it is immediately assigned to its cradle-to-grave lawyer. The prosecutor begins a major fraud case in the exact same way as a robbery case – by taking an oral history from the victim. As explained by the Chief Assistant DA:

> "The very first thing we do is to interview the victim or their lawyer – even in a securities case where there will be hundreds of victims. This gives us the lay of the land. We ask ourselves, 'Is there an adequate civil remedy? Has it been shopped around elsewhere? Are they really interested in a prosecution? Will the courts take this seriously? Is this a repeat crime? Are there 100 other victims out there? Are the victims in NY? Are we the only jurisdiction likely to prosecute? Is there evidence or the possibility of getting evidence?' We'll tell the victim or his lawyer, 'Give us the documents . . .'"

53. Commenting on the SFO's vetting process, DANY's Counsel to the Investigation Division correctly observed,

> "Adding in another layer builds in delay because there is a natural tendency on the part of everyone to neglect their work. If the attorney who is assigned the case is referring it out and not involving themselves in the evidence-gathering process, and the investigative agency to whom you are referring it is not particularly diligent, then you are not going to get a speedy result."

54. Rapid vetting decisions are a function of experience, competence, and appropriate confidence that lead to robust decision-making. In the

Recommendations section, I suggest changes to the vetting system that would enable the SFO to begin investigations as close in time as possible to the “golden hour”. This will permit the use of proactive investigative techniques, improve the quality of evidence, reduce delays, and lead to better outcomes.

Chapter 10. The SFO's use and management of external counsel

"*The results of all our efforts stand or fall on counsel's ability to present the case . . . Nevertheless, there is general agreement among case controllers that, with some notable exceptions, we are not getting the best service from the best counsel."*

Internal SFO review of the use of external counsel, 2006

1. Currently, the SFO uses external counsel for investigative advice; analysing evidence and offences pre-charge; charging advice; writing Statements of Evidence; some bail hearings; pre-trial proceedings in the Crown Court; Crown Court Advocacy; and other legal advice.

2. One of the issues that the Director asked that I consider was the SFO's use of external counsel. During the Review, I interviewed and/or watched in action some excellent counsel. I also reviewed a case where the counsel did not perform well and was not well managed. It became clear that an organisation requires sophisticated consumers and a rigorous selection and monitoring system in order to obtain a consistently high quality of service from external counsel. While some SFO consumers are sophisticated, others are not, and it does not have a rigorous selection and monitoring system. It also became clear that the SFO's excessive reliance on counsel is de-skilling lawyers at a time when they need to be enhancing their skills. This was well explained by one respected case controller:

> "I came in having started at the Bar, and then I went to a regulatory agency where I was doing almost the same job as at the SFO but on much smaller cases where we didn't get counsel involved until we hit the Crown Court. I came to the SFO happy to make all the decisions, happy to go to court which I did initially at SFO bail applications. But

you enter into a society where that is not done and where you are expected to rely on counsel to take your legal decisions and to go to court for you, and five or six years later I am used to relying on counsel and not used to going to court and those skills atrophy and so does the confidence."

3. In my view, the SFO's future lies in following the path trail-blazed by the CPS and RCPO. The SFO's two sister agencies have embarked on ambitious programmes to develop their own in-house higher-court advocacy capability. The Director of Public Prosecutions, a former leading member of the criminal defence Bar, envisions CPS Higher Court Advocates (HCAs) eventually prosecuting most CPS cases from cradle to grave, including serious organised crime and terrorism cases.

4. Cost is one reason for the CPS/ RCPO policy of bringing advocacy in-house, but the most important "drivers" relate to justice. For example,

- it has been recognised that prosecutors require sophisticated trial advocacy skills to develop the case analysis skills that enable them to provide pre-trial advice to the police and make effective charging decisions;
- external counsel, who are paid on an hourly basis, are not as sensitive to the resource implications of adjournments, delayed trials, and delays within the trial;
- in complex cases, counsel do not live with the investigation from the beginning and sometimes miss the minutiae that can "make or break" a court ruling. For this reason, one prosecution counsel said he would be delighted to have an SFO prosecutor as his junior;
- contracting out trial advocacy undermines the cradle-to-grave principle of accountability based on continuity of knowledge and decision-making.

5. The CPS/RCPO provide various models that could be adapted to the SFO's requirements.

6. Both the CPS Fraud Prosecution Service (which has six HCAs among its 15 prosecutors) and RCPO (which has a considerable caseload of serious and complex fraud) use in-house trial advocates to conduct case management hearings, take guilty pleas and manage cases to progress them to trial. This counters case drift and the counsel attitude of "It's just a hearing and who cares?"

7. The FPS, whose caseload is not as consistently complex as that of the SFO, attributes its 80% conviction rate to its high guilty plea rate (70.59% of convictions). As explained by a senior FPS prosecutor:

> "You know your case better than anyone else, you are fully prepared, it does not cost any more for you to be ready for PCMH, whereas if I get a counsel in pre-PCMH, I have to pay them to read the case. And, depending on the lawyer, we are more like to get a plea because we are tougher and we know the case better."

8. RCPO has a team of 12 "Standing Counsel", similar to Treasury Counsel, who take its work in preference to other clients. This means they know the RCPO cases and their context.

9. The CPS Organised Crime Division has developed an interesting approach that may be applicable to the SFO. There is a new CPS rank called Principal Crown Advocate which the Organised Crime Division has filled by recruiting senior junior counsel from the Bar whose experience falls just short of QC.

According to the head of this Division,

> "They have been fantastic. They sit in amongst everyone else in an open-plan office. They get involved with the lawyers pre-charge so they can give advice, and they take the case all the way through to trial. We have found that our preparation time has gotten much shorter and quicker. In the first 6 months of last year, taking into account their salaries, they saved us £200,000.

> "We immerse them in our policies so these become their policies. They don't give disclosure away. We don't have to go outside for conferences. We don't have to send them briefs because we are sharing the same files – these are all the hidden savings. They act as mentors. We have one HCA who has done one trial on her own and they helped her to work on that. And they have helped on the wider front, developing a training course on prosecution of complex large cases. Across the board, they raise skill levels and reputation levels because they are CPS employees."

10. The success of this initiative – described as "startling" by the Director of Public Prosecutions – has encouraged the Counter Terrorism Division to follow suit.[69] If the CPS is able to bring in-house its higher court advocacy of terrorism cases, which are of the highest public priority and present equivalent complexities to much of the SFO's caseload, then this should encourage the SFO to develop a programme, adapted to its needs, that follows suit.

[69] "Detaining the terror suspects for over four weeks is not needed, says DPP", *The Times*, Tuesday April 1 2008, p. 6.

Chapter 11. Improvements in training, policy and standards

"In the SFO, skills get passed on by accident and not by process."

A Senior Investigator

Training

1. In June 2007, as part of this Review, I met with District Attorney Robert M. Morgenthau. Twenty-one months earlier at the age of 85, he had been elected to his ninth term as Manhattan District Attorney. He had soundly beaten his opponent, a 60-year-old former Supreme Court judge who had campaigned on a platform calling for a refocusing of resources away from white-collar crime. At our meeting, the District Attorney recalled a conversation he had had with a Supreme Court judge shortly after he took office in January 1975. The judge was on trial in a case prosecuted by the Office, and the District Attorney wanted to know how the trial was going. "Do you really want to know?" the judge asked. Morgenthau said, "Yes." "'Terrible," the judge replied, "the prosecutor doesn't know what she is doing." A few days later, Morgenthau saw the young prosecutor in the case and asked the same question. "Terrible," she said, "I have no idea what I am doing."

2. Whenever I have told this story to SFO prosecutors, they are surprised that the young prosecutor would admit her failings to her boss. She was willing to do this because she trusted in his leadership. Not many SFO lawyers and investigators have the same degree of trust in the leadership of the SFO.

3. The District Attorney had many problems on his plate in 1975, including the fact that New York City was on the brink of bankruptcy and there was no money to raise salaries, which were low. I can recall legal writing pads being rationed and the office dismissing indictments because there was no money to

pay the costs of bringing out-of-state witnesses back to court to testify. For the first couple of years, the DA's priority was scrabbling to find money to keep the office afloat, and instituting early case screening and cradle-to-grave case ownership of indictable offences. Three years after his election, in 1978, the District Attorney created a new legal post, Director of Training, to replace ad hoc on-the-job training with an institutionalised programme to raise skills and knowledge across the Office's then nine bureaus and transfer them to succeeding generations.

4. Although the SFO has begun to improve the amount of internal training, much more needs to be done in this area. For example, the interviews revealed that there was no induction into the role of the prosecutor. Given that SFO lawyers are recruited from different backgrounds, including the CPS, regulatory agencies, civil practice, other government law offices, the private bar and criminal defence firms, it is not surprising that there is confusion about the dual role of a prosecutor.

5. In contrast with the SFO, DANY has a fully developed training programme that has evolved over 29 years. This programme, the equivalent of an internal prosecutor's college, helps to create high professional standards, and this enables DANY to prosecute its own complex casework, including advocacy, and to achieve consistently high outcomes. The training programme attracts good candidates to the Office and is a major selling point in the Office's recruitment strategy.

6. The programme consists of:

- a seven-week induction programme for all new lawyers;
- a week-long Trial Advocacy Programme;
- a week-long Grand Jury practice programme;
- an on-going lecture series (three per month);
- specialist training, including on the investigation and prosecution of white-collar crimes.

Case wash-up conferences

7. The SFO is missing an important trick by not using the case wash-up conference as effectively as it could. A case wash-up conference should be a process of individual and team self-reflection based on careful analysis and judgment. One of the reasons case wash-up conferences are regarded as ineffective is because of the lack of probing questions. Consequently, there is no learning from mistakes. Moreover, the results do not appear to be fed back into the rest of the Office.

Policy

"I react to changes in case law or inconsistent case law by sending memos to the Bureau Chiefs to circulate to their staff. When there was an upheaval in the law of murder by depraved indifference, I put together a memo on the issue. Sometimes I just send out a reminder about the same old case law when I see appellate briefs that show trial lawyers falling afoul of particular rulings. This is almost a training function."

DANY Chief of the Appeals Bureau

8. The 1996 reorganisation included the creation of a Policy Division. At that time, it was recognised that this unit should be staffed with SFO lawyers who had recent case controller operational experience. Up until the appointment of the current head of Policy, this was the case. Now the Division is entirely staffed by lawyers who do not have recent SFO case controller experience.

9. Many SFO lawyers are not satisfied with the quality of Policy's service to the operational divisions. The quality and quantity of comments, and their variety and independence, is too significant to dismiss as a few disgruntled individuals.

10. The Policy Division's remit includes providing high-quality legal operational advice to the Director and the Divisions and also close

involvement in the development of criminal law and procedure. This is a big task given the modernisation requirements of the criminal justice system. I do not see this level of work easing up; if anything the pace of reform is likely to continue.

11. In my view, the Policy Division is having "delivery" difficulties because of the burden and complexity of its legislative work, which has significantly increased since 1996. This has been well managed by the current head of Policy. But Policy's ability to provide legal operational advice has taken second seat. As a result, at the moment the SFO is lacking a centre of legal excellence within the Office.

12. In DANY, the centre of legal excellence is the Appeals Bureau. The Chief of the Appeals Bureau, who has been a criminal appellate advocate for 30 years, is the equivalent of a QC. Besides overseeing the work of the Appeals Bureau, he serves as Counsel to the District Attorney. His Bureau is, in effect, an internal barrister's set of 50 prosecutors specialised in criminal appellate work. They spend 98% of their time researching law, writing briefs and arguing briefs in the appellate courts of New York State and the federal courts. The Appeals Bureau assigns one lawyer to each Trial Division Bureau to advise on complex legal issues.

13. The recommendations describe structural changes at the senior management level that will improve the policy function within the SFO.

Standards

"I have been sitting in my office coming up with standard policy with no authority to do this, no consultative mechanism – just what I thought was a good idea. Management comes to the meeting and says, 'It looks like a good idea, let's circulate it and we'll all discuss.' And then there is silence."

A case controller

14. The development and dissemination of uniform policies and standards ensures the efficient use of resources, prevents mistakes, promotes high-quality work, and provides a measure for identifying poor performance. For example, if every case controller is required to maintain a policy file and there is a model for a good policy file and guidance on what it should contain and why, then the failure to maintain an adequate policy file is an indicator of poor performance, for which a case controller can be held accountable.

15. A remark frequently made in interviews of SFO staff (current and former) was that each Division functioned as a separate fiefdom and that, even within Divisions, case controllers did things differently. The Case Management Reform Programme, which is improving the Office's use of IT, has also identified this as an issue. The SFO has recognised that a higher degree of standardisation would improve the quality of output, save resources and reduce case delay.

16. Progress is being made in this area. However, the senior management team is still having difficulty devising and implementing uniform policies and standards although staff, in interviews, identified this as a significant problem. Another frequent comment was the propensity of the SFO to "reinvent the wheel", which is a symptom of inadequate standardisation. For example, there is no uniform policy on the use of hearsay to establish the provenance and authenticity of documents for the purposes of the Trial Bundle. Much resource would be conserved by addressing this issue promptly. Currently, the Deputy Director oversees the Standards Unit, which also is in charge of vetting and preliminary enquiries in overseas corruption allegations. Because of competing demands, Standards has taken third place.

17. The recommendations on restructuring at the senior management level should address the lack of standardisation.

Chapter 12. Improvements in hiring and promotion

"I saw the SFO as an opportunity to do high-quality work and to do work that I could believe in."

An Investigative Lawyer's answer to
the question "Why did you join the SFO?"

Recruitment and Hiring

1. It is often said that the prosecution services of England and Wales cannot attract high-calibre talent because of salary scales. The recent experience of the CPS, as well as the experience of SDNY and DANY, proves that this is not the case. Indeed, the SFO has many very capable employees that give the lie to this rather defeatist assertion.

2. Both SDNY and DANY operate in a competitive and tight labour market. The cost of living in New York City and London is equivalent, and NY private law firms pay three times the entry-level salary of a prosecutor's office. To compensate for the salary differences, SDNY and DANY have developed a recruitment strategy based on an understanding of their market niche. Their target is idealistic young people who value their emotional needs from work above material needs. In the US, the phrase "commitment to public service" is used to describe this quality in applicants. Both DANY and SDNY also sell their mission – e.g., they are not ordinary law firms, they are operational agencies dedicated to justice. The US Allied Deals prosecutor, who had joined SDNY after four years of working for a "Magic Circle" firm, said: "I went to Cravath as part of a career path to get this job and also to pay my law school loans. I didn't do bad things at Cravath but it was morally neutral. Who really cares about patent litigation? Here, I feel like I am doing the right thing. If my wife would let me, I'd work here forever." DANY has a number of "Ivy League" law school graduates who have devoted their professional

careers to the Office because of the high level of professional challenge and job satisfaction.

3. The SFO is well placed to emulate either SDNY or DANY because SFO "graduates" have highly marketable skills. There are very few organisations that can provide the full range of experience potentially available from SFO work.

4. DANY's recruitment and hiring process, which is very similar to SDNY's, focuses on legal ability (either potential or proven, depending on whether the applicant is newly qualified or experienced), plus the character traits of commitment, decisiveness, good judgment, and maturity. DANY does not use Civil Service-style competencies, but does conduct thorough reference checks.

5. The DANY process is summarised below.

- DANY has a Hiring Board composed of hand-picked lawyers who have been identified as having the capability to sell the office and who can read people. Selection to the Hiring Board is an honour. If a member's judgment proves lacking, he or she is removed from the Board.
- Successful applicants are interviewed first by an individual member of the Board, then by a three-person panel, then by the Director of Hiring, and finally by the District Attorney, who views hiring as a strategic priority.
- A writing sample is required and references are probed. There is no psychometric testing but hypothetical situations are used to check logical thinking and judgment. The Director of Hiring's interview is focused on biographical information to understand "where the applicant is coming from". Interviewees appreciate this because it means that the highly competitive process is not paper-focused but takes account of who they are "as people".

6. At the start of this Review, the SFO did not have a clear idea of the type of lawyer it should be recruiting in terms of character, competencies and

professional background. In the Recommendations section, I will propose a career path that includes a description of the target recruit.

Promotion

"There have been times when my performance has not been as good as it should have been but nobody has ever said to me, 'You've missed your deadline, pull your finger out and do it better.' They might notice that we have missed a deadline, asked why, and I tell them and they say, Okay, or they say, 'You shouldn't set such aggressive deadlines.' Nobody ever gives poor appraisals, and when you do, it causes huge amounts of trouble."

A case controller

7. Some of the weaknesses in the SFO's leadership ranks result from the deficiencies of its performance management regime, and these have a knock-on effect on the promotion process. Although the process is intended to be meritocratic, the results depend on the quality of information fed into it. It is all too common in the SFO for employees to react to a frank assessment that has some negative comments by filing a complaint against their supervisor. This is an abuse of the complaint process which discourages managers from providing frank assessments.

8. The lack of adequate information creates a risk of "over-promotion" and contributes to a lack of confidence in the promotion process.

Chapter 13. Improving the effectiveness of SFO leadership

"There should be a fear that if you haven't done your tasks there will be consequences. Ideally you want the motivated team, you want to get the task done, and you go and get it. There are always more or less enthusiastic people, and for those who are less enthusiastic, the stick needs to be there. But in the SFO, it doesn't seem to be."

A Police Detective Sergeant

1. The SFO has a small senior management team that plays a vital role in the organisation. It is divided into a Strategic Management Board and an Operational Management Board.

2. The Strategic Management Board includes three non-Executive Directors who inject valuable practical external experience. It also includes the Head of Accountancy (a forensic accountant), who provides the investigative perspective; the head of the Policy Division; the Deputy Director (a long-time SFO prosecutor); the Head of Resource and Policy, a non-lawyer; and the Director. The Operational Management Board includes all of the above except the Non-Executive Directors plus the six Assistant Directors in charge of operational divisions and the Head of Human Resources and Finance.

Skills shortage at the senior management team level

3. Effective management of a prosecutor's office requires a legal management team with high levels of both operational and leadership capability.

4. In both SDNY and DANY, there is a developmental leadership path that ensures that lawyers are not promoted without having "earned their spurs". Otherwise, they cannot command the respect of the troops or

understand what the Office requires to produce consistently high casework or develop solutions for the inevitable problems.

5. In DANY, potential leadership ability is tested through small assignments such as: a) representing the office at community meetings; b) participating in the "Hiring Panel"; or c) assisting with the Training Programme. Each of the top leadership jobs has a Deputy post that provides another opportunity to obtain leadership skills and prove leadership ability.

6. For example, DANY has a legal post called Director of Training, which has always been filled by a respected trial lawyer. The current Director of Training is a former Frauds Bureau ADA with 18 years' operational experience. She spent seven years in the Trial Division, where she tried in excess of 30 Crown Court cases, including homicide cases. She "graduated" to the Frauds Bureau where she spent eight years investigating and prosecuting white-collar crimes. There, she was lead counsel in the Office's first prosecution under the NY version of the Federal RICO statute. The target was a "boiler room" fraud operation linked to organised crime. The investigation included undercover penetration of the criminal operation. The six-month Grand Jury presentation resulted in indictments of 37 individuals and a company. All of the defendants were convicted by plea or trial. The corporation's chief financial officer was separately indicted prior to trial for attempting to hire a contract killer to murder the judge in the case. He was tried and convicted on this indictment and pleaded guilty on the main indictment. Post-conviction, this ADA oversaw the collection and distribution to investors of a $13 million restitution fund.

7. The SFO does not have a comparable leadership development path that ensures that all of the legal members of its senior management team have the required operational and leadership skills and knowledge.

Performance management

8. Performance management is a leadership issue and it is fair for the senior management team to be judged on its effectiveness in promoting and

delivering a performance management culture, especially in a small organisation such as the SFO.

9. Most internal interviewees noted the low level of performance management and its adverse impact on morale. This was also highlighted by the last two staff surveys. Inadequate performance management is a common problem in government agencies. Hence the Civil Service Capability Review Programme, which is an effort to tackle this issue. However, the fact that this is a common problem does not make it more acceptable, especially in an agency whose job is to deliver justice. The next Director and the senior management team will want to make the creation of a performance management culture a top priority. This will require the development of:

- a shared sense of mission;
- accountability;
- defined roles and responsibilities;
- a recruitment and hiring strategy that is geared to the mission;
- promotion processes that identify the best person for the job;
- appropriate training and development;
- standardisation;
- supervision; and
- an effective appraisal system coupled with rewards for good performance and consequences for poor performance.

Leadership Renewal

10. While there are some very capable members of the current senior management team, as a collective entity it is not fulfilling its leadership role of agreeing the changes that the organisation requires and driving them through. This is a long-standing problem and a source of low morale. To compensate, case controllers, investigators and other staff members have stepped into the breach and have come up with many good ideas. But they lack decision-

making power. They can suggest how the car should be driven but they do not control the keys to the ignition.

11. In 1996, the former Director noted the propensity for debate without action. In a paper delivered to the senior management team at a strategic retreat, he wrote,

> "The Director's circular which was put out after the meeting in March produced a slightly unfortunate comment: 'The time for talking is over. Now is the time to talk.' At all costs this must be avoided again. A decision must be made whether or not to change the Office's structure. If not, then it should be explained to the troops. If so, then immediately we must plan its implementation and implement it."

12. The current legal senior management team has had a number of years to prove whether it can deliver change, and has failed to do so. The advent of the new Director creates the opportunity to recruit new members to the senior management team. Then it will be possible to put flesh on the bones of this Review's recommendations and implement the changes that will underpin the next twenty years of the SFO's history.

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A roadmap for turning the SFO into a centre of prosecutorial excellence

Restructuring the senior management team to upgrade skills and knowledge

Recommendation 13. In light of the Office's need for increased high-level legal capability, it is recommended that the post of Deputy Director be replaced with a new position entitled Chief Counsel. The Chief Counsel would sit on the Strategic Management Board and report to the Director. He or she would head up a new directorate (tentatively called the Office of Chief Counsel) that would combine the policy, training, standards and vetting

functions. The Assistant Directors, who currently report to the Deputy Director, will instead report to the Director, who must keep a close finger on the casework that is the pulse of the organisation.

The role of Chief Counsel calls for an external appointment with high-level criminal fraud skills and a practical and proactive character. This lawyer would establish an ethos of close cooperation with operational lawyers, problem-solving, and delivery. He or she could fulfil the role performed by the Chief of the Appeals Bureau in DANY who is also Chief Counsel to the District Attorney. This would eliminate the need to out-source legal/policy issues to the Bar absent exceptional circumstances.

Recommendation 14. The Chief Counsel would be supported by three Legislative Assistants who could be two Grade 7 lawyers and one Grade 6 lawyer. All would be required to have recent SFO operational experience and the intellectual bent to become junior versions of the Chief Counsel. They could provide support on all aspects of policy work and bring to the Office of Chief Counsel operational understanding and high legal ability. This would assist in making the Office of Chief Counsel a centre of legal excellence, which would raise the quality and efficiency of casework throughout the SFO.

Recommendation 15. In light of the urgency of the Office's training needs, it is recommended that a new senior management post of Director of Training be created. This should be filled by a respected case controller who understands the training needs of operational staff, both legal and investigative. The Director of Training would report to the Chief Counsel and sit on the Operational Management Board. The Director of Training, working closely with the Chief Counsel, would also be responsible for creating and implementing standards and policies. He/She would be assisted by the Human Resources professional now responsible for training who is currently located in Corporate Services.

The Director of Training's immediate priority would be developing an appropriate training programme for lawyers, financial investigators and

managers to develop their investigative, case management, Crown Court advocacy, case analysis, and leadership knowledge and skills.

As part of this programme, the Director of Training might decide to send SFO staff to police training courses and/or have case controllers and principal financial investigators spend time on a major incident enquiry to learn how tightly it is controlled and to expose them to police culture and psychology.

The Director of Training might choose to quickly upgrade knowledge and skills by organising various types of learning events that could include:

- induction lectures on the role and responsibilities of a prosecutor to instil the SFO's unique corporate values;
- improving the quality of the output of the Policy Division, which will be discussed further below;
- organising in-house lectures on high-priority topics;
- organising workshops based on case studies to improve investigative and case analysis;
- bringing in police and defence counsel to lecture on topics of interest.

The Director of Training should reinstate regular monthly meetings of lawyers and investigators to share operational know-how, legal developments, and best practice. He/She might want to bring in, on a regular basis, RCPO and CPS complex case lawyers to present case studies to stimulate innovation and spread best practice.

The Director of Training, in conjunction with the Chief Counsel, should improve the quality of case wash-up conferences. It is suggested that they be facilitated by someone outside of the Division who can bring a set of fresh eyes to the case. This could be a respected operational lawyer from another Division, or a respected lawyer from another prosecution agency. Case wash-up conferences could be used as a learning opportunity for a wider circle by making them a Division-wide event so that everyone can ask questions and suggest solutions. A member of the Office of Chief Counsel would attend and

draft an analytical memo that summarised the lessons to be learned. This could be circulated to the entire staff.

Recommendation 16. It is recommended that a new senior management post, tentatively called Director of Investigations, be created to be filled by a capable ex-police officer with leadership and CID experience, including management of serious and complex cases. This person, who would sit on the Strategic Management Board, could take forward the body of work relating to the development of the SFO's internal investigative capability.

His/Her responsibilities would include:

- liaising and networking with police forces to ensure that the police and the SFO are providing each other with the right level of service;
- developing the office's internal investigative capability at the strategic and operational level, including improving the investigative skills of civilian investigators;
- supervising the use of proactive investigative techniques;
- advising lawyers and investigators on investigative plans, strategies and tactics;
- having ultimate responsibility for performance management of the investigative staff;
- assisting the office to identify and recruit capable law enforcement agents as civilian investigators;
- making the case to the government to authorise police powers for ex-police who are SFO investigators.

Recommendation 17. It would be helpful to all operational staff if there were an "anchoring" understanding of the role of the prosecutor which they could fall back on in making the discretionary decisions that are a prosecutor's bread and butter. To that end, it is recommended that the SFO should formulate a clear and simple vision of the role of the prosecutor that emphasises the dual dimensions of robustness and fairness.

Recommendation 18. The SFO should adopt as a policy that it will use the full range of investigative techniques to detect, prove and successfully prosecute defendants involved in serious and complex fraud, including its Section 2 powers.

Recommendation 19. The SFO should create standardised processes for making maximum use of SOCPA powers to obtain cooperating witnesses, and should provide training in the use of these powers. This is one of the powerful instruments in the prosecutor's tool kit.

Recommendation 20. The vetting system should be overhauled from head to toe to realign it with changes that have taken place since the establishment of the SFO. The new procedures should reduce bureaucracy to a minimum and produce a process that is aligned to the "golden hour" principle. This could include:

- outreach to police and other investigative and regulatory agencies at the operational rather than executive level, to encourage early referrals;
- direct outreach to potential complainants, such as the City law firms and banks, to obtain direct referrals;
- changing the criteria for acceptance to suspicion, to allow the use of Section 2 powers. This would involve recognising that the SFO might drop a larger number of investigations at an early stage;
- using the Director of Training or Legislative Assistants to make quick preliminary assessments and to reject cases where the waters are muddy or it is a "pass the buck" referral.
- thereafter, the case would be assigned to an Assistant Director or case controller to arrange a prompt interview with the complaining witness(es) and review whatever information was required to assess whether the SFO should accept the case for investigation.

Recommendation 21. To the extent that there have been deviations from the "cradle to grave" concept, the SFO should reinstate the principle of case ownership and extend it to the key members of the legal and investigative

team. Only exceptional circumstances ought to dictate a change in the team's composition. The principle of team ownership of a case is a widely recognised mechanism for achieving accountability and high-quality results in serious and complex crime prosecutions.

Recommendation 22. The 1996 descriptions of the roles and responsibilities of case controller and Assistant Director should be reinstituted.

Recommendation 23. An agreed list of oversight tasks should be established for Assistant Directors, to enable them to fulfil their supervisory role effectively. This will also assist with performance management. Everyone would benefit if the tasks included: a) regular in-depth reviews of the caseload of each case controller, to encourage robust and sound decision-making and prevent case drift; and b) the review of key documents in a case, to quality-assure and evaluate performance.

Recommendation 24. Assistant Directors should undertake a "spring cleaning" and review pending investigations, to make robust and appropriate termination decisions.

Recommendation 25. The responsibilities of senior managers should be clarified to ensure that they are aware that they are ultimately responsible for performance management in their divisions. Their delivery on this issue should be one of the measures by which their performance is evaluated.

Recommendation 26. In light of the findings of this Review, there is a need for the SFO to reanalyse the qualities, skills and knowledge required in their prosecutors, Assistant Director and investigators.

Prosecutors handling complex white-collar crime cases require the aptitudes, knowledge and skills listed below. If this list were translated into "competencies", it could be used for both the recruitment and promotion of lawyers.

1. Good understanding of criminal law and procedure.
2. Good legal research, analytical and writing skills.

3. Good understanding of the Crown Court jury trial process, including how judges, defence counsel and juries react to evidence.
4. The ability to import jury trial knowledge into the investigation. This includes detecting potential defences and neutralising defence attacks on the process.
5. Sufficient understanding of investigative techniques and procedures, including the various forensic specialities, to be able to ask sensible questions and give sensible advice to investigative teams.
6. Good strategic and tactical sense.
7. The ability to focus on the key issues.
8. The ability to obtain credible and reliable information from witnesses.
9. Good judgment, common sense and broad life experience.
10. A combative spirit, which is necessary to lead a litigation team.
11. Perseverance and idealism.
12. Decisiveness. Decision-making is an essential prosecutorial skill. Good decisions are based on a solid foundation of knowledge, including knowing what you do not know.

Recommendation 27. The SFO has identified the need to re-analyse the competencies it requires in investigators to enable it to recruit more capable ex-police as civilian investigators. This body of work would best be undertaken with advice from serving or former police officers.

Recommendation 28. The SFO has identified the need for a career path for lawyers. It is suggested that any proposed career path be integrated with the skills- and knowledge-gaps identified in this Review. The SFO might wish to consider a career path model with the following elements:

- recruitment of barristers from the criminal Bar with significant Crown Court advocacy experience, who would be employed initially as Grade 7 lawyers;

- the job of a Grade 7 lawyer would be to investigate in conjunction with the investigative staff, including interviewing witnesses and analysing evidence as well as writing statements. This would teach entry-level barristers investigative and teamwork skills;
- capable Grade 7 lawyers, who have followed this career path, would then be eligible to become in-house junior counsel or case controllers, depending on their inclinations and skills;
- Grade 7 lawyers could also spend periods of time as Legislative Assistants, which would expand knowledge and skills.

Recommendation 29. It is recommended that the SFO develop a short-term and long-term plan for bringing in-house much of its trial advocacy. In my view this would be one of the most effective methods of developing skills and knowledge and reducing case delay at all stages of the process. The different models, especially the CPS Organised Crime Division model, which the CPS intends to extend to the Counter Terrorism Division, could be considered by the SFO.

Recommendation 30. The new Director will want to make changing the Office's performance management system – including the complaint culture – a priority, and will no doubt find his own way of communicating this welcome sea change to the entire office.

Recommendation 31. The office can support line managers by expanding its use of the HR Business Partnering model that was successfully used to reform one unit.

Recommendation 32. The HR department should ensure that the appraisal criteria adequately reflect the requirements for lawyers and investigators identified in this Review.

Recommendation 33. The HR department should set up a system of exit interviews conducted by the Head of HR. Feedback on these interviews should be provided to the Director.

Recommendation 34. The information resulting from an improved performance management system should be fed into the promotion process in a way that is consistent with fair and open competition based on merit.