
The Art of the Referral: Presenting Cases to United States Attorneys

by Kelly A. Sisario, Bruce Sackman, and Jerry A. Lawson



*Kelly A. Sisario, Inspector General,
National Archives and Records
Administration*

*Bruce Sackman,
Special Agent in Charge,
Northeast Field Office,
Office of Inspector General
Department of Veterans Affairs*



*Jerry A. Lawson, Counsel to
the Inspector General,
National Archives and Records
Administration*

Two nearly identical audits or investigations may result in opposite decisions by the Assistant United States Attorney (AUSA).

In many cases, the difference is that one auditor or investigator understood how to present a case to the AUSA, and the other did not. This article emphasizes techniques to use when you believe you have a strong case that deserves to be prosecuted by indictment or civil recovery action. Let's set the stage for successful referrals by taking a few minutes to consider things from an AUSA's perspective.

The AUSA's Perspective

There are 96 Federal judicial districts in the United States. Each district has a U.S. District Court, and a United States Attorney. Each U.S. Attorney employs AUSAs who handle most of the day-to-day work. For our purposes, the most important thing these AUSAs have in common is that they are busy. They see more meritorious cases than they can possibly prosecute.

AUSAs decide whether a judicial action should proceed based not just on their assessment, but on policies of the Department of Justice and their local U.S. Attorney. Although few AUSAs are political appointees, they can be exposed to politically-motivated criticism.

The quality of case presentation to AUSAs is uneven. Many Office of Inspector General (OIG) employees are ill-prepared for presenting cases. Some do not fully understand how the government programs they investigate actually work. Written reports are frequently poor. Some reports include no information as to how the AUSA can contact other individuals in the case such as expert witnesses or auditors. A few agents even fail to include any information on how the AUSA could contact them for follow-up questions.

Practical Consequences

The high volume of cases means that AUSAs can be, in fact, must be, highly selective. Understanding that this is a "buyer's market," a wise auditor or investigator who wants the AUSA to proceed with his or her case will make it as attractive as possible. Your cases compete for the attention of the AUSA against many other matters. If you are presenting a case where judicial action is desirable, it is your responsibility to show the AUSA why your case will be a good place to invest time and energy.

Try to learn professional preferences of the AUSAs you are going to work with. For example, some prefer to see only a case file, and don't want to meet with investigators or auditors in every case. They figure they can read a well-written summary faster than you could explain it, and they can call you if they have any questions.

Other AUSAs are offended by merely receiving a file in the mail, and scornfully refer to this as the "Crime in a Box" approach to presenting a case. They feel that if the case is important enough to be prosecuted, it's important enough that someone should bring it in and explain it. Especially if you will be having repeated dealings with a particular AUSA, find out what he or she prefers, and handle the case his or her way.

Your presentation to the AUSA is in one sense a trial run or audition of the case:

(continued on page 28)

- If your case seems poorly organized to the AUSA, then imagine how it will strike a judge who hears it.
- If your case seems confusing to the AUSA, then imagine how hard it will be for a jury to make sense of it.

Finally, when presenting a case, remember that the AUSA is evaluating not just your paperwork and the objective strength of your case, they are evaluating you. What kind of impression would you make on a judge or jury if you have to be called as a witness?

Initial Contact

The preferred timing for the initial contact will vary from case to case, from district to district and from AUSA to AUSA. In general, if there's any doubt, it's better to contact the AUSA earlier rather than later. Get an informal take on a case, especially before investing a great deal of time on it. Finding out early what the AUSA views as potential stumbling blocks may help you focus your energies where they will do the most good.

You must decide whether to contact the Department of Justice (most often the Public Integrity section) or one of the U.S. Attorney offices. If you are contacting the latter, find out if there is a designated AUSA for case intake, or even one assigned to handle cases from your particular agency.

The initial contact can usually be by telephone. Identify yourself and your agency, briefly summarize the case and explain why it is important. When the case is far enough along, request a meeting in person to talk about the referral if you think the case merits it.

Report Writing

Write your reports so that anyone can understand them quickly and easily:

- Include a brief overview of the case to orient someone reviewing the file. Consider the use of proof charts, as explained below.
- Avoid unexplained acronyms. Everyone in your agency may know what VARO, DCSAR and NAVSEA are, but don't assume the AUSA does.
- Include the full name and identity of all agents, witnesses, auditors, experts, etc., and contact information.
- Include a full criminal history of the targets, and civil record checks, if relevant, such as Dun & Bradstreet reports. It's self defeating to find out after you have presented a case and possibly received a declination that a target had a significant criminal record that would have been relevant.

List any relevant statutes that you are aware of. Most AUSAs normally have about 15 to 20 statutes that they deal with frequently and feel comfortable with. The closer your case is to one of these laws the happier the prosecutor is likely to be. If you have a choice of statutes, try to stay

with the common ones like mail fraud that are most likely to be familiar to the AUSA (not to mention the judge and jury, if the case goes that far). However, you should also include any special criminal statutes relevant to your Agency that are usually not known to most AUSAs, such as Department of Veterans Affairs (VA) pension fraud, 38 U.S.C. 3501. Coordinate with your IG counsel.

While it is not required that you do so, consider attaching a copy of a complaint, indictment or arrest warrant that was used successfully in a similar investigation. Even better, provide the same material on computer diskette for easy editing by the AUSA.

In a complex case, instead of including just the standard diary-like chronological recitation of what the auditor or investigator on the case did, consider including a reconstructed chronology of the alleged wrongdoing. This will be more useful in helping the AUSA make sense of the matter.

At least one AUSA prefers files that have pictures of the key people, places and things involved in the case. "This is suspect Jones." "This is the warehouse where the stolen merchandise was stored." "This is the seized contraband." He believes that well selected photos make the issues seem less abstract, and help persuade him so he will be able to convince a jury or judge.

Proof Charts: A Case Organizing Tool

For an important case, using "proof charts" is an option. A proof chart looks like a very simple spreadsheet. Attorneys are frequently taught to construct these in law school, so there is a good chance yours will look familiar to the AUSA. You could make up a proof chart for each crime in the file that you think should be prosecuted, or for each civil claim that you think should be brought.

In complex cases, doing "proof charts" can be a valuable tool for use inside an Inspector General's office. They can help keep auditors and investigators focused on the critical issues, instead of avoid wasting time on irrelevancies.

Speaking with the AUSA

Remember that you are "auditioning" for the role of witness in a Federal court proceeding. Dress and behave professionally.

Peter Vigeland, a former Deputy Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, used to advise agents presenting cases to be "Certain in their Certainty and Certain in their Uncertainty." He felt strongly that agents should never state something as a fact unless they knew it to be correct. They should never guess at an answer. Once an AUSA determines that an agent's information is unreliable, they will not be eager to continue working with that agent.

Tom Dworschak, formerly a Special AUSA for the Eastern District of Virginia, suggests that it's a good idea to

A Sample Proof Chart

Bribery: 18 U.S.C. 201 (b): Whoever ... directly or indirectly, corruptly gives, offers or promises anything of value to any public official ... to influence any official act [shall be guilty of bribery].

Summary of this case: On June 21, 1999, John Smith offered to pay Tom Jones, a clerk at the Office of Personnel Management, \$5,000 for a copy of the personnel file of George Thomas, who was a candidate for political office.

Element	Facts	Evidence	Evidence Location
directly or indirectly, corruptly gives, offers or promises anything of value	At the Tiffany Tavern on June 21, Suspect (John Smith) conditionally promised to pay Jones \$5000	Statement of Jones	Tab A
to any public official	Jones is a clerk at OPM	Statements of Jones and his supervisor, Bill Johnson	Tabs A and E
to influence any official act	Smith told Jones he would be paid only on receipt of Thomas's personnel file	Statement of Jones	Tab A

approach cases “backwards.” In other words, figure out early on what is the realistic expected sentence if you get a conviction. He believes everyone presenting cases to AUSAs needs to have a working knowledge of the sentencing guidelines, as it usually makes little sense to ask the AUSA to spend months on a case where little punishment is likely even if you are successful.

Agreeing to proceed with a case resulting from your audit or investigation can mean a time commitment of weeks, months or even years from the AUSA. No prosecutor wants to work with someone who is poorly organized or hard to deal with. Use this opportunity to show the AUSA that you are on top of things and they will be that much more willing to proceed on your cases.

It's also a good idea to let the prosecutor know that the case is important to you and your Agency and that even if it drags on for months or years, you will continue to provide the support that will be necessary to bring the case to a successful conclusion.

Why, Why, Why?

Regardless of whether you are putting a case file together or meeting the AUSA in person, if you don't think a case should proceed, tell the AUSA up front, and tell them why. For example, “Jones is our main witness, and he's not credible. We'll probably lose this case if it goes to trial.”

On the other hand, if you are working on a case you think deserves prosecution, you should do whatever you can

to highlight the reasons why. Make it very easy for the AUSA to see why your case should be prosecuted. For example:

- Will prosecution produce a good deterrent effect?
- Was a significant amount of money involved?
- Was this offense particularly egregious?
- Did the offense create unusual obstacles to the effective operation of your agency?
- Is there a history of corruption at the particular Government facility or in the program involved?
- Are there few or no disputed evidentiary issues that could prevent a conviction if the case goes to trial?

Frauds that affect more than one agency are attractive to prosecutors. Particularly in a benefit fraud case, check with your counterparts in other agencies to see if the target has defrauded others as well. Some AUSAs will be more likely to prosecute someone who has defrauded several Government agencies, even if the total dollar amount is small. Another red flag is the existence of a good confession from the target. This is usually the strongest possible sort of proof, and makes a case that much more attractive from the prosecutor's point of view.

(continued on page 30)

A 1989 President's Council on Integrity and Efficiency (PCIE) study found that the cited reason in 9 percent of declinations was "lack of criminal intent." Many perpetrators of sophisticated white collar fraud are clever, articulate and have no prior criminal convictions. After hearing the evidence against them, they can frequently come up with a cover story that convinces a jury it was all an innocent mistake. For this reason, you should be alert for what one former AUSA referred to as the "big fat dirty filthy stinking rotten lie." He uses this joking expression to make a serious point. It is a major help to a prosecutor in white collar cases if the file has proof of some untrue statement made by a suspect that proves his conduct was not merely an honest business error. Such a statement makes a case more attractive not just because it shows the suspect deserves criminal punishment, but because it makes it easier to convince a jury of guilt, especially if the untruth was memorialized in writing. The prosecutor can tell the jury, "The defendant lied to you, just like he lied previously."

If you have reason to believe that politicians or high-ranking officials of your agency would be interested in a case, let the AUSA know so that factor can be weighed. While presenting an important case on behalf of a large State agency, one of the authors even arranged for the Agency head to attend a meeting with the prosecutor. It's hard to imagine a more effective way of showing the prosecutor, "This case is significant."

Often auditors or investigators are acutely aware of factors like these or others that should influence the prosecution decision, but we fail to highlight them. Sometimes we never tell the AUSA about them at all. You could talk about factors like this in a cover letter, in a phone call, or in a face-to-face conference with the AUSA. Just make sure that whatever method you choose, the AUSA does know about them.

A good auditor or investigator should not automatically refuse to present a case to the U.S. Attorney because it falls outside prosecutorial policies. These policies are usually just guidelines. If there is a compelling reason, don't be afraid to ask for an exception to the policy.

One of the authors investigated a case involving the theft of about \$8,000 in Government funds from a VA Medical Center. The Federal Bureau of Investigation (FBI) was not interested in the case because the local U.S. Attorney's office had a threshold of \$10,000. When the author presented the case to the AUSA, he explained that the particular facility had a history of numerous frauds and thefts, that employees there felt they could commit crimes with impunity and that arresting the targets could help develop information on other unsolved crimes at the facility. Much to the surprise of the local FBI office, the AUSA accepted the case.

Sometimes you can make several cases that individually would be poor candidates for action more attractive by presenting them to the AUSA as a package. One fraud case of \$5,000 may not be enough, but three or more such cases grouped together often will.

Is There Life After Declination?

Suppose that the AUSA declines to proceed on a case you have presented. Is that the end of the matter? In many cases administrative sanctions, or even no action at all are more in society's interest than a criminal prosecution. However, if you have a good reason to believe that a judicial action is appropriate, you can try again.

Don't re-present a case without substantial justification. This is not something to do on a whim, or out of pique. However, if you have a strong reason, don't be afraid to try it. The AUSA does not want to see a miscarriage of justice any more than you do.

Even if you have mounds of justification, you should be careful about how you re-present a case. Don't antagonize the AUSA, by, for example, trying to find some other AUSA and re-presenting the case as if it had never been rejected previously. Occasionally it might be appropriate to try going over the head of the AUSA by talking to the supervisor, but you should not do this without considering the possible adverse consequences.

Your best opportunity will usually be re-presenting the case to the first AUSA. Diplomacy is in order. Try to find some relevant facts that were omitted or underemphasized during the initial presentation. When you re-present the case, preface it with an explanation of the missing information, and why giving it proper consideration should result in a different decision. This way, you give the AUSA a way of reversing the previous decision without losing face.

Whose Job Is It, Anyway?

A few auditors and investigators will probably react negatively to some of the suggestions in this article, such as the notion that they should prepare proof charts, or offer the AUSA copies of successful old complaints, and so on:

"But this would be a lot of work. Why should I do the AUSA's job?"

Partly, it's a question of efficiency. It may only take an auditor or investigator who has lived with a case for weeks or months a short time to prepare a case summary. The auditor's or investigator's investment may save days or even weeks of time to an AUSA who would otherwise be starting at ground zero.

Partly, it's a question of seeking justice. Is the case important to you? Do you want to see it prosecuted? If so, then you should be happy to do whatever it takes to help it along. The conclusion of an audit or an investigation is not the end of the auditor's or investigator's role in helping see that justice is done in a particular matter.

Investing the time and effort that is needed to win a court case by preparing charts, tables, and anything else that will make your case easier for the AUSA to understand and prepare for prosecution can reap better rewards in the long term. Ideally, your commitment to justice will come to the attention of other AUSAs, who will then be more inclined to accept your other cases.

Conclusion

Misunderstandings and communications failures can cause less-than-optimal relationships between prosecutors and Inspector General personnel.

Auditors and investigators are sometimes dissatisfied with the time it takes AUSAs to reach decisions. They seldom realize that in many cases, their own poor presentation of a case contributes to the delay.

Declinations are another source of friction. Some cases with strong substantive merit are declined because very real reasons to proceed were obscured by an auditor's or investigator's poor organization. It is not enough to mail the AUSA a file with hundreds or thousands of confusing documents and expect him or her to sort it out.

OIG personnel sometimes perceive AUSAs as arrogant because they refuse to take cases that are significant from the OIG perspective. In many cases, the perceived arrogant attitude is caused by inadequate explanation of why a case is significant. The auditor or investigator handling the case should make it easy for the AUSA to understand why a case is important.

OIG personnel can and should help AUSAs identify those cases which are most deserving of prosecution by indictment or civil action. By improving the way in which you present cases to the U.S. Attorney's office, you may improve not just the speed with which decisions are made, but your satisfaction with the substance of those decisions. □