



Meetings with the Attorney General, Deputy Attorney General and on Capitol Hill Prove Highly Productive

NAAUSA completed a successful series of meetings with top Justice Department and Congressional officials during two days of meetings on July 9 and 10. The meetings included a productive 45-minute meeting with Attorney General Eric Holder, Deputy Attorney General David Ogden, and others to review NAAUSA's issues.

For the meeting with the AG and the DAG, NAAUSA President Steve Cook, Vice President for Policy Bob Mydans, Executive Director Dennis Boyd and Counsel Bruce Moyer represented NAAUSA. The AG and DAG were joined by EOUSA Director Marshall Jarrett, Associate Deputy Attorney General David Margolis, Counsel to the AG Monty Wilkinson and Principal Associate Deputy Attorney General Kathryn H. Ruemmler.

The meeting was very positive and encouraging. The AG began by saying that he was interested in meeting with NAAUSA because he wanted to understand better the resources that AUSAs need to perform their jobs, to pay attention to their concerns, and to affirm that NAAUSA had an open door to him. NAAUSA raised four issues for discussion with the AG: the AUSA retirement legislation; the need for AUSA security improvements; the opportunity to address AUSA pay within emerging government-wide pay reform; and NAAUSA representation on the Attorney General's Advisory Committee. In addition, the AG and the DAG raised the issue of policy and resource improvements related to litigation discovery.

On the retirement legislation,



NAAUSA Executive Director Dennis Boyd, President Steve Cook, Attorney General Eric Holder, Vice President for Policy Bob Mydans and Washington Counsel, Bruce Moyer meet on issues of concern to NAAUSA members.

NAAUSA informed the Attorney General of the principal sponsorship of the retirement/collections reform legislation by Sen. Patrick Leahy (D-VT) and Rep. William Delahunt (D-MA) and their joint goal to introduce bills as soon as possible. The Attorney General noted his past personal support for legislation achieving improvements in AUSA retirement benefits, *and he reaffirmed his continued personal support.* The AG asked that DOJ and NAAUSA continue to collaborate on further analysis and discussion of the costs of the legislation and the scope of its coverage, e.g., whether it should apply only to AUSAs or whether as well to DOJ attorneys with similar prosecutorial responsibilities. The coverage issue is one that DOJ has wrestled with in the past. The current legislative proposal extends only to AUSAs and USAs who

previously served as AUSAs.

On the security issue, NAAUSA highlighted some of the results from the membership security survey (some of which are set out on NAAUSA.org). The need to provide secure parking for more AUSAs was stressed, including both short and long term solutions. The AG observed that there has been a noticeable increase in the number of threats against AUSAs since his time as DAG in the Clinton administration.

On pay, NAAUSA raised a broad range of issues that deserve resolution, including new AUSA pay, senior AUSA pay, including pay caps, pay compression and the disparity with the SES pay scale and bonus system. NAAUSA President Steve Cook emphasized that there was a unique opportunity to address these issues

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The NAAUSA News provides members of the National Association of Assistant United States Attorneys with information on legal, congressional and federal employee developments affecting AUSAs.

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NAAUSA's New President Looks Back and to the Future as Term Begins

By Steven H. Cook, President, Eastern District of Tennessee

I am truly honored to begin serving as president of NAAUSA. While we have accomplished much over the years (more on this below), I am VERY excited about the potential for what we can do together in the future.

By way of background, I am proud to say that I joined NAAUSA in 1994, the year it was formed (in fact, the day I heard about it), because I believed then and I believe even more strongly now that AUSAs need a collective voice to pursue our unique and common concerns.¹ The reality is that no other organization or entity within DOJ or elsewhere is pursuing the interests, concerns, and values of AUSAs.

The Past

Under the leadership of past presidents and boards, NAAUSA has accomplished much. Arguably the most significant accomplishment is nearly invisible. Not so long ago, NAAUSA was an association unknown to EOUSA, the Attorney General, Congress or the media. Now, however, NAAUSA is becoming increasingly well known. Through the hard work and perseverance of many, over the years NAAUSA has developed exceptional working relationships with a wide range of individuals and groups. Moreover, we are now extremely fortunate to have an experienced, solid and resolute executive director, Dennis Boyd, and an exceptional and highly respected Washington D.C. counsel, Bruce Moyer of the The Moyer Group. We also have a seasoned Board of Directors and dedicated delegates across the country representing virtually every district. Thanks to the dedication of these individuals, representatives of NAAUSA routinely meet with DOJ officials and members of Congress to discuss matters of importance to AUSAs. In fact NAAUSA has been instrumental in the passage of several pieces of legislation important to AUSAs.² Likewise, NAAUSA's views on pending legislation and other important issues are often sought out by Congress and the media. Finally, NAAUSA has filed two *amicus*

briefs in the Supreme Court.³ In sum, NAAUSA has spent years building a strong foundation of talent, organizational structure, contacts and experience with which we can do fantastic things.

The Future

AUSAs and NAAUSA members are a diverse group. To accomplish any of our goals we must work together on several fronts. Fortunately we have an increasing number of members who have recently begun their careers as AUSAs. Understandably these members tend to be most interested in issues like pay parity and student loan repayment programs. NAAUSA has begun working with EOUSA (and, for now to a lesser extent, Congress) on both of these issues. Our preliminary research has revealed, first, that the starting salary for DOJ attorneys is higher than AUSAs and second, although the Department has a student loan repayment program, the majority of AUSA applicants (unlike agent applicants) are denied the opportunity to participate. We are addressing these issues and must continue to.

At the other end of the career spectrum we have a large and active membership group approaching retirement. This group is more focused on the gross inequity⁴ between retirement for AUSAs and the rest of the law enforcement community (including pretrial and probation officers). Over the last ten years, with the help of Bruce Moyer, Dennis Boyd, and many members who have traveled to Washington D.C. for lobbying efforts, written their Congress members, and met with their Senators and Congress members, we have made huge strides toward passage of this important legislation. Those strides began with the small step (significant for a new organization) in our first session of Congress by finding a sponsor to simply introduce the legislation in the House side. Since then we have incrementally advanced the AUSA retirement equity bill by garnering support in the House

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NAAUSA Interviews New OPR Director, Mary Pat Brown

Mary Patrice Brown was appointed acting Counsel of the Office of Professional Responsibility by Attorney General Eric Holder in April. OPR is responsible for investigating allegations of professional misconduct involving Department attorneys. Ms. Brown succeeds H. Marshall Jarrett, who headed OPR for eleven years before being appointed by the Attorney General to head the Executive Office for United States Attorneys.

NAAUSA recently sat down with Mary Pat for the following interview.

1. Can you provide some information concerning your legal background and experience within the Department of Justice? How has it shaped your views toward OPR and its role?

After graduating from Georgetown University Law Center, I joined a law firm in Washington, D.C. for several years, where I handled primarily large civil cases. I joined the U.S. Attorney's Office for the District of Columbia (USAO-DC) in 1989. As many of you know, the USAO-DC acts as both the federal and local prosecutor for crimes committed by adults (and some crimes of violence committed by juveniles of a certain age group) in the District of Columbia.

I started in the Office's Superior Court Division, rotating through its various sections: the Misdemeanor, Felony, Grand Jury, and Violent Crime Sections. I also "rotated" through the Office's Criminal Division (which handles federal criminal cases in the U.S. District Court for the District of Columbia), where I later became a senior OCDEF attorney in the Organized Crime and Narcotics Trafficking Section. I also served in the Office's Appellate Division (which handles criminal appeals in the D.C. Court of Appeals and U.S. Court of Appeals for the District of Columbia Circuit).

As a line AUSA, I handled over 100 criminal appeals and jury and bench trials. In 1997, I became a supervisor when I took over as a Deputy Chief of the Appellate Division. Following that I served in managerial roles as Deputy Chief of the Fraud and Public Corruption Section, Executive Assistant U.S. Attorney, and, finally, as Chief of the Criminal Division.

I believe my experiences in trial and appellate work and criminal and civil litigation, as well as my supervisory roles have provided me a broad view of life "in the trenches" for AUSAs and other DOJ attorneys. As a supervisor, I was responsible for making decisions relating to the professional conduct of attorneys I worked with and oversaw.

2. What changes, if any, do you expect to make at OPR?

One of my top priorities is efficiency. I plan to redouble OPR's efforts to triage the referrals it receives and to streamline the review process. My goal is to resolve our investigations fairly and promptly.

3. You have indicated in comments quoted in the media that you intend to make the decisions of OPR investigations more transparent and accessible. Can you expand on that? What are the criteria for publishing a report of an OPR investigation?

It is my view and the view of this Attorney General that the more transparent we can be as a Department, the better we do our jobs serving justice. There are factors that have to be weighed against that goal – such as privacy protections, national security interests, and ongoing litigation – but whenever possible, it is my hope to be as transparent as possible.

4. What is the most frequent subject of complaints received by OPR? What trends to you see in the complaints received and OPR's handling of them?

OPR receives approximately 1,000 complaints per year. OPR's records show that, between January 2001 and June 2009, the three most common allegations of misconduct by DOJ attorneys were that an attorney: (1) made misrepresentations to the court or opposing counsel (213 instances); (2) failed to perform job-related duties (155 instances); and (3) committed discovery violations (154 instances). Attorneys also were alleged to have made improper remarks to a grand jury or petit jury (111 instances); made unauthorized disclosures (85 instances); failed to comply with DOJ rules and regulations (98 instances); and missed deadlines, violated the Speedy Trial Act, or failed to perform some other obli-

gation in a timely manner (76 instances).

As to actual findings of professional misconduct (intentional or reckless) during this same period, allegations of failure to perform duties resulted in the most findings of misconduct (54 instances), followed by allegations of making misrepresentations to the court or opposing counsel (47 instances). OPR also made findings of misconduct for failure to comply with Department rules or regulations (36 instances), for making unauthorized disclosures (22 instances), for tardiness in dealings with the court (22 instances), for making improper remarks to a jury (18 instances), and for discovery violations (17 instances).

For more examples of matters investigated by OPR, you can visit OPR's website (www.usdoj.gov/opr/index) for its annual reports (the 2007 report will be available shortly).

5. When a complaint about the conduct of an AUSA is received, how and when is the AUSA consulted? What input does the U.S. Attorney have into the OPR investigation and recommended punishment or referral to state bar authorities?

In general, when a complaint is received about an AUSA, and if OPR decides to open an "inquiry" (which may or may not lead to an "investigation"), the AUSA's U.S. Attorney is contacted in writing, asking for a written response from the AUSA to the complaints. This step usually takes place within a few weeks of receiving the complaint. If, after reviewing the response, OPR opens an investigation, OPR will interview the attorney on the record. The U.S. Attorney may write her own letter regarding the facts surrounding the complaint, as well as provide background information about the AUSA. The final Report of Investigation is forwarded to the Executive Office for United States Attorneys and the Office of the Deputy Attorney General (ODAG). OPR recommends a range of discipline. If the U.S. Attorney does not agree to discipline within the recommended range, she must inform the ODAG, which resolves the dispute. If OPR's findings implicate a bar rule of professional conduct, OPR will report its findings to bar(s) where the

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What's on the NAAUSA Website?

The NAAUSA website – www.naausa.org – underwent a complete overhaul earlier this year to allow it to be updated easier, greatly improve the security of payment information when AUSAs join or renew, create a separate section for members to renew on-line, and publish a daily update on news about United States Attorney's Offices, U.S. Attorneys, and AUSAs.

Because NAAUSA uses the official DOJ email addresses when communicating by email, NAAUSA rarely sends emails to all NAAUSA members. As a result, the website is the best, most up-to-date, communication method for NAAUSA members to keep informed.

The NAAUSA website includes the most recent updates on the status of the NAAUSA retirement legislation, as well as background information on the retirement legislation. As soon as the NAAUSA retirement legislation is introduced, the website will include information on how members can contact their Senators or Representative to contact them to urge them to support, i.e. cosponsor the bills.

NAAUSA members should use the website regularly to review NAAUSA's accomplishments on behalf of AUSAs when asking non-member colleagues to join. (All delegates have a list of members and non-members in their district.) NAAUSA's influence is directly tied to the number of AUSAs who are members.

If NAAUSA Never Existed

If NAAUSA never existed, AUSAs would not be reimbursed for half the cost of professional liability insurance. NAAUSA successfully lobbied Congress in 1999 to include AUSAs in the legislation, P.L. 106-58, to authorize federal agencies to pay half the cost of professional liability insurance.

Under the Publications Page of the website copies of past newsletters are published and NAAUSA's testimony before Congress on the USAO's budget, AUSA retirement, and AUSA security .is published.

The website includes valuable links to useful websites, such as the Department of Justice website on DOJ benefits, links to daily updates on the status of U.S. Attorney nominations and appointments, the congressional website which tracks all legislation, including AUSA legislation and federal employee legislation

NAAUSA Discussion Board

In order to improve **two-way** communication between NAAUSA members and NAAUSA leadership, NAAUSA added a Discussion Board to the website. Its main purpose is to easily allow NAAUSA members to pose questions about anything NAAUSA is doing or should be doing, make suggestions on initiatives or provide information on issues affecting AUSAs work in the field. AUSAs registered for the Discussion Board can easily see how many topics are included under each main topic, how many responses there are and how many have viewed each topic.

What is a Discussion Board?

A discussion board is a communication tool that allows an AUSA to post a comment or question online. Other AUSAs who are registered to post on the discussion board may read that comment/question, and respond with their own remarks over time. NAAUSA's Discussion Board is open to all AUSAs and former AUSAs who are Associate Members of NAAUSA.

Discussion Board Terminology

If one individual posts a question, and three others post answers or comments to that question, these four "posts" comprise what is known as a "thread" of conversation. The phrase, "threaded discussion board" is common, referring to threads of conversation, each focused on a particular topic (e.g., "AUSA Retirement").

What Topics are on the NAAUSA Discussion Board?

There are currently eight active discussion forums for AUSAs to discuss or comment on:

1. **AUSA Retirement:** This forum includes comments and suggestions related to NAAUSA's pursuit of the enhanced retirement legislation for AUSAs.
2. **AUSA Pay:** This forum includes comments on the starting salaries of AUSAs and the need to increase starting salaries and the problems with AUSAs whose pay is capped at \$100 a year less than the maximum pay for United States Attorneys.
3. **General Discussion:** This forum is open to comment on or discuss any issues not covered by other forum, raise new topics that might result in a new forum, or discuss issues of concern to NAAUSA members.
4. **AUSA Security:** This forum is for AUSAs to post information about specific threats or assaults against AUSAs and their families, suggest improvements to increase AUSA security or comment on issues related to AUSAs carrying firearms.
5. **Meeting with the Attorney General:** This forum is for AUSAs to comment on the July 10 meeting with the Attorney General (the meeting summary is in this forum) and to raise issues to be discussed during NAAUSA's next meeting with the Attorney General.
6. **NAAUSA Membership:** This forum is to discuss how to increase NAAUSA membership or, for non-members, to comment on why they are not a member.
7. **Legal Issues:** This forum is used to discuss any legal issues facing an AUSA, to ask for help on legal issues or to post notices of legal rulings affecting AUSAs.
8. **OPR Issues:** This forum is to comment on and discuss Office of Professional Responsibility (OPR) issues.

NAAUSA's Longest Serving President, Richard L. Delonis, Becomes President-Emeritus after 13 Years of Stewardship

By Richard L. Delonis Eastern District of Michigan

Earlier this year the NAAUSA election process progressed to the election of members of the Board of Directors, I advised the NAAUSA Board that I would not be seeking another term as your President. After 13 years of stewardship, it was, quite frankly, time for me to step aside. (I will remain a member of the Board of Directors and continue to serve as the Delegate from my USAO in Detroit.) The Board honored me by awarding me the title of "President Emeritus" and electing me to a position on the Association's Executive Committee. I hope to remain deeply involved in NAAUSA's various initiatives, albeit at a level of lower visibility and with less administrative responsibility.

Serving as your President has been a great and unparalleled honor, and I am profoundly grateful to the various members of the Board who, over these years, have expressed their faith and confidence in my leadership by their continued entrustment of the presidency to my hands. I thank them not only for their expressions of confidence, but also, for their cooperation, wise counsel, hard work and dedication in serving the common interests of AUSAs. I also wish to thank the many Delegates and innumerable NAAUSA members who, during the course of the last 13 years, have helped me immeasurably in seeking to elevate the status and improve the worklife conditions of this nation's finest public servants. And finally, a word of special thanks to those who have been my closest friends, advisors and confidantes during my presidential tenure: NAAUSA's past and present Officers and Executive Committee members, our extraordinary Executive Director, and our widely respected Washington Representative.

While we have not yet achieved final success on our signature issue, AUSA retirement, we have "advanced the ball down the field" in a significant manner. I recall that when we first started this initiative, I was told by a person affiliated with the FBI Agents' Association that it

"Much to my dismay, during these years many AUSAs have overlooked NAAUSA's many important achievements on other issues."

generally takes 10 years to get congressional approval of legislation which would significantly improve government employee benefits. It has been a long, arduous struggle played out in a Washington environment replete with an array of bureaucratic, procedural, fiscal and political obstacles that would astound and perplex most AUSAs. The good news is, however, that despite the assortment of challenges, we have moved significantly closer to the goal line, and I step down from office fully confident that AUSAs will ultimately receive a more equitable retirement benefit.

Much to my dismay, during these years many AUSAs have overlooked

NAAUSA's many important achievements on other issues. For example, as a direct result of NAAUSA's efforts, AUSAs now receive government reimbursement for one half of their professional liability insurance costs, comp time for off-duty travel, and inclusion in certain protections provided by the recently enacted court security legislation. Moreover, NAAUSA was there to draft and coordinate a letter to Congressional leadership from 6 former Attorneys General in the fight against the McDade Act, to secure DOJ confirmation that AUSAs were entitled to the death and disability benefits of Public Safety Officers, and to directly and successfully lobby Congress (including testimony at a congressional hearing) to alleviate the budget crisis in the USAOs by significantly increasing their budgets for FY 2007 and FY 2008. When NAAUSA was alerted to a draft of an appropriations bill provision limiting future AUSA appointments to 2 years, NAAUSA intervened and secured the deletion of that provision from the bill. Today, NAAUSA is engaged in continuing efforts to improve the personal security, pay and worklife benefits (especially retirement) of AUSAs.

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(with broad bipartisan support and approximately two-hundred cosponsors) and in the Senate, where we have also had bipartisan support, including Senators Leahy and Hatch. This is clearly an important issue to all of our members, and it is a priority. We must take advantage of every opportunity to pursue the AUSA retirement equity bill.

As reflected by our recent membership survey, security issues are also a significant concern to members, and our work in this area has paid dividends. We helped convince Congress to pass legislation that addressed issues raised by members, including privacy matters and false

liens. DOJ personnel and members of Congress have met with NAAUSA and have discussed other issues (such as providing secure parking). Because of these efforts, both the Department and Congress have an increased appreciation for our concerns and the risks faced by AUSAs. Addressing the security concerns of our members is important to all of us. It, too, must remain a priority.

There are also a substantial number of members and potential members who believe and expect that as a professional association we will address the important public policy issues in our field, for example, proposed changes in the discovery

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rules, minimum mandatory penalties, sentencing and grand jury reform. Since we cannot address each issue with policy implications, we should address the most important ones. Addressing issues of this type is important to the Association for at least two reasons. First, and simply, as a voice of AUSAs and as a professional association, we have an obligation to advance our members' views regarding issues on which we have special insight. We cannot stand mute on the sidelines as other organizations (like NACDL) present one-sided agendas. Instead, we must make our collective voice heard on criminal and civil justice issues affecting the federal courts. Second, for those who believe we should limit ourselves to a narrow agenda (i.e., workplace improvement issues), we all should appreciate that by working on broader public policy issues, we develop relationships and credibility with the same people in DOJ and on Capitol Hill who deal with our "self-interest" issues. Regardless of how one sees the focus or goals of NAAUSA, participating in the broader arena and weighing in on policy issues provides a valuable service to the public and our members.

In the final analysis, to serve all of our members we cannot be a one-issue organization. Serving only one group will divide us, significantly limit the number of people to whom we appeal, and ultimately doom us to fail in all of our goals. Conversely, when we work together pursuing a broad set of goals we will be strong enough to address all of them.

How you can help with the future

Shortly before signing the Declaration of Independence, Ben Franklin famously quipped, "We must, indeed, all hang together, or most assuredly we shall all hang separately." If we work together we can accomplish many things; if we do not we will accomplish few. We currently have a very dedicated core group of members (many of whom are officers, board members and delegates) who contribute in substantial ways far beyond paying dues. For example, many members have traveled (sometimes at their own expense and always while taking leave) to

Washington D.C. for meetings, hosted recruitment/member receptions (at the NAC and in their own offices), and traveled to various offices around the country to update members and to recruit new members.

This core group can only do so much. The truth is that beyond their hard work, our ability to pursue our goals is directly related to the number of members who belong to NAAUSA. Obviously, member dues provide the necessary foundation for the organization by providing resources to retain Washington DC counsel and executive director, as well as publish the newsletter, maintain the website and provide travel for our members and staff for lobbying efforts and meetings.

NAAUSA's membership numbers are a direct reflection of the health, strength and conviction of an association. In our meetings with members of Congress and Department officials we are often asked how many of the 5500+ AUSAs across the country are members of NAAUSA. The higher the number, the stronger the

statement we make. The reverse is equally true. Low numbers signal a lack of interest and suggest support for the status quo.

If you are not a member, please realize that your absence does negatively impact our ability to succeed. We need you to join. If you are a member, we need you to continue your support and PLEASE recruit other AUSAs to join.

Let me close by expressing my appreciation to each and every one of you as colleagues for your outstanding effort and professionalism shown by you. Regardless of our success or failure on these many issues, AUSAs as a group remain the most ethical, skilled and dedicated lawyers in our profession. Let's all continue to fight the good fight!

¹ Virtually every other group of professionals, including criminal defense attorneys (National Association of Criminal Defense Attorneys), federal judges (Federal Judges Association), federal magistrate judges (Federal Magistrate Judges Association), FBI agents (FBIAA), other federal law enforcement officers (FLEOA), and District Attorneys (NDAA), has an association which zealously advances the interests of its members in Congress, to the administration and elsewhere.

² This legislation has included, but not been limited to, imposing criminal penalties on individuals who place false liens on AUSA's property, reimbursement to AUSAs for professional liability insurance, and reversing a DOJ determination that AUSAs and other DOJ attorneys would not be eligible to receive comp time for official travel (a benefit extended by Congress to all other government attorneys).

³ One case in which NAAUSA filed an amicus brief is currently pending before the Supreme Court. *Pottawattamie County v. McGhee* (08-1065). For a copy of the amicus brief please go to www.NAAUSA.org.

⁴ A typical AUSA with 25 years of service at age 57 under FERS would receive approximately \$20,000 less per year in retirement than an agent or probation officer at the same age and with the same service.

New President Profile

Name: **Steven H. Cook**

Previous positions in NAAUSA: **Vice President, Secretary, Board Member**

District: **Eastern District of Tennessee**

AUSA since: **1986**

Current positions in USAO: **Criminal Division Chief, District Office Security Manager, Crisis Management Coordinator and EARS evaluator**

Previous work experience: **Law Clerk to H. Ted Milburn, U.S. Court of Appeals for the Sixth Circuit (1985-1986)**

Police Officer, Knoxville Police Department and Knox County Sheriff's Department (1978-1985)

Law school: **University of Tennessee with high honors (1984); Order of the Coif; Member, Tennessee Law Review**

Legislative Update

By Bruce Moyer, Washington Counsel

AUSA Retirement/Collections Bills to be Introduced Soon

The House and Senate resumed work on Capitol Hill in early September after a fractious August recess. NAAUSA's goal now is to introduce identical bipartisan bills to improve the retirement benefits of AUSAs and reform the collection of judgments and restitution.

Our lead Democratic sponsor in the House — Rep. William Delahunt (D-MA) — and lead Democratic sponsor in the Senate — Sen. Patrick Leahy (D-VT) — are seeking a balance of Democratic and Republican cosponsors at the time of introduction of the bills. In the House, Rep. Louie Gohmert (R-TX) has agreed to join as the lead Republican cosponsor. Mr. Gohmert's support will be helpful because

he is the leading Republican on the House Judiciary Crime Subcommittee, the panel to which the bill once again will likely be referred after it is introduced.

NAAUSA has been working with Delahunt and Gohmert in securing additional original cosponsors to the House bill, especially those who cosponsored the bill in the last Congress. **Once the bills are introduced, we will begin an intensive effort which will require the help of NAAUSA members to add cosponsors to both bills.**

Smaller Federal Pay Raise for 2010 Expected

The size of the federal employee pay raise for 2010 is likely to be somewhere

between 2 to 3 percent, but the exact figure will become better known later this fall when House and Senate negotiations wrap up. Two things though are already certain: the federal civilian raise will be smaller than that for military personnel; and the raise for 2010 will be less than the 3.9 percent pay raise that federal workers received in 2009.

The House in July passed legislation that includes a 2 percent pay hike for federal employees, coinciding with President Obama's recommendation earlier this year. That figure is lower than the 2.9 percent increase approved by the Senate Appropriations Committee earlier this summer. After the Senate approves that number, House and Senate negotiators will determine the final size of

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the 2010 federal pay raise.

Even if the Senate figure prevails, the federal employee raise will still not equal the 3.4 percent pay raise slated for military service members, which both chambers have approved. A higher military raise would depart from the well-established Congressional practice in applying pay parity to federal civilian and military personnel. Why the break in parity? The economic downturn and joblessness has dampened the Congressional appetite for giving federal workers a larger raise, with lawmakers aware of the stronger job security and benefits that federal employees generally enjoy than many in the private sector.

FERS Sick Leave Credit Legislation Could Finally Pass

House and Senate conferees on the 2010 defense authorization bill will decide in September whether FERS employees begin to receive credit for sick leave remaining at the time of retirement in the calculation of their pension. Language applying sick leave credit to FERS employees, an approach that has long applied to CSRS employees, is contained in the House-approved version of the defense authorization bill.

The House has passed the FERS sick leave proposal in four different legislative measures since January, with Senate approval faltering each time. NAAUSA and other proponents of the FERS sick leave benefit have continually pressed for approval. The best shot in getting the FERS sick leave benefit now rests in the outcome of the final version of the defense measure. NAAUSA has argued

If NAAUSA Never Existed

If NAAUSA never existed, DOJ would not have been successful in defeating legislation to transfer the responsibility for investigating allegations of misconduct against AUSAs from OPR to the IG.

AUSA Lobbying Budget a Drop in the Bucket

In 2007, the Federal Judges Association, the Federal Magistrate Judges Association and the National Conference of Bankruptcy Judges paid a Washington firm \$140,000 to lobby on a single issue, a federal judges pay raise. This is twice the amount of money NAAUSA spends annually on all AUSA lobbying.

that permitting FERS workers to retain their unused sick leave at retirement will save millions of dollars and deter the abuse of sick leave. Otherwise many FERS-covered employees sadly use up their sick leave aggressively as they near retirement.

NAAUSA Endorses Measure to Curb Shell Corporations

NAAUSA has endorsed Senate legislation that cracks down on the fraudulent creation of shell corporations to hide criminal activity. The Senate legislation, the Incorporation Transparency and Law Enforcement Assistance Act (S. 569), requires states to obtain the names of the beneficial owners of any corporation or limited liability company formed under their laws and to make information about their owners available to law enforcement authorities when legally authorized.

The bipartisan legislation was introduced in March by Sen. Carl Levin (D-MI), Sen. Charles Grassley (R-IA) and Sen. Claire McCaskill (D-MO). The Senate Committee on Homeland Security and Governmental Affairs held a hearing on the measure on June 18. In a letter endorsing the legislation, NAAUSA President Steven H. Cook said, "Mindful of the ease with which criminals establish 'front organizations' to assist in money laundering, terrorist financing, tax evasion and other misconduct, it is shocking and unacceptable that many state laws permit the creation of corporations without asking for the identity of the corporation's beneficial owners. S. 596 will guard against that, and no longer permit criminals to

exploit the lack of transparency in the registration of corporations."

Provide Funding for Extradition Efforts, NAAUSA Urges

NAAUSA also has endorsed a legislative proposal that will expand resources to federal law enforcement authorities to extradite suspects who have fled to foreign countries to avoid arrest or prosecution. The bipartisan legislation, the Global Justice Act of 2009, has been drafted by Sen. Orrin Hatch (R-UT) and Sen. Amy Klobuchar (D-MN). It is expected to be introduced in the Senate soon.

The legislation will authorize increased funding for extradition efforts by the DOJ Office of International Affairs and the United States Marshals Service and establish a fund within DOJ to pay for extradition fees and translation fees.

NAAUSA President Steve Cook identified the benefits of the measure in a July 15 letter to its sponsors, noting that, "Despite the fact that extradition efforts often involve the arrest and return of organized criminals, terrorists, drug traffickers and smugglers, extradition is too frequently frustrated by a lack of sufficient resources and coordination between and among federal law enforcement authorities."

If NAAUSA Never Existed

If NAAUSA never existed, AUSAs would not be protected against false liens and the public disclosure of restricted personal information. NAAUSA convinced Congress to extend these protections to AUSAs in 2007 court and judicial security legislation, P.L. 110-177, as well as require DOJ to report to Congress on the adequacy of current measures, including personal security training, secure parking, and the role of the U.S. Marshals Service, in protecting AUSAs.

What are the Ethical Issues Raised by Membership in NAAUSA and Service on the Board of Directors?

by Debra L. Roth Partner, Shaw, Bransford, Veilleux & Roth, P.C.

Most federal attorneys understand that their ethical obligations come in two forms, *i.e.*, professional responsibility rules that apply to their practice of law and government ethics rules issued by the U.S. Office of Government Ethics (OGE) and found at 5 C.F.R. Part 2635. A central part of both sets of rules is avoiding conflicts of interest. For many federal employees who belong to a federal employee association, the question often arises about whether membership in and service on a board of directors of a professional association, such as the National Association of Assistant United States Attorneys, would be a conflict of interest with their official duties, particularly if the association decided to oppose or seek modification of an official U.S. Government policy or position. Fortunately, Congress, the Office of Personnel Management and OGE have addressed this issue and provided some specific guidance.

Let's begin with the subject of money, corporate money that is, paid to NAAUSA to become a "sponsor" of the association, and whose funds are then used by the association to administer the association's activities. What ethics rules are implicated to NAAUSA's members by NAAUSA's acceptance of funds from corporate sponsors, and do those rules apply differently to NAAUSA general members and NAAUSA officers?

The primary law implicated by corporate sponsorships for federal employee associations is the criminal prohibition in 18 U.S.C. § 208(a). That statute prohibits a federal employee from participating in certain governmental matters that impact his or her financial interest. OGE issued an implementing regulation which states:

An employee is prohibited by criminal statute, 18 U.S.C. § 208(a), from participating personally and substantially in an official capacity in any particular manner in which, to his knowledge, he or any person whose interests are imputed to him

under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

5 C.F.R. 2635.402(a).

Importantly, this statute does not prevent federal employees from *having* a financial interest in an organization that relates to or does business with the federal government, but only prevents employees from *participating* in an official capacity in matters concerning that business.

In order to address the implications of this statute, first consider what it means to have an imputed financial interest, and second consider what it means to participate in a matter that affects that financial interest.

To have a financial interest in a matter, an individual or organization must have "a potential for gain or loss" based on the outcome of a certain matter.¹ 5 C.F.R. § 2640.103(b). With respect to organizations such as NAAUSA, the financial interests of that organization are imputed only to officers, directors, trustees, general partners and employees. 5 C.F.R. § 2635.402(b)(2). NAAUSA's general members could not, therefore, have an imputed financial interest in a corporate sponsor by virtue of that corporation's sponsorship of NAAUSA. General members are free to participate on any level in matters impacting corporate sponsors because they are not deemed to have any financial interest in the contract. Accordingly, NAAUSA's entry into corporate sponsorships would not put general members in danger of running afoul of 18 U.S.C. § 208.

Even for those officers and employees that are deemed to have an imputed financial interest in NAAUSA (officers, directors, trustees, general partners and employees), such interest itself is not prohibited. Those officers are only required to disqualify themselves from "participating personally and substantially" in a governmental matter that is likely to have a "direct and predictable effect on that interest." 5 C.F.R. § 2635.402(a).

Participation includes "decision, approval, disapproval, recommendation, the rendering of advice ... or investigation" regarding a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim ... or accusation." 18 U.S.C. § 208(a). A "particular matter" is defined by OGE as "encompass[ing] only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3).

By way of example, assume Lockheed Martin served as a corporate sponsor for NAAUSA and paid NAAUSA money for that sponsorship. By virtue of this corporate sponsorship, NAAUSA would have a disqualifying financial interest in any "particular [governmental] matter" involving the Lockheed Martin. As the interests of NAAUSA would be imputed to its officers and directors, those individuals would therefore be prevented from taking any job-related action that affects Lockheed Martin's interest. 5 C.F.R. § 2635.404(a). Accordingly, an Assistant U.S. Attorney would be prohibited from representing the government in a matter that concerns Lockheed Martin, such as a civil breach of contract case, a criminal investigation or trial.

As another example, assume LexisNexis served as a paid corporate sponsor for NAAUSA. As in the above example, NAAUSA officers would have a disqualifying imputed financial interest in any "particular matter" involving LexisNexis. An NAAUSA Board member serving in the Executive Office for United States Attorneys would be disqualified in participating in the award or administration of any contract with LexisNexis to provide legal research services to the office.

In the scenarios described above, the NAAUSA officer would be required to disqualify him or herself by disclosing the financial interest to the person responsible for his or her assignment to the

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conflicting matter and “take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified.” 5 C.F.R. § 2635.402(c)(1). As with all rules, there is an exception—in this instance an “exemption,” such that an individual who falls within the above-described scenario and would otherwise be conflicted out from participating in his or her official capacity in a matter may be eligible to obtain a waiver to participate in the particular matter by notifying the appropriate official about the imputed financial interest and obtaining a waiver in writing. 5 C.F.R. § 2635.402(d).

In the absence of a “particular matter,” such as an investigation, prosecution, lawsuit or federal contract, there generally will be no conflict of interest problems under 18 U.S.C. § 208 if NAAUSA entered into a corporate sponsorship with most organizations.

One additional OGE regulation is worth mentioning. It requires that Federal employees take appropriate steps to avoid an appearance of loss of impartiality in performance of official duties. 5 C.F.R. § 2635.502(a). Under this regulation:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on a member of his household, or knows that a person with whom he has a *covered relationship* is a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency of the appearance problem and received authorization from the agency.

Id. (Emphasis added).

An employee only has a “covered relationship” with an organization if that employee is an active participant in the organization, defined as service as an official or in any capacity similar to that of a committee chairperson or spokesperson. 5 C.F.R. § 2635.502(b)(v). Section 502, though covering a broader range of con-

duct, operates very similarly to the conflict of interest regulation discussed above. To steer away from coming close to the prohibition of this section, NAAUSA officers and members who meet the above definition should report the potential appearance problem before taking substantial action relating to a government contract with a corporation that also happens to be a NAAUSA corporate sponsor.

In sum, it is a specific act in his or her official capacity by an individual who is also a NAAUSA officer that would violate ethics regulations, not the existence of a NAAUSA sponsorship agreement itself. Therefore, in the event that any NAAUSA officer is in a position as part of his or her official duties to take an action that affects the financial interests of a NAAUSA sponsor, that officer could disclose the financial interest and then either obtain a waiver or recuse him or herself from taking action. 5 C.F.R. § 2635.402(d)

In contrast to the financial interest implicated by NAAUSA’s acceptance of funds from corporate sponsors, under 18 U.S.C. § 208, NAAUSA does not acquire a “financial interest” in a matter simply because NAAUSA spends money to advocate a position or policy. See Office of Legal Counsel Memorandum “Financial Interests of Non-Profit Organizations” dated January 11, 2006. Essentially, the conflict of interest rules allow a federal employee to represent the policy-related interests of a nonprofit association if it is not inconsistent with the employee’s faithful performance of duties and is there not a specific claim, judicial or administrative proceeding where the agency is a party, or a grant, contract or other agreement providing for the distribution of funds to the professional association.

For example, assume that a member of NAAUSA also works in the Executive Office of United States Attorneys and is responsible for developing the Department of Justice’s policy on whether Assistant United States Attorneys should be covered by 5 U.S.C. § 8336(c), the so-called law enforcement retirement coverage provision. That member would be prohibited from representing the views of NAAUSA before the Department because it would be inconsistent with that member’s faithful performance of his

duties. 18 U.S.C. § 205(d). But another AUSA, whose official job duties did not relate to this policy, could advocate on behalf of NAAUSA.

A discussion about the ethics of membership in a professional association and activity before the government in representing the interests of the association is not complete without addressing the use of government time and property: Can a member represent the association on official time? Also, what about the use of government telephones, computers or copying machines to advance an association’s interests? The answer to these questions is that the agency *can* authorize such use of time and equipment. The Office of Personnel Management has issued regulations at 5 C.F.R. Part 251 covering this specific point and indicating that an agency may find it in its best interests to permit some limited use of time and resources to permit employees to engage in professional association activities. Remember that the OPM rules require the agency to approve the use of time and resources *in advance*, so in the absence of advance approval, representational activities should occur on the employee’s own time and with the employee’s own equipment, or in a manner consistent with an agency’s policies for personal use of telephone and computer systems.

In sum, ethics laws create a manageable set of rules for membership and participation in a professional association such as NAAUSA. It is NAAUSA board members who need to be aware of their imputed financial interest in matters affecting corporate sponsors, and on those rare occasions that a Board member is asked to participate in an official matter as part of his or her official duties, such as a case or contract that might affect a corporate sponsor of NAAUSA, he or she should disclose the conflict and recuse him or herself or obtain a waiver. With regard to advocacy on behalf of NAAUSA, be mindful that such activity on behalf of NAAUSA should not be inconsistent with the employee’s faithful performance of duties. And when in doubt, consult your agency ethics official or the Office of Government Ethics.

¹ In contrast, NAAUSA does not have a financial interest in a matter simply because it spends money in advocacy of that matter.

Government-Wide Pay Reform, Including Pay-for-Performance, Might be an Opportunity for AUSA Pay Changes

Calling the federal pay system "balkanized to the point of a risk of failure," Office of Personnel Management Director John Berry earlier this year said that he will pursue a significant reform of the civil service system within the next two years, with the goal of establishing a governmentwide pay-for-performance system. "About every 50 years or so, someone tries to take on Title 5 reform...I think it's time again," Berry said at a meeting with reporters.

While AUSAs are not paid under Title 5, but are paid under an administratively determined system, AUSA pay caps and low starting salaries are of concern to NAAUSA, and were a major concern of the past Director of EOUSA. AUSA pay was one of the four issues brought to the attention of the Attorney General during NAAUSA's July 10, 2009 meeting.

"Berry acknowledged that designing a rigorous and sound system was a significant challenge, and doubted that any private sector company would dare hold itself up as a model for performance-based pay."

Berry said President Obama has asked him to prepare a three-pronged strategy

to reform the law on federal employee pay: create a fair and credible performance appraisal and accountability system; develop training that would prepare employees for promotion and support them throughout their careers; and establish genuine parity between federal and private-sector salaries for employees in comparable occupations.

"I believe if we can deliver the first two [items], and they are serious and true, and will be understandable to employees, managers and the public, that we can convince the public that an adjustment on comparability is in order," Berry said, acknowledging that it would be difficult to establish pay comparability immediately during a recession. He said he hoped that the Administration and Congress, with help from employee groups and aca-

See **PAY REFORM**, page 12



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within a government-wide pay reform legislative proposal currently being drafted by the Office of Personnel Management.

NAAUSA also addressed representation on the AGAC.

During further discussion, the AG said that he wanted the Department to take a closer look at several criminal justice issues, including mandatory minimum sentencing and the sentencing guidelines. Additionally he touched on DOJ efforts to improve its performance in litigation-related discovery. Specifically, he said that the DAG is heading two working groups looking comprehensively at discovery issues on both the civil and criminal sides. Input from the AUSA community will be important, the AG said. DAG Ogden noted that his inquiry includes focusing on the operational support AUSAs need to fulfill their obligations. He said that the focus is on technology, training, and the resource issues necessary for AUSAs to best do their jobs. The AG said he wants to assure accessibility by AUSAs to the "best equipment for discovery and the production of documents."

Obviously these issues are not so distantly related to the media attacks on the integrity of individual prosecutors and the AUSA community at large. In this regard the AG asked that NAAUSA's help communicate to the field his view that the cases and events in the news had not detracted from his "full confidence and trust in AUSAs." Many people are doing the right job all the time, he said.

As the meeting concluded, the AG

noted that NAAUSA's concerns were reasonable and that further discussion should proceed with EOUSA Director Marshall Jarrett. NAAUSA anticipates significant follow-up work on these issues in the coming months. In addition to the meetings with the AG and the DAG, NAAUSA had separate meetings with EOUSA Director Marshall Jarrett and Deputy Director Terry Derden as part of ongoing discussions on issues affecting AUSAs.

On Capitol Hill, Steve Cook, Bob Mydans and Bruce Moyer participated in meetings focused on bipartisan introduction and passage of the AUSA retirement/collections reform legislation. The meetings were with Sen. Judiciary Committee Chairman Patrick Leahy (D-VT), Rep. William Delahunt (D-MA)

and Rep. Louie Gohmert (R-TX), as well as with staff associated with Sen. Leahy, Sen. John Cornyn (R-TX), Sen. Orrin Hatch (R-UT), Sen. Thad Cochran (R-MS), Rep. Steve Cohen (D-TN) and Rep. Adam Schiff (D-CA).

Cook and Mydans came away from all of these meetings impressed by the significantly improved relationship that NAAUSA has established with Department of Justice over the past several years, and the wide range of support and contacts Bruce Moyer and Dennis Boyd have cultivated on our behalf on the Hill. NAAUSA will keep members advised of the continued progress on the AUSA retirement bill as we near introduction, as well as ongoing discussions with DOJ on security and pay improvements, and representation on the AGAC.

PAY REFORM, from page 11

demics, could create a pay-for-performance system that would cover a large majority of federal employees. Berry said the new system should include large raises for a small group of truly outstanding performers, not just salary adjustments to account for the cost of living. He also noted that poor performers should be given a period of time in which to improve their work, or risk losing their jobs.

Berry acknowledged that designing a rigorous and sound system was a significant challenge, and doubted that any private sector company would dare hold itself up as a model for performance-based pay. But Berry said that during meetings with employee and managers' groups, even those organizations that opposed pay for performance during the Bush administration were willing to at least explore reforms. "If we have good communication and open and honest negotiations, we can get there," Berry said. "No one has foreclosed this as an option, said, 'You're crazy, you're not going to get there, [or] I'm not going to participate.'"

Berry said he hoped to make progress on all three of those priorities by June 2010. On hiring, in particular, he wants to create mandates rather than recommendations. As an initial goal, he suggested eliminating Knowledge, Skills and Abilities statements in favor of resumes,

and requiring agencies to use simplified descriptions in job postings. "OPM has basically tried the nice way, which has been recommendations and sweetly asking" agencies to change, Berry said. "I don't see this effort as an attempt to build another set of nice options that people have a choice to use. It will be mandated in the federal government, and we will use the power of the President to make sure it's implemented in every agency."

In addition to reforming the pay system, Berry said his longer-term goals include increasing the diversity of the federal workforce and moving aggressively to control costs in the Federal Employees Health Benefits Program.

**If NAAUSA
Never Existed**

If NAAUSA never existed, AUSAs would not have an advisory opinion from DOJ, or P.L. 104-177, acknowledging the general right of AUSAs to communicate with Congress in their personal capacities on changes in the laws of the United States.

**If NAAUSA
Never Existed**

If NAAUSA never existed, the Executive Office of U.S. Attorneys would not have established a Student Loan Repayment Program, as recommended by NAAUSA, that is geared specifically to AUSAs and includes a substantial increase in funding.

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BROWN, from page 3

AUSA is licensed; however, the AUSA and the U.S. Attorney first are provided an opportunity to appeal the decision to refer. This appeal goes to the ODAG.

6. *What advice can you provide to AUSAs who find themselves the subject of an OPR investigation as the result of a complaint?*

First, take a deep breath and remember that the vast majority of OPR attorneys previously were AUSAs or litigators in other DOJ components, and they know what you are going through. We recognize that some complaints are the result of a misunderstanding or a simple mistake, and in other instances, they are frivolous. Second, give us all the facts you believe are important to resolution of the inquiry or investigation, particularly any extenuating circumstances that may have given rise to the complaint. One of OPR's jobs is to exonerate – and to do so quickly – AUSAs and other DOJ attorneys who have been unfairly accused of misconduct. Finally, remember to consult the Department's Professional Responsibility Advisory Office

NAAUSA Elections Lead to Changes

The NAAUSA elections of delegates, directors and officers for 2009-2011 resulted in a number of new members taking leadership positions in NAAUSA and generated some changes to the governing structure of NAAUSA. This year's elections were the first conducted completely on-line (saving many reams of paper) and the first that required all candidates to prepare statements on why they were running for office.

Among the changes instituted during this year's election process were:

- Districts are allowed to elect one delegate for every 30 members. As a result, several districts now have more than one delegate to help with recruiting and keeping members informed of NAAUSA activities.

- The Executive Committee was increased from seven to eight positions with the addition of a President-Emeritus and the creation of two Vice Presidents, one for Policy and one for Operations and Membership.

The Board would like to acknowledge the dedication and work of those delegates who served on the Board in the past and are still active NAAUSA members.

Carl G. Eurenus,
Northern District of New York
Theresa L. Ollila,
District of New Hampshire
Joseph M. Revesz,
Southern District of Texas
Robert W. Wiechering,
Eastern District of Virginia

(PRAO) *before* taking any potentially controversial step. That consultation is

crucial and in many cases can prevent an AUSA from getting a call from OPR.