GUIDEBOOK
TO CORRUPTION AND FINANCIAL CRIMES INVESTIGATION

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CONTENTS

PREFACE		11
FORWARD		13
ACKNOWLEDGMENTS		15
INTRODUCTION		17
ACRONYMS		19
ROLE OF THE PROSECUTOR		21
1.	Introduction	21
2.	Prosecutor as a "judge"	22
3.	Prosecutor's role in the investigation	23
4.	Decision to prosecute	24
5.	Role of prosecutor vs. the role of defense attorney	26
6.	Prosecutor and the media	28
REGISTRATION OF A CRIMINAL CASE		30
1.	Case initiation	30
1.1.	*Ex-officio* or by initiative of the prosecutor	30
1.1.1.	Media	31
1.1.2.	Can the evidence obtained from the media be used in criminal proceedings?	33
1.2.	Referrals from the State Police	35
1.3.	Direct citizen complaints to the prosecutor's office	36
1.4.	Referrals from public officials	36
2.	Pre-registration	37
2.1.	Meeting potential witnesses	37
2.2.	Collecting supporting documents	38
3.	Registration of the case	39
3.1.	Mechanism of registering a case	40
3.2	Registration paperwork/documents	40
3.3.	Confidentiality	41
3.4.	Name of subject	41
3.5.	What constitutes justification for extending the investigation time limits?	43
3.6.	Termination of prosecution	44

WITNESSES, INFORMANTS AND WITNESS PROTECTION 46
1. Witnesses 46
1.1. Witness interviews and witness control 46
1.2. "Testing" the witness 49
1.3. Witness declarations 50
1.4. Strategies 52
1.5. Audio or videotaped statements 53
1.6. Documenting statements of potential defense witnesses 56
1.7. Corroborating the witness 57
1.8. Uncooperative witness 58
1.8.1. Safety concerns 59
1.8.2. Fear of scandal 59
1.8.3 . Apathy and distrust 60
1.8.4. Self-incrimination 63
1.8.5. Strategies for dealing with uncooperative witnesses 66
1.9. Victims 68
1.9.1. Rules to consider 70
2. Informants 71
2.1. Proactive use of CIs by the judicial police 73
3. Witness protection 77
3.1. General strategies 77
3.2. Special strategies 79
3.3. Witness Protection Program 81

SPECIAL INVESTIGATIVE TECHNIQUES 84
1. Electronic surveillance 84
1.1. Who may be intercepted? 84
1.2. Procedure for obtaining approval for electronic interception 85
1.3. What constitutes a "public place" and "private place?" 88
1.4. Practical considerations 89
2. Tracking 90
2.1. Cell phone tower - Triangulation 91
3. Search warrants 92
3.1. Securing and evaluating the scene 94
3.2. Preliminary interviews 95
3.3. Documenting the scene 95
3.4. Evidence collection 96
3.5. Search team 97
3.6. Transportation and storage procedures 98
3.7. Inspection of the evidence 98
4. Digital evidence 99
4.1. What is electronic/digital evidence? 101
4.2. Electronic devices: types, description, and potential evidence 101
4.2.1. Computer Systems 102
4.2.2. Storage devices 103
4.2.3. Handheld electronic devices 104

4.2.4. Peripheral devices 104
4.2.5. Other potential sources of digital evidence 105
4.2.6. Computer networks 105
4.3. Obtaining electronic evidence during a search 106
4.3.1. Preliminary interviews 107
4.3.2. Collection of digital evidence 108
4.3.3. Computers, components, and devices 108
4.3.4. Packaging, transportation, and storage of digital evidence 112
4.4. Forensic examination 115
4.4.1. Two-stage examination 116
4.5. Digital evidence and financial crimes and corruption 116
5. Special Investigative Means in the Jurisprudence of the European Court of Human Rights. 119
5.1. Secret surveillance 120
5.1.1. When is secret surveillance justified under Article 8(2)? 120
5.1.2. Safeguards in surveillance operations 121
5.1.3. Undercover operations 123
5.2. Entrapment/provocation 123
5.3. Informants 125

FINANCIAL INVESTIGATION 127
1. Introduction 127
2. Direct method of proof (specific items) 128
3. Indirect method of proof 129
3.1. Net worth analysis 129
3.2. Total Expenditures Method 138
3.3. Cash Expenditures Method 141
3.4. Bank Deposits Method 142
4. Other Types of Financial Evidence 143
4.1. Limited cash analysis 143
4.2. No Checks or Credit Charges 144
4.3. Indirect and *"in-kind"* benefits analysis 145
4.4. Safe boxes activity 146
5. Financial investigation of corruptive schemes 147

MONEY LAUNDERING AND ASSET FORFEITURE 153
1. Money laundering 153
2. Elements of the laundering of crime proceeds 155
2.1. Elements of Money Laundering under Article 287/1/a 156
2.2. Elements of money laundering under Article 287/1/b and 287/1/c 158
3. Three stages of money laundering 159
4. Investigation of money laundering 161
5. Asset forfeiture 162
5.1. Criminal vs. civil forfeiture 162

BANKS AND BANKING TRANSACTIONS 165
1. Introduction 165
2. Obtaining Bank Records 165
3. Banking Regulations 167
4. Information Available From Bank Records 168
4.1. Deposit Accounts – Savings, Checking, and Current Accounts 168
4.2. Account Application (Opening an Account) 168
4.3. Signature Record 169
4.4. Bank Statements (Record of Transactions) 170
4.5. Deposit Slips/Deposit Items 171
4.6. Withdrawals 172
5. Analyzing Bank Records 178
5.1. Deposit Analysis 178
5.2. Withdrawal or Check Analysis 180
5.3. Multiple Account Analysis 181
6. Certificates Of Deposit 182
7. Investment or Security Accounts 183
8. Loans or Mortgage Accounts 183
9. Bank Credit Card Accounts 185
10. Other Miscellaneous Records 186
10.1. Non-Account Transactions 186
10.2. Cashier's Checks, Certified Checks, Traveler's Checks, and Money Orders 187
10.3. Stored Value Cards 188
10.4. Currency Transactions 189
10.5. Safe Deposit Boxes 190
11. Summary 190

CRIMINAL RESPONSIBILITY OF LEGAL PERSONS 192

TRIAL ADVOCACY 195
1. Introduction 195
1.1. Credibility of the sender 195
1.2. Receiver capacities 196
1.3. Effective Messaging 197
1.4. Planning the Trial 199
2. Opening statement 201
2.1. Elements of the opening statement 202
2.2. Other strategic and evidentiary advice 207
2.3. Structure of the opening statement 210
3. Direct examination 213
3.1. Basic goals of direct examination 213
3.2. Legal Considerations 215
3.3. Some rules for direct examination 215
3.4. Direct examination tools and techniques 219

3.5. Planning direct examination and witness preparation 224
3.6. Dealing with weaknesses and credibility issues 227
4. Cross examination 229
4.1. Should you cross-examine? 230
4.2. Cross examination techniques 231
4.3. Organization of cross examination 237
4.4. Impeachment of the witness 239
4.5. Rebutting the testimony 242
4.6. Cross examination as an "offensive weapon" 246
4.7. Cross examination of the defendant 247
5. Closing argument 249
5.1. Structure of closing argument 257
5.2. Other considerations on closing argument 259
5.3. Content and organization 261
5.4. Message delivery technique 263
5.5. Ethics and impermissible arguments 265

ANNEX 1
UN guideline on the role of prosecutor 267
ANNEX 2
Standards of professional responsibility and statement of the essential duties and rights of prosecutors, as adopted by the International Association of Prosecutors 269
ANNEX 3
Code of professional ethics for prosecutors 275
ANNEX 4
Minutes of "Obtaining statements from persons who are familiar with the circumstances of the criminal offense" 283
ANNEX 5
List of NGOs which provide assistance services for victims of crime 285
ANNEX 6
Agreement of Collaboration with IC 287
ANNEX 7
List of criminal offenses of economic nature which allow the inclusion of witnesses in the protection program 289
ANNEX 8
List of economic crimes for which electronic interception in private places and recording or incoming and outgoing calls is permitted 290
ANNEX 9
List of economic crime for which photographic or video surveillance and the use of tracking devices is permitted 292

ANNEX 10
Summary of jurisprudence of ECHR regarding the special investigative techniques 294
ANNEX 11
Law No. 9917, dated 05/19/2008 "On the prevention of money laundering and terrorism financing" 296
ANNEX 12
Legislation on criminal forfeiture 301
ANNEX 13
Legislation on civil forfeiture 303
ANNEX 14
International Partners in the fight against money laundering 307
ANNEX 15
List of information requested from the bank 311
ANNEX 16
Methods of business organization 314

PREFACE

"The Guidebook to Corruption and Financial Crimes Investigation", drafted by the Office of Overseas Prosecutorial Development and Training (OPDAT) in collaboration with the Project Against Corruption in Albania (PACA), is a very relevant document which I believe will be broadly useful to prosecutors, judicial police officers and other agencies involved in corruption and financial crimes investigation, and will contribute to enhance the performance of their daily work.

I express this confidence not only because of the good, long and serious work which has been accomplished while drafting this Guidebook, but also because it combines the international experience of the drafters with that of the law enforcement agencies in Albania.

This Guidebook will assist not only the Joint Investigative Units (JIUs), but also the prosecutors and judicial police officers of other levels because it contains the most successful experience regarding where evidence may be located, how it should be gathered and administered, and how it should be presented to the court in criminal cases regarding corruption and financial crimes.

The drafting of this Guidebook has special value not only for its usefulness in unifying investigative practice, but also because the fight against corruption and financial crime is one of the main priorities of the Albanian Prosecution Office. The use of this Guidebook will increase the effectiveness of the work of our institution in the fight against this present phenomenon.

On this occasion, I would like to offer special thanks to the foreign experts who have worked to draft this Guidebook, as well as the Albanian prosecutors who contributed to its drafting. Additionally, special thanks go to Millennium Challenge Cooperation (Stage II), OPDAT, as well as to PACA, all of whom made the publication of this Guidebook possible.

Ina Rama,
Prosecutor General

FORWARD

This first edition of the Guidebook to Corruption and Financial Crimes Investigation is geared toward assisting members of the Joint Investigative Units to Fight Economic Crime and Corruption (JIUs) to investigate and prosecute cases within their mandate. However, it is hoped that all prosecutors and investigators in Albania will find some aspects of this Guidebook helpful in their approach to investigations and prosecutions generally.

This book is termed a "guidebook" for several reasons. It is not an operations manual containing mandatory procedures for prosecutors in Albania but rather a handbook offering suggestions, considerations and, occasionally, concrete information. Certainly prosecutors must comply with the Criminal Procedural Code, procedures established by the Prosecutor General, orders from their own supervisors, etc. To the extent that any of these mandatory procedures conflict with the information contained in this book, prosecutors must abide by those procedures. Although many prosecutors have contributed to this Guidebook, it has not been adopted as an official publication of the Prosecutor General.

The term "first edition" is used, because it is hoped that this Guidebook will remain a work in progress and that ambitious prosecutors of the JIUs and elsewhere will periodically review, update and correct this document as needed. In order to keep this Guidebook a manageable size, some topics are not covered in great detail, and other topics are omitted altogether. Future updaters should consider this in later editions.

Finally, use or reproduction of this book or portions thereof is not restricted, except for commercial profits. It is said that imitation is the sincerest form of flattery, and, therefore, any use that others can make of this publication is most welcome.

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INTRODUCTION

The formation of Joint Investigative Units (JIUs) throughout the country of Albania for the purpose of investigating and prosecuting public corruption and financial crimes is an important step in achieving the transparency and good governance required in a democratic society. Corruption of and by public officials is a cancer that destroys the public's faith in the institutions and operations of government. When the people of a society cannot trust public institutions and the people who have been appointed or elected to administer the laws and rules which govern the actions of all, then the laws begin to have no meaning, and civil society breaks down. That trust is destroyed when public officials use their position and office to wrongly benefit themselves, or to benefit their family and friends, and otherwise permit the law and rules to be circumvented or disregarded. Likewise, private individuals who disregard the law, who reap economic benefit by fraud and deception, and who are able to escape justice by weak or lack of enforcement of the laws, contribute to a demoralized society.

The concept of the JIU is to take some of the best, brightest and most highly dedicated and determined public prosecutors, law enforcement agents and investigators* and to combine them in a setting where they can work together to investigate and bring to justice corrupt and dishonest public officials and private offenders. It is expected that, as a combined unit, the JIU will avoid some of the overlap, inefficiencies and bureaucratic delays that inevitably result when agencies work separately and apart, sometimes with different agendas and time constraints.

The success of the JIUs will be initially demonstrated by the numerical increase in investigations and prosecutions. However, its success will ultimately be measured by an increased and restored faith of the Albanian people in the institutions that govern them and in the criminal justice system which is designed to protect them.

*Throughout this guidebook the term "investigator" is frequently used, rather than prosecutor and/or judicial or state police officer. Since prosecutors, judicial police officers employed by the prosecutors' offices, and other judicial police officers assigned to the JIU are all "investigators"- with the prosecutor being the lead investigator- no separate distinction will be made except when clarity is needed.

ACRONYMS

1.	CC	-	Criminal Code
2.	CPC	-	Criminal Procedure Code
3.	OPDAT	-	Overseas Prosecutorial Development, Assistance and Training
4.	UN	-	United Nations
5.	TIMS	-	Total Information Management System
6.	NRC	-	National Registration Center
7.	NLC	-	National Licensing Center
8.	HIDAA	-	High Inspectorate for the Declaration and Audit of Assets
9.	KESH	-	Albanian Energy Corporation (the electric company)
10.	FIU	-	Financial Intelligence Unit
11.	GDPML	-	General Directorate for the Prevention of Money Laundering
12.	CI	-	Confidential Informant
13.	Convention	-	European Convention on Human Rights
14.	ECHR	-	European Court of Human Rights
15.	GPS	-	Global Positioning System

ROLE OF THE PROSECUTOR

1. Introduction

The prosecutor performs several different functions.[1] On the one hand he acts as an investigator - indeed as the lead investigator - of the cases on which an investigation has been undertaken.[2] As the investigator, the prosecutor himself undertakes investigative actions or directs judicial police officers/agents to conduct certain investigative actions. The prosecutor gathers and reviews the evidence and decides whether it is sufficient to move forward with formal criminal charges. The prosecutor, then, "changes hats" and becomes the traditional prosecutor, preparing and bringing forward the formal criminal charges and representing the state in criminal proceedings in court.

Of course the prosecutor's powers are not unlimited. Certain investigative actions require prior court approval, while others are subject to review by the courts after they have been carried out. In fact, even the decision not to gather evidence requested by the injured party or not to prosecute can be challenged by the injured party in court.[3] Additionally, even though judicial police officers obligated tox report criminal offenses to the prosecutor "without delay,"[4] often the prosecutor does not receive notification in a timely fashion. The authors of this Guidebook believe that involving the prosecutor from the very first stages of the in-

1) Article 24 of the CPC
2) Articles 277 and 304 of the CPC
3) Articles 58 and 291/2 of the CPC
4) Article 293 of the CPC

vestigation helps to structure the investigation process, thereby preventing unnecessary delays and inappropriate investigative work.

2. Prosecutor as a "judge"

In his role as an investigator, the prosecutor actually acts as a judge (as the first judge) of the facts. He has the initial responsibility to determine whether the evidence can support the criminal charge and is sufficient to obtain a conviction. Obviously, as a representative of the state, the prosecutor's job is to seek "justice," and sometimes, justice means that a criminal case should not go forward. The case should not be taken any further when the prosecutor is not personally convinced of the defendant's guilt, for if the prosecutor has reasonable doubt or concern over the defendant's guilt, how can he expect a court to think otherwise? Moreover, as the advocate of the "truth," how can the prosecutor make arguments that he does not believe in? The prosecutor must address all of these doubts before going forward.

The case should also not go forward when the prosecutor, even though personally convinced of the defendant's guilt, recognizes that the available evidence is insufficient to sustain a conviction. Under such circumstances, the prosecutor may choose to continue the investigation; however, if all the investigative avenues have been explored, or the investigation time limit has expired, he should terminate the prosecution.[5]

---

5) Some legal commentators believe that if there is sufficient evidence to file charges, the case should be brought to court, leaving the ultimate decision on guilt or innocence to the judicial panel. Others hold that if the prosecutor is not convinced of guilt, it is an abdication of the prosecutors' role, not to mention a waste of the court's and prosecution office time and resources, to proceed with a case that has little likelihood of success. We hold that Articles 327, 328 and 331 of the CPC give the prosecutor the authority to decide, in the first instance, whether there is sufficient evidence to go forward.

Saying that the prosecutor initially acts as a judge does not mean that the prosecutor must proceed with the investigation as if he were an impartial and detached magistrate. The prosecutor is the advocate of one of the parties after all, and to be an effective investigator, the prosecutor should begin with the proposition or theory that the subject is, in fact, guilty of the crime (or *some* crime) for which he is under investigation. Sometimes it takes this tenacity, this belief that the search will eventually yield the expected result, to separate a truly successful investigator from one who simply "goes through the motions."

3. Prosecutor's role in the investigation

So what is the prosecutor's actual role in an investigation? Frequently, the prosecutor is not a trained investigator and lacks police skills on interrogating subjects or seizing and analyzing evidence. He does not have any in-depth forensic skills and has never made an arrest or conducted a search. However, the prosecutor can and must fulfill important functions at the investigative level. His advantage is that he is trained in law and that he has knowledge of the facts or evidence required to prove the crime, as well as a legal approach towards analyzing the elements of the criminal offense, in other words to distinguish which of them have been proven and which have not, in a given case. The prosecutor shall guide the judicial police to focus its work especially on the missing elements.

By participating in and directing the investigation, the prosecutor is able to ensure that evidence is gathered in compliance with the law and that it is properly stored and analyzed so that it can be used at trial. To summarize, the prosecutor's role in the investigation includes the following:

- Ensuring that investigative efforts are focused on the elements of the crime;
- Ensuring a cohesive and coordinated effort in the investigation;
- Ensuring that evidence is gathered in compliance with the law;
- Ensuring that evidence is properly stored;
- Ensuring that evidence is properly analyzed;
- Ensuring that evidence is in a usable form for trial.

Some of these areas will be addressed in more details in other chapters of this Guidebook.

4. Decision to prosecute

The prosecutor is obligated to register every criminal offense notification he has received or he has undertaken at his own initiative.[6] This provision is interpreted by some as allowing for no discretion in initiating a criminal investigation. However, initiating an investigation is not the same thing as filing a criminal charge.

On the other hand, the prosecutor has the right not to initiate or to dismiss criminal proceedings in cases expressly provided for in the law.[7] One example of dismissal of the proceeding is when the defendant has not committed the offense, or it is not proven that he committed it.[8]

Yet, who determines whether it is proven or not that the defendant committed the offense? In the first instance, it is the investigating prosecutor. While a prosecutor must act with integrity, there are certainly many instances when the sufficiency

6) Article 287 of the CPC
7) Article 24 of the CPC, Functions of the prosecutor; Article 290 of the CPC, non-initiation of criminal proceedings; and Articles 290 and 328 of the CPC, dismissal of criminal proceedings.
8) Article 328/1/dh

of the evidence is a judgment call, and the prosecutor can fairly observe this insufficiency, especially when it is in the interest of justice to do so.

***Example*:**
A motorist (witness) reports to the police that he was solicited by a traffic policeman to pay a bribe to avoid receiving a traffic citation for violating traffic rules. The witness acknowledges he paid the bribe, but now wants to report it. Is the prosecutor obligated to prosecute the witness for payment of a bribe at the same time that the prosecutor undertakes an investigation of the police officer? Some would say yes. But what is the evidence that would support a prosecution of the witness? Simply his own words? There is no physical evidence, there is no corroboration. If the investigation were to end here, would the prosecutor file charges against the police officer based upon such flimsy evidence? Certainly not. So why would he consider criminal charges against the witness? On the other hand, if the prosecutor does not start a proceeding against the witness, then the prosecutor would be in a position to further his investigation of the police officer, via undercover operation for example, which might furnish sufficient evidence to file charges.

The prosecutor also has the right to consider the criminal responsibility of a person before filing criminal charges against him. In particular, he shall examine whether a person has acted under duress or extreme necessity to protect himself or a loved one from harm or danger and for this reason may not bear criminal responsibility.[9] Consider a case where a patient is compelled to pay a bribe to the doctor for necessary medical care. If the prosecutor establishes that the patient (now a cooperating witness with the prosecutor) was acting under extreme

9) Articles 19 and 20 of the CPC

necessity, then a reasoned decision not to initiate or to dismiss the investigation of the patient is the proper outcome.

Therefore, one may argue that the prosecutor always has some limited discretion, which gives him the authority to make decisions regarding the course and scope of an investigation and to decide upon the sufficiency of evidence. The exercise of discretion on whether to proceed with an investigation or prosecution has strong consequences for the subject, the victim and the community. The decision to continue an investigation or to prosecute should only be taken after careful consideration of the evidence and other surrounding factors, including the criminal history of the defendant/suspect, and any information favorable to the subject. A misguided decision to prosecute can erode public confidence in the criminal process, as well as inflict undeserved stress on a person wrongfully charged.

A Canadian justice minister once observed that the carrying out of the duties of a prosecutor is difficult.

"...it requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work under great stress...there is no recipe that guarantees the right answer in every case, and in many cases, even two totally reasonable persons may think differently. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error..."

5. Role of prosecutor vs. the role of defense attorney

The defense attorney does not have the truth as his essential aim; his aim is to declare his client innocent. Thus, a defense attorney can make - and frequently makes - arguments that he

may not personally believe to be true and can present evidence that is suspicious or of questionable validity. Of course, he may choose not to do this for strategic reasons, but there is no legal barrier to doing so, as long as he does not "knowingly" present false evidence or otherwise deceive the court. His goal - if not his obligation as a defense attorney - is, quite simply, to cast doubt on the case initiated by the prosecutor.

In contrast, the prosecutor represents not only the accusatory party, but also the society and the public at large. The public includes all the citizens, including the defendant, and therefore, the prosecutor has the duty to ensure that a defendant receives a fair trial and that the rule of law is respected. Because of the special nature of a prosecutor's role, he cannot use evidence that was illegally obtained, and he is obligated to disclose to the defense all the evidence which might be helpful to him and which the prosecutor is not intending to use.[10] The defense has no similar obligation.

However, the defense attorney's role is not one to be criticized or despised. The existence of competent defense attorneys in an adversarial system creates a "check and balance" against abusive police, prosecutorial and even judicial conduct. In fact, having good defense attorneys as adversaries raises the quality of the practice of law and advocacy overall. Good prosecutors should welcome the challenges posed by high quality defense attorneys, as this forces the prosecutors and police to raise their standards, improve their skills, and be more prepared. It also lessens the risk of a wrongful conviction, for a skilled defense attorney may uncover weaknesses in the state's case. A good prosecutor must be open to this possibility at all times.

10) This conclusion stems from the obligation that the prosecutor has upon taking a person as a defendant. Article 327 of the CPC combined with Unifying Decision No. 3/2002 of the High Court provide that the defendant and his defense should be presented with all the acts of the investigation file.

Some believe that it is not the duty of the prosecutor to secure a conviction, but only to present his case fairly, impartially, and objectively. They argue that if the prosecutor has done that, he should not be concerned as to whether the defendant is convicted or acquitted. However, others (including the drafters of this Guidebook) believe that the prosecutor should be an advocate, who strongly and passionately believes in the righteousness of the case and communicates that belief and passion to the judicial panel. If the prosecutor is indifferent to the result or acts as if he is, this communicates a lack of belief in the case he is representing to the judicial panel. On the other hand, if the prosecutor presents his case fully, with diligence and preparation, but an unbiased tribunal honestly and fairly comes to a decision in favor of the defendant, the prosecutor has nothing to be ashamed of or angry about.

6. Prosecutor and the media

First of all, the media may serve as a source of information for the initiation or moving forward of criminal cases.[11] The media can serve another important function for a prosecutor which is to publicize efforts and successes. This is important because the public perception of success will contribute to enhancing the prosecutors' authority and the public trust in them. Ultimately, it is the citizens of the country who will play the most significant role in the fight against corruption. As long as citizens tolerate the *status quo*, it will not change. However, once the citizens see that their complaints are making a difference and that something is being done to fight corruption, the tolerance level will decline and more people will come forward with information. This will increase the number of criminal cases. Even though prosecutors are often wary of the media, since as public officials, they are also affected by media critics, they should start to see the benefits of publicity.

11) See chapter on "Registration and Pre-registration of a Case."

Obviously, prosecutors should not seek publicity by leaking information about their cases. However, documents which are filed with the court, or other actions that take place in court, are all matters of public record that the media can rightfully report on.[12] For that reason a prosecutor should be careful while drafting a request for trial as his/her arguments on the crime details and criminal conduct of the defendant will also serve to make the public aware of the charges. The request for trial should be detailed, factual, and accurate. The prosecutor should not include accusations that are unlikely to be proven at trial or other statements prejudicial to the defendant. After all, the prosecutor does not want to face accusations that he is trying to prejudice the defendant or unfairly damage his reputation.

Additionally, the prosecutor should avoid, to the extent possible, including confidential information in the public registries or acts that are filed with the court secretariat. For instance, the names or other personal information of victims or witnesses should be kept out of public filings or prosecutor's office files to the greatest extent possible. If it becomes absolutely necessary for the prosecutor to refer to an action of a victim or witness, the prosecutor may refer to the person by his initials rather than by full name.

Annex 1: UN Guidelines on the Role of Prosecutors

Annex 2: Code of Ethics of Prosecutors, approved by the National Association of the Albanian Prosecutors

Annex 3: Standards of Professional responsibility and statement of the essential duties and rights of prosecutors, approved by the International Association of Prosecutors

12) Articles 103/1 and 332 of the CPC

REGISTRATION OF A CRIMINAL CASE

1. Case initiation

A criminal case may be initiated in several ways. The most common are:

- *ex-officio* or by initiative of the prosecutor;
- by referral from the State Police;
- by direct complaint to the prosecutor's office from a citizen;
- by referral from a public official or medical staff.

1.1. *Ex-officio* or by initiative of the prosecutor

Some of the most successful public corruption cases begin "spontaneously" by an alert prosecutor or prosecutor's office, which follows up information obtained in the public domain. The most common situations involve newspaper or media reports or public denouncement of allegations against a public official or agency. However, a prosecutor may, on his own initiative, start working simply based on information received by chance or even through a rumor, if there is a way to conduct further informal inquiries. For example, in response to public or private rumors or speculations about how a particular public official is able to afford new cars or properties, there are public records sources which can either refute such rumors, or lend more fuel to the fire. These investigative sources will be discussed in more details in the Financial Investigations chapter. Thus, it appears that the law leaves much to the discretion of the prosecutor when it comes to the initiation of a criminal proceeding *ex officio*.

1.1.1. Media

Newspapers or other public media may write about criminal acts of public officials and may gather supporting information, including documents, statements from prospective witnesses, and/or audio and video tapes from secret surveillance. At this early stage, the media has an advantage over the prosecutor, as it is not constrained by rules that prosecutors and judicial police must follow, such as having to register a case, obtaining court authorization for an interception, advising people of their right against self-incrimination, etc. The only limitations or concerns that the media may face are to avoid a possible violation of criminal law by exposing "an aspect of the private life of the person without his consent."[13] The key element of this criminal provision is exposing aspects of private life, and since corrupt practices are accomplished as a result of holding a public position, they most likely do not fall within the scope of one's private life.

Generally speaking, the media is not motivated to find out the truth or punish the wrongdoers, but rather to get publicity for itself and enhance its reputation in the market in order to sell newspapers and advertising space. For these reasons, media reports should be taken "with a grain of salt." Often, however, the information or evidence displayed (such as videotapes) is too incriminating to be ignored. Furthermore, opposition to the government may be best provided by a free media that is able to exercise real pressure over political power, which is healthy in a democratic society.

13) Article 121 of the CC: "The installation of appliances which serve for hearing or recording words or images, the hearing, recording or airing of words, affixing, taping or transmitting images, as well as their preservation for publication or the publication of these data which expose an aspect of the private life of the person without his consent, constitute criminal contravention and are punishable by a fine or up two years of imprisonment."

What can the investigator[14] do with this information? Initially, he can try to speak with the reporter to learn more of the background story (facts which perhaps were not reported) and attempt to speak with the sources of information that the reporter used if they are publicly revealed. As a general rule, the reporter is not compelled to disclose the source of information that he has published;[15] however, the reporter's trust in the prosecutor or good relations between him and the prosecutor may cause him to believe that helping the prosecutor is in his interest. After all, a prosecution resulting from his story makes good news as well! Therefore, the investigator may find the reporter helpful, but the prosecutor should be careful to keep this information flow as a "one way street," from the reporter to the investigator. The investigator must never reveal who is under investigation or talk about any evidence or information that he has gathered or is aware of. Also, any unwise or offhand comments regarding the case could find their way into a newspaper article and create considerable embarrassment to the investigator and his office.

The investigator can also try to recreate or retrace the steps taken by the reporter by contacting witnesses that have been publicly identified or obtaining documents that may have been described. The investigator should also consider requesting or issuing a subpoena to the news media for raw tapes of all recordings or other documents that have already been gathered, as well as copies of notes of interviews that have been conducted. Even though the reporter is not required to disclose the names of sources, he could produce notes that are redacted to remove identifying information. Nevertheless, the investigator must keep in mind that such evidence may not be accepted by a court.

14) In this case and hereinafter the term "investigator" shall mean both prosecutors and judicial police officers/agents.
15) Article 159/3 of the CPC protects reporters from the obligation to disclose names of their secret sources of information.

1.1.2. Can the evidence obtained from the media be used in criminal proceedings?

Unfortunately for the prosecutor, evidence gathered by the reporter might be unusable in court. An unsettled area of law is the use in a criminal case of surreptitiously recorded phone conversations and video intercepts made by the media or private individuals. On the one hand, the CPC requires strict adherence to its rules on evidence collection for evidence to be admissible; it even stipulates that evidence collected in violation of prohibitions set by law may not be used.[16] Therefore, many law practitioners, including judges and lawyers, argue that conducting an audio/video registration differently from the rules and procedures set by the law on surveillances, constitutes a violation of a legal prohibition and as such, the results cannot be used in court. They argue that such prohibitions are applicable to anyone, be they state structures or individuals, as the law does not make any express specification.

Nevertheless, the CPC remains open with regard to the admission of other types of evidence not explicitly provided by law.[17] In our opinion, article provisions pertaining to the use of evidence obtained through electronic surveillance[18] apply only to the actions of the state representatives (police and prosecutor's office), because the procedural provisions define the rules on how to conduct prosecutions, investigations and trials of criminal offenses.[19] Private individuals and media do not perform any of these functions. Additionally, no law prohibits the secret

16) Article 151/4 of the CPC
17) Article 151/3 of the CPC: "When evidence, which is not regulated by law, is requested to be admitted, the court may admit the evidence if it serves to prove the facts and it does not affect the free will of the person. The court shall rule on the evidence admission after hearing the parties concerning the way it was obtained."
18) Articles 221 and following of the CPC
19) Article 2 of the CPC

recording of another person, unless it is done for the purpose of exposing the private life of that person without his prior consent.[20] Therefore, it seems reasonable that admission of such evidence is within the discretion of the court.

The issue the court must resolve is whether the evidence "has value" and whether the free will of the person was violated. The value of the evidence will be evident from the substance of the recordings, whereas the conclusion whether the free will of the person was violated will depend on the manner in which the recording was made. To demonstrate that a person's free will was not violated, that is, to show that the person was not coerced or entrapped into making incriminating statements, the prosecutor will need the testimony of the person who made the recording and other evidence that explains the circumstances in which the recording was made. If the person who made the recording is not available or declines to testify, it will be impossible for the prosecutor to meet this condition.

If the court refuses to accept the evidence acquired from the secret recordings, the prosecutor will be in a bind. Regardless of the existence of such evidence, the prosecutor should go forward as best as he can until this area of the law is clarified or modified. Change may come when inconsistent court rulings compel lawmakers to act. In the meantime, the prosecutor must find the means to build a case, with or without secret recordings.

Even if the secret recordings are disallowed as evidence, the prosecutor still has the testimony of the individual who made the recording and/or participated in the conversations. This testimony should be legally sufficient to obtain a conviction, even though courts may be reluctant to convict the defendant based upon the testimony of one witness alone. In some instances,

20) Article 121 of the CPC

this testimony may be corroborated by another party who was present and perhaps even an employee of the media outlet. The prosecutor may also try to corroborate this testimony by locating other witnesses of similar criminal conduct by the defendant. Often such persons come forward in response to news exposing the defendant. Even though their testimonies may not be usable in the current case, they could serve as a basis for registering another case, which the prosecutor could then seek to join with the underlying case. The joining of several proceedings for the same criminal conduct may cause the defendant to agree to a summary trial.

Finally, the prosecutor should conduct a detailed financial investigation. Documents or testimony of unexplained wealth could be admissible as evidence to establish a sustainable pattern of criminal conduct.

1.2. Referrals from the State Police

The State Police receive notification on criminal offenses from citizen referrals and from the information gathered by its structures in the field and refers to the prosecutor, without delay, the main elements of the criminal offense. As a rule, the notification is made in writing, but in urgent cases it may also be done verbally.[21]

Police may investigate to the best extent possible and send the case to the prosecutor's office only after having exhausted all investigative means at their disposal. This course of action is preferable for many types of criminal offenses such as robberies, assaults, etc. However, for economic crimes and corruption, it is preferable for prosecutors to be notified about the case as soon as possible. One of the trends in this regard is joint investigations as a cooperative effort between police and prosecutors.

21) Articles 280 and 293 of the CPC

1.3. Direct citizen complaints to the prosecutor's office

Currently, prosecutors may receive "walk-in" complaints from individuals who deliberately have not been willing to file a complaint with the police or otherwise have filed a complaint with the police or other agencies and have received no satisfaction. Prosecutors must treat these complainants respectfully. If the initial information has merit, the prosecutor should assign a judicial police officer to assist in gathering corroborative information. One of the advantages of a direct citizen complaint is that citizens who have shown a willingness to uncover some criminal activity may also be used for simulating actions or consensual surveillances. In addition, a successful investigation of citizen complaints will result in more complaints reported to the prosecutor's office, as citizens' trust in the prosecutor's office will increase.

1.4. Referrals from public officials

Public officials, including medical personnel, can make a criminal referral to the police or can go directly to the prosecution. Referral by a public official should always be presented in writing and even when the criminal offense is discovered during a civil or administrative proceeding, the official should refer it directly to the prosecutor's office.[22] Most often, these types of referrals are made by public agencies on activities that fall within their competence/jurisdiction.

The prosecution office receives many such referrals which often are incomplete, do not highlight the elements of the crime, do not identify the perpetrator, or the referral is simply an economic or administrative violation with no explanation why the violation might be a criminal offense. It is clear that the referral

22) Article 281/3 of the CPC

of a public official is not expected to be as detailed as an indictment, but it should contain some minimum arguments, since it comes from a government agency. Even with incomplete referrals, the prosecutor should not disregard them, but should assign them to judicial police officers for further investigation.

In other instances, referrals from public agencies with their own auditors or internal investigative structures are sufficiently complete for the prosecutor to register the case immediately.

2. Pre-registration

Upon receipt of a criminal referral, the prosecutor should take preliminary steps to determine whether the case should be registered. Even though the law appears to obligate the prosecutor to register a case for any criminal offense of which he becomes aware, either *ex officio* or through a referral,[23] the prosecutor still has discretion in deciding whether to register a case. First of all, the prosecutor should be convinced that there is at least a reasonable ground to believe that a criminal offense has been committed for which evidence may be gathered. The following sections list some of the preliminary actions an investigator may undertake.

2.1. Meeting potential witnesses

The investigator should not take for granted all statements contained in the referral, but should speak personally with the complainant or other persons identified as potential witnesses. Before speaking with potential witnesses, other than the complainant, the investigator should consider whether the opportunity for a proactive investigation exists, and if so, whether contacting other witnesses could compromise the investigation.

23) Article 287 of the CPC

In most referrals from the State Police, judicial police officers should have already conducted a thorough investigation and gathered sufficient evidence to warrant registering the case. In a corruption or economic crime case, the State Police officer should have contacted the prosecutor from the very beginning to receive instructions on the investigation.

2.2. Collecting supporting documents

Before registering a case, the prosecutor may acquire information from a number of public sources. It is surprising what one can discover simply from conducting internet (Google) searches of key persons or events. Such searches may reveal prior newspaper articles and complaints or allegations against the same subject. Other inquiries or verifications which may be conducted are:

- Obtaining records from the TIMS data base, regarding prior criminal history, and out-of-country travel;
- Obtaining records from the National Registration Center regarding the registration of businesses;[24]
- Obtaining records from the National Licensing Center regarding the possession of licenses;[25]
- Checking old newspapers for any potential information;[26]
- Obtaining records and data from various governmental agencies, concerning ownership of land and buildings, ownership of vehicles, licenses and permits, tax records, family records;[27]
- Obtaining records from HIDAA concerning declared assets;[28]

24) The NRC has an electronic data base, which may be found on its internet web site: www.qkr.gov.al.
25) The NLC has an electronic database which may be found on its internet web site: www.qkr.gov.al.
26) Old newspapers may be consulted at the National Library, while some of them may be found online in electronic databases.
27) This information may be secured by the prosecutor through a simple request.
28) This data may be secured by the prosecutor through a simple request.

- Obtaining records from FIU concerning suspicious transactions and transactions above the legal threshold;
- Obtaining data from private businesses concerning bank records, airline records, credit card records, money transfer records (through Western Union, Money Gram, etc.), property and personal insurance records, telephone records (both landline and mobile), utility records (electricity, water, gas, internet), vacation records etc, to the extent they are publicly available;
- Online Google search.

3. Registration of the case

A criminal investigation formally begins when the case is registered with the appropriate prosecutor's office. Registration refers to the act of obtaining an investigative file number from an official (usually a registrar/secretary) within that prosecutor's office.

Registration has significance in a number of ways. First of all, for statistical purposes, the number of registered cases is compared each year with the number of filed or prosecuted cases and the number of convictions. The larger the number of registered cases not resulting in convictions, the less efficient prosecutors and police appear to be. On the other hand, until the case is registered, investigators are limited in their actions because there can be no formal investigation until registration has occurred. For this reason, investigators are unable to record statements of witnesses, issue subpoenas, or authorize special investigative techniques. Before registration, no evidence may be gathered or if evidence has been obtained, it cannot be used in court.

After the case is registered, investigators may interview witnesses and the subject, as well as gather evidence against the defendant which may be used in court. Additionally, registra-

tion allows investigators to ask the court for restrictive measures against the defendant.[29]

The registration of a criminal case is followed[30] by the registration of the name of the person subject to investigation in the files of the prosecutor's office. The registration of the name of the person subject to investigation has some undesired consequences for the prosecutor, such as time limits for the investigation.

3.1. Mechanism of registering a case

Usually, referrals go through the chief prosecutor who conducts the first examination then distributes them to the respective sections or prosecutors. At this early stage, the prosecutor assigned to the case may be instructed to register it and begin an investigation immediately or he may be asked to conduct additional preliminary verifications before a decision is reached about whether to register the case. Internal rules of the prosecutor's office require the prosecutor to complete this verification process within 20 days. Within this time limit, the prosecutor of the case reviews the information gathered during the verification process and either approves the registration or declines the matter.[31]

3.2. Registration paperwork/documents

When the prosecutor is convinced that he should register a case, he prepares a form entitled Decision for Registering the Criminal Proceeding. This decision contains information regarding the name of the person subject to investigation, the charges on which he will be investigated, and the provisions of the criminal law he is suspected to have violated. The decision is filed in the

29) Articles 228 and following of the CPC
30) Article 287 of the CPC
31) Article 291 of the CPC

criminal offenses' register in the prosecutor's office secretariat. The registry clerk opens a file and assigns a case number to the file. This file is then sent to the prosecutor.

3.3. Confidentiality

All investigative actions remain secret until the defendant has been notified about them.[32] Additionally, the registration of a case is confidential and any publication of it is prohibited until the person is indicted.[33] Additionally, the publication of any documents during the preliminary investigation is prohibited,[34] with publication narrowly defined as mass media publication. On the other hand, every interested individual may obtain copies of documents pertaining to the proceeding, including the preliminary investigation; however, the obligation not to publish still applies.[35] A violation of these confidentiality provisions is punishable by up to 5 years imprisonment.[36]

3.4. Name of subject

The prosecutor is obligated to specify in the case register the name of the subject alleged to be the author of the criminal offense. This registration should take place simultaneously with the registration of the case, or whenever the subject of investigation is identified. This provision of the law requires the prosecutor to register the name of the person subject to investigation, if his identity is clear from the referral. However, it also allows the prosecutor to register a case prior to having identified the names of the persons subject to investigation if the identity of the persons is not known or not clear.

32) Article 279 of the CPC
33) Article 287 of the CPC
34) Article 103 of the CPC
35) Article 105 of the CPC
36) Article 295/a of the CC

The prosecutor should carefully evaluate whether strong reasons exist not to register the name of the subject of investigation from the very beginning. Especially in economic crime cases, the prosecutor may not be certain, at least initially, of the identity of the subject investigation. In such cases, he should not rush his decision. Because information leaks are always a concern, the less information contained in the paperwork reviewed by others, the better for the investigation.

Another consideration is that time limitations for conducting a preliminary investigation only begin when the subject of the investigation is named, even if the investigation itself began earlier. As a rule, every registered case must be sent to court for trial within three months from the moment of registering the name of the subject.[37] Time limitations make sense if their aim is to protect the person under criminal investigation whose life and reputation could be ruined by public disclosure of potential crimes he may have committed, especially if the investigation and court procedures extend endlessly. For this reason, the law gives the defendant the right to challenge the extension of an investigation. On the other hand, a person who is unaware that he is under investigation, because he is not named as a suspect, is not harmed by investigative actions that neither he nor the public is aware of. For this reason, we emphasize that a prosecutor should consider whether cause exists not to name the subject at the moment of registering the case.

The prosecutor may extend the time limit for investigation up to 7 times, by 3 months for each extension, so that the total extension time does not exceed 2 years. Beyond the 2-year period, only the Prosecutor General may authorize up to 4 other extensions, of 3-months duration each.[38]

37) Article 323 of the CPC
38) Article 324 of the CPC

3.5. What constitutes justification for extending the investigation time limits?

The CPC offers little guidance on the criteria for extending investigation time limits or the grounds a court should consider in examining an appeal of a prosecutor's decision to extend investigation time limits. The general practice has been that the prosecutor may order the first extension without any justification, or at least by giving almost any justification, whereas further extensions require proof that the case is complex or that it is objectively impossible to terminate the investigation within the time limits provided. However, the defendant has the right to appeal any extension decisions, including the first, and the court is not limited in reviewing this decision. For this reason, prosecutors should be careful to give solid reasons even for the first extension of the time limits.

Of course, in cases of corruption or complex financial crimes, it is almost impossible to complete the investigation within 3 months. Thus, without limiting the calculation to a 3-month period, the prosecutor should formulate a plan or strategy of investigative actions to be taken, and this plan should be frequently updated as new developments occur or new information becomes available. From the very beginning, the prosecutor should document each and every action taken during the investigation and the time required to complete each one. If delays occur, the prosecutor should document these along with the reasons for the delay. At the very least, the prosecutor should be able to demonstrate that there has been activity and progress in the investigation, and that any delays have occurred for reasons beyond the control of the prosecutor or the judicial police.

There are several other matters to consider regarding the time limits for investigations:

- The workload of the prosecutor is not a reason for extending investigation time limits.
- Investigation time limits are the same for all types of criminal offenses, which means that the courts will tend to accept time limits in their maximum duration only for more serious criminal offenses.
- In addition to investigation time limits, the prosecutor should also consider pre-detention time limits in cases where the defendant is under detention arrest or home arrest.
- Extension of the time limits should be announced to the defendant and the victim, both of whom are entitled to appeal this decision in court.[39]

3.6. Termination of prosecution

The criminal proceeding terminates upon the case being sent to court for trial or dismissal, whereas in cases when the perpetrator is not identified, the proceeding is suspended. Cases of suspension of the proceedings are explicitly provided for by law.[40]

In order to reach a decision on whether to bring the case to court for trial or dismiss it, the prosecutor should evaluate first whether the evidence is sufficient to obtain a conviction. If the prosecutor has doubts about the credibility or reliability of the witnesses or other evidence, he should not go forward with the case and cannot be faulted if, after careful analysis of the facts and evidence, he still has doubts about the merits of the case. The law allows the injured party (victim) to appeal the decision

39) In their daily practice, prosecutors do not notify the person under investigation about the extension of investigation time limits if the investigation remains confidential and the person being investigated is not aware of it. In such cases, they consider the decision for the extension of time limits a confidential document. However, court practice [in these matters] is not consolidated, but these cases should not become the rule, given that secret investigations should not last endlessly.
40) Articles 24/2, 290, 323, and 328 of the CPC

of the prosecutor to dismiss a case in court.[41] If the court finds the appeal valid, it may order the continuation of the investigation; however, even after such a decision, the prosecutor reserves the right to decide whether to dismiss the case or send it to court.

41) Article 329 of the CPC

WITNESSES[42], INFORMANTS AND WITNESS PROTECTION

1. Witnesses

No case can be successfully investigated or prosecuted without the cooperation and testimony of credible witnesses. Therefore, it is essential that the investigator knows how to deal with and handle witnesses properly and professionally.

A witness is a person who has actual knowledge about certain facts or events that are relevant to a criminal investigation or prosecution. Witnesses may fall into several sub-categories. The witness may be the victim of the crime, meaning he has suffered harm as the result of the criminal actions of another person. The witness may be an "accomplice" or a "justice collaborator," meaning he has knowledge of a crime based on his participation in it.

1.1. Witness interviews and witness control

What is the typical witness like? The answer, of course, is there is no typical witness. Witnesses vary in intelligence and education, gender and cultural background, ability to articulate and ability to recall. Some people have photographic memories and can recount details of events that occurred 5 or 10 years ago;

42) For purposes of this Guidebook, the term "witness" more specifically refers to persons who are willing to testify in official court proceedings, and as a result, are willing to give formal statements to the prosecutor or judicial police. These persons should be distinguished from "informants," who furnish information informally to investigators and are unwilling to furnish a statement or otherwise testify in court.

others can't remember what they did two days ago. Awareness of the limitations of each witness may help the investigator deal with the witness in a professional manner.

The handling of a witness by an investigator requires a little bit of psychology and a great deal of patience. First of all, one must remember that, regardless of background, the witness is a member of the public who the prosecutor's office and police represent and serve. Therefore, the witness should be accorded respect and courtesy.

With respect to persons who are reporting a crime for the first time, the investigator must leave aside other cases and commitments to give the witness ample time to make his report. Whenever possible, the investigator should interview witnesses in a location where there is privacy - without frequent interruptions and the comings and goings of other persons. This may be difficult in offices where space is limited, but the effort should be made. In the absence of an available "interview room," the investigator should consider interviewing the witness away from prosecution or police offices, to ensure privacy and confidentiality. The witness himself may propose a location where he will feel comfortable meeting with an investigator. The investigator should, of course, keep in mind his own safety when accepting an interview location.

With respect to the interview itself, remember that the witness usually is not a professional witness, and that with the exception of "justice collaborators," he is not a criminal. Questions should be asked in a non-accusatory manner. Give the witness an opportunity to express himself without frequent interruptions; however, if the witness is unable to stay focused or strays to unrelated topics, it is appropriate to take control and revert to a direct question and answer format.

On some occasions, it will be apparent fairly quickly that a complaint has no merit, or that the matter is better suited for civil courts or for another agency. In such a situation, the investigator should try to direct the individual to the proper agency or authority, if there is one, rather than just dismissing him.

On other occasions, when it appears that the initial complaint may have merit, the interview should be more thorough, eliciting as many details as possible. From the beginning, the investigator should think in terms of proof at trial, and what evidence or witnesses might exist to corroborate the witness. The investigator should immediately begin compiling a list of persons, physical evidence, documents and the like, which the witness might have in his possession or can legally collect for the investigator. Follow-up meetings or interviews may be necessary to clarify issues and to collect additional information.

In conducting the initial interviews, an important consideration is to determine what interest or motivation the witness has in furnishing information. Is the witness simply an honest citizen or public employee who is performing his duty to report a crime? Does the witness have a grudge or dispute with the alleged offender and is seeking revenge? Is the witness under disciplinary proceedings instituted by the alleged offender? Does the witness hope or expect to receive a reward? Is the witness seeking restitution for harm that the offender caused? Does the witness have a criminal history? A "yes" answer to any of these questions does not necessarily make the complainant a bad witness or his information unreliable. But it is still important to know the motivation, because it could and should be important to a good defense attorney. In addition, false or incomplete information from the witness may cast serious doubt on the truthfulness of other information he has furnished. It is far better to know the truth and deal with it from the beginning than to learn

unpleasant facts after a criminal case has been filed or even during the trial itself. Therefore, the good investigator will explore this topic with the witness at the initial interview and keep it in mind in subsequent interviews with the witness.

1.2. "Testing" the witness

While it is appropriate to treat the witness in a trusting and sympathetic manner, this does not mean that the investigator should trust the witness or his information. The investigator can be skeptical without displaying his skepticism. The investigator should first ask himself whether the information makes sense. Is it logical? Does it fit with the events of the real world? If the story does not make sense, if it is not consistent with how people act in the real world, this is usually because the incident never occurred, or at least not in the way it is described. Remember, if it does not make complete sense now, it is not going to make sense later, and it will certainly not make sense to the judge or judges who will try the case. Good investigators rely upon their powers of intuition and the logic of their own life experiences to determine whether a story makes sense. Further, a good investigator will resist the temptation to believe the witness only because the information fits with something the investigator already thinks is true or because the information is "dynamite."

Next the investigator needs to be alert to discrepancies or inconsistencies in the story. This comes from getting detail after detail. It is like peeling an onion, removing layer after layer until the core is exposed. Usually this requires multiple interviews or sessions with the witness and, when there are no time constraints, a lapse of some time between interviews can be helpful. Discrepancies or inconsistencies become more apparent when a person cannot tell the same story twice or changes important details.

On the other hand, discrepancies or inconsistencies do not compel the conclusion that a witness is lying. It is normal for people over time to forget details or to remember later details that were previously omitted. To extract information from a witness is like squeezing a sponge full of foam. One should squeeze the sponge many times in order to get the soap bubbles out, and even then some of them still remain inside. Often the information extracted depends on the skill and patience of the investigator; so when a witness suddenly "remembers" new and important information, the investigator should factor in the circumstances under which previous information was supplied to determine whether the witness is telling the truth. Of course, concerns of witness reliability decrease when the investigator is able to gather corroborating evidence.

1.3. Witness declarations[43]

The common practice is to document the information furnished by a witness through the taking of a formal statement. The statement must be taken in compliance with the CPC; otherwise it cannot be used in future court proceedings for any purpose. Taking formal or written statements is important for a number of reasons. For example, prior statements of the witness can be used to rebut his trial testimony, if he testifies inconsistently with his prior statement or if he refuses to testify.[44] Such a statement is not evidence by itself, but it may be used to determine the credibility of the witness. It may be considered substantive evidence if it is linked to other evidence that corroborates its truthfulness, or if the witness has been subjected to threats, violence, or promise of money or other benefits in exchange for his refusal to testify or for giving false testimony.[45]

43) In this sub-chapter the term "witness" refers to persons who furnish statements to the judicial police officers or prosecutors during the preliminary investigation stage.
44) Article 362 of the CPC
45) Articles 362 and 363 of the CPC

Additionally, the court may allow the reading of statements obtained during the preliminary investigation when due to unforeseen circumstances, they cannot be repeated.[46] After they are read in court, these statements become evidence. These provisions have been interpreted to allow the court to consider the statements of witnesses who have passed away, have become incapacitated, or have disappeared. More specifically, the reading of statements of an Albanian or foreign citizen residing abroad is permitted if he has been summoned and fails or refuses to appear or to testify, or if he cannot be located despite a search conducted by the judicial police.[47]

Last but not least, if the defendant asks for a summary trial, the prosecutors may use written statements of the witnesses as part of the record/file of the case on which a determination of guilt or innocence will be made.[48]

In conducting a formal interview, the investigator must advise the witness of his legal guarantees. In particular, the witness must be advised that:

- a false statement could lead to criminal prosecution;
- he does not have to furnish information if he might incriminate himself.

Additionally, the date, time, and location of the interrogation must be clearly and accurately stated, and the statement must be signed by the person being questioned and affirmed by the interrogator. Before a formal statement of a witness is taken, especially when he is an important witness, it is highly recommended that the witness be thoroughly interviewed. "Thoroughly" means to take

46) Article 369 of the CPC
47) Article 369/3 of the CPC
48) Article 405 of the CPC

whatever time is necessary to elicit all of the facts and information related to the events that may form the basis of criminal charges and future trial testimony. This could result in multiple sessions with the witness over an extended period of time. Although such information is not given under "under oath," the information should be documented, that is at least one of the investigators should take detailed notes of the interview and then someone, usually a judicial police officer, should prepare a written summary. Even though such summaries may have no evidentiary value, they may be used by the prosecutor for future actions. In particular, the summaries help in preparation for the formal interrogation and also to test the witnesses as they may bring forth weaknesses or inconsistencies in the story.

Other advantages to conducting informal interviews are:

- the speed of obtaining information, if a number of potential witnesses have been identified, and it is important to determine quickly which persons have relevant information;
- the informality may put a nervous or reluctant witness at ease, as opposed to a formal setting, where his information is being recorded;
- the informal interview allows the investigator more time to investigate before recording the final witness' statement in writing;
- the informal interview process allows a witness to correct or modify past statements, without being "locked in or linked to" a formal declaration. This is especially beneficial when witnesses are initially hostile or uncooperative or are suspected of furnishing false information.

1.4. Strategies

Most often witness statements are obtained by judicial police officers/agents. However, nothing prohibits the prosecutor

from conducting the interview, and in cases of significant witnesses, especially ones who could become "collaborators," it is appropriate for the prosecutor to obtain the witness statement along with the officer/agent.

Before conducting the formal interview, the investigator should be familiar with all the facts of the case. At the same, statements should be obtained only after the witness has been interviewed informally. Before beginning the formal interrogation, the investigator should prepare a list of questions that he will ask, or at least write down notes mapping out the questioning. Even though this may seem to be an unnecessary burden, the list of questions or the notes should help the investigator construct his interrogation in an orderly and logical fashion. The net result will be a written statement that will be topic-focused, concise, and easy to read and understand. Also the questions should be clear and well-organized; otherwise, the answers will be unclear and not useful. Moreover, the person who asks the questions should insist on clear answers. This should not be difficult, given that up until this point, the investigator will have spent a considerable amount of time with the witness and will know what is important enough to go into the written statement.

1.5. Audio or videotaped statements

Although uncommon at present, the investigator should consider conducting audio or videotaped interviews of important witnesses and victims. An audio or videotape is a definitive record of what the witness said in his statement. Moreover, the witness cannot later claim coercion, confusion, or the like, when the recording demonstrates that the questioning was done in a calm manner, the investigator was courteous, the witness was relaxed and appeared to understand what was going on, etc. Furthermore, the recording will document what the investiga-

tor said during the interview and may be helpful to rebut claims by a defendant's lawyer that the witness was pushed to testify of received improper benefits in exchange for his cooperation. On the negative side, the recording registers any inappropriate comments or conduct on the part of the investigator; thus, the questioning must be conducted in a professional manner.

The recorded statement has value in several ways. Just like a written statement, it "locks" or links the witness to his testimony. It will be difficult for a witness to later claim or deny something when he previously told the investigator the opposite. Moreover, if he changes his testimony, the witness becomes subject to impeachment. Above all, if the witness changes his testimony and tries to furnish favorable testimony to the defendant, the statement can be used to discredit him and to destroy his credibility as a result of the inconsistencies in his statement. However, for the recorded statement to be useful to the prosecutor, a written transcript of the statement should be prepared. The witness should be afforded the opportunity to review the transcript and sign or dispute its accuracy. If these steps are followed and the statements become part of the case file, then they may be used for all purposes referenced above. Without a signed transcript, it will be difficult to use the statement given during preliminary investigations for rebutting the witness' own testimony or for any other purpose, although it is possible that a court may accept the actual recorded tape as evidence.[49]

Also, a transcript of statements provides the prosecutor a quick and easy roadmap of what the witness is expected to testify at trial, without the prosecutor having to listen to possibly lengthy recordings of statements given to the judicial police officer/agent. The transcript can also be used by the witness to refresh his memory before he testifies in court. Certainly, the written

49) Articles 151/3 and 191 of the CPC

transcript of the statements can be used to rebut the testimony if necessary.

If the statements are lengthy, the investigator may prepare a summary or index of the transcript with key answers indexed by page. The prosecutor will appear unprepared if, during the hearing, he needs to cite something from the statements and is unable to find it.

Caveat: Some witnesses might be willing to talk freely to an investigator but would "freeze up" if a recording device were to appear. Also, it may take a while for a witness to be comfortable with the investigator, and his initial answers may not be clear, or he may evade the question. Therefore, it is highly recommended that initial interviews be conducted without any recording devices. Only after the witness has been fully debriefed, and the investigator and the witness have established a good relationship, should the investigator ask the witness for permission to take a recorded statement. If the witness agrees, the investigator can repeat his interview with the recording device, but in a more concise way. If the witness declines to be recorded, the investigator should prepare minutes of obtaining the statement, which contain what was verbally declared by the witness.

Caution: Make sure the recording equipment is in working order. Do a short test and check quality. Make sure there is a sufficient power source (batteries) and tape (or memory) for all the possible duration of the statements. If the recording is interrupted for any reason, say for a bathroom break, the investigator should document that in the recording by announcing the reasons for the recorder being turned on and off and should also have the witness verify the reason for the recorder to be turned off. In other words, measures should be taken to protect the recording against later claims that it was manipulated or certain portions were deleted.

1.6. Documenting statements of potential defense witnesses

During the course of the investigation, the investigator will encounter witnesses who furnish information that may be favorable to the defendant. The witness may be a friend or family member of the defendant, or he may have some other motivation to assist him. The witness could also be telling the truth, meaning the prosecutor's case has some serious flaws. The investigator should not hesitate to take a detailed statement from such a witness. The defendant is entitled to examine all the evidence, and if the investigation team fails to document evidence that hurts the prosecution, but favors the defendant, the investigators may seem unethical and dishonest.

On the other hand, a detailed statement from a potential defense witness may actually be helpful to the prosecution. The statement may reveal flaws or inaccuracies of the witness' testimony which can be refuted by other witnesses or evidence. For example, a witness who purports to furnish an alibi for the defendant may trip up on important details relating to the time or location. Knowing the defendant's version of the event in advance, and being able to refute it before it he presents it to court, presents a tremendous advantage for the prosecution. Also, the statement of this witness may serve in trial to refute his testimony, if he changes his statement. Undoubtedly, this has a negative aspect as well, as the defendant may try to use the statement as evidence if the witness disappears or refuses to testify.

The investigator should also try to obtain formal statements from persons close to the defendant who declare that they are not aware of the situation. At first impression, it may seem like a waste of time to obtain statements from persons who claim to have no knowledge of events. However, if the investigator suspects that someone close to the subject may appear later as a

defense witness, it would be wise to formally "lock in" his initial statement of lack of knowledge. This statement may serve to "neutralize" and refute his subsequent testimony in court as a defense witness, if he suddenly remembers information that exculpates the defendant.

1.7. Corroborating the witness

Corroboration is the key to any successful prosecution. No matter how much "information" a witness brings to the courtroom, the more his testimony is corroborated, the more likely the judicial panel is to believe him. On the other hand, the panel of judges will have a hard time convicting a defendant based only on uncorroborated testimony, no matter how honest or sincere the witness appears. As stated earlier, the investigator should be thinking from the initial stages of the investigation about other witnesses or evidence that may exist to support this witness. The investigator should immediately begin compiling a list of persons, physical evidence, documents and the like which may exist. Some of the questions that the investigator may ask the witness in the early stages of the investigation are:

- Has the witness discussed his information with any other persons? If so, who, and under what circumstances? (An interview with these other persons may establish whether there are inconsistencies in the declaration of the witness, but it may also reveal details the witness has forgotten or has failed to reveal to investigators.)

- Is the witness aware of other witnesses who might be willing to cooperate? If so, the investigator should interview those people. However, he should use caution in approaching people whose loyalties are unknown or who seem suspicious. Contact with such persons may expose the existence

of the investigation and/or the identity of the collaborating witness. Also, the initial witness should be requested not to discuss the case with other potential witnesses so as not to influence their testimony.

- Does the witness have documents or other evidence to support his allegations? Documents to consider are business records, telephone bills (which reflect calls made and received), daily planners and calendars, handwritten or typed notes, bank or financial transaction records, credit card records, receipts of purchases, passports and travel documents or records, computers (that may still contain emails, documents or relevant software programs), telephones (which may still contain emails or sms), photographs or videos from cameras, cell phones, or surveillance equipment.

- Does the witness have knowledge of documents or evidence existing elsewhere? If so, what is the basis for that knowledge and how recently has he seen these documents/evidence? If there is a reasonable possibility that such evidence is still present, the investigator should ask the court for a search warrant.

- Has the witness made any recordings of conversations with the person subject to investigation? The witness may have made such recordings, but is reluctant to reveal this out of fear of having broken the law through such action.[50]

1.8. Uncooperative witness

Dealing with a victim or witness who does not want to cooperate carries a different set of concerns. The victim or witness has chosen not to cooperate for a reason, and the investigator needs

50) Article 121 of the CC

to determine the reason and, if possible, overcome the witness' objections. The reasons that make the witness or victim uncooperative could include: 1) safety concerns, 2) fear of scandal, 3) apathy and distrust of authority, and 4) concern of incriminating oneself and others.

1.8.1. Safety concerns

The victim or witness may fear physical harm to himself or family members or economic harm or retaliation, and the investigative team must develop a strategy to alleviate these fears. Fortunately, actual physical harm or the threat of physical harm in corruption or financial crimes is not common because offenders generally come from different professions which are not linked to violent crime. However, violent individuals can be involved in some categories of economic crime, such as credit card fraud, credit fraud, terrorism financing and money laundering. A witness' fear of physical harm should be taken seriously by the investigator, and the investigator should express to the victim or witness that he takes it seriously. Thereafter, the investigative team must develop a plan or strategy to safeguard the victim or the witness.

1.8.2. Fear of scandal

The witness may be afraid of having his or her name publicly disclosed as a cooperating witness. Nobody likes to be branded a cooperating witness. Having one's name associated with a high-visibility case, especially a corruption case, does not enhance one's reputation in legitimate business or government circles. This fear is obviously greatest when the subjects of the investigation are high-level public officials, and the case is likely to receive intense attention from the press.

Witnesses in corruption cases are also aware of the fact that visibility in the press can lead to all sorts of other unwanted scrutiny from licensing authorities, regulatory boards, auditors and even former spouses and business partners.

It is this fear of scandal and other consequences associated with being a witness in a corruption case that often causes a potential witness to feign ignorance, or worse, lie to the investigators or commit perjury. A cooperating witness runs a significant risk of having his name disclosed to the public. Sometimes such witnesses commit perjury, despite the risks, as it is preferable to the potential consequences of truthful cooperation with justice, which include humiliation, ridicule, scandal, intimidation, and financial ruin.

One successful technique for obtaining the cooperation of reluctant witnesses (especially when the fear is publicity and retaliation) is to explain to the witness that in the present state of the evidence against the subject, the latter will claim to be innocent and that the witness will be called to testify in the public court hearing. Furthermore, explain to him that the only possible way to avoid testifying in court would be if the defendant asks the court for a summary trial. On the other hand, the defendant could be forced to ask for a summary trial if the evidence against him is complete, irrefutable and without any disputes and this can be achieved only if the witness is convinced to cooperate with the investigation, maybe by recording a phone call or a conversation with the defendant. The point is to make the witness believe that the only way to avoid testifying publicly is to help the authorities gather sufficient evidence to induce a guilty plea.

1.8.3. Apathy and distrust

Apathy and distrust towards law enforcement officials are the results of perceived ineffectiveness of the criminal justice sys-

tem. This is a "disease" that will not be cured overnight, so witness' resistance may be encountered frequently in criminal investigations.

It is important for investigators to perform their daily work with conviction to demonstrate that they aim to establish high standards. They should acquire a reputation of being tough, knowledgeable, just, and with integrity. It may be necessary for them to educate the public, sometimes even the judges, that "business as usual" is no longer an option. By attacking the power structure, the investigators will demonstrate that they are not afraid to go after those who are perceived as untouchable.

The investigator must be aggressive and relentless and should be perceived as such. Aggressive investigators will use all tools legally available to pursue investigations, from undercover techniques to electronic surveillance and search warrants. Being relentless means pursuing leads and tracking down witnesses, interviewing and re-interviewing them as many times as necessary to get to the bottom of the matter. The only way to break the code of silence is to keep pursuing the criminals. Let them know that you are not going away, and do not take "no" for an answer.

The investigator should display professionalism and competence in his appearance and conduct. The investigator should be professionally dressed when interviewing a witness. As an example, the FBI in the United States has created a reputation for professionalism merely by making it mandatory for agents to wear a jacket and tie in public. The dress signifies that the investigator is a member of an elite investigative unit.

The investigator carries the appearance of competence into the interview process. We already talked about the manner of con-

ducting a professional interview in an interview room with no distractions and interruptions. In reality, however, many contacts with a witness are much more informal. The investigator must maintain the same air of professional conduct whether at his place of business, at someone's home, or on the street. The manner in which a prospective witness is spoken to and treated can mean the difference between having that person on board or not. In addition to being professional and polite to the witness, the investigator must be polite to family members and co-workers of the witness. Nothing makes a witness refuse to cooperate more than an investigator going to his house or work place and being rude to his family, friends, or coworkers.

An investigator demonstrates competence by appearing to be organized and knowledgeable. If an investigator has background or experience in a particular area related to the investigation, or is able to conduct some research before interviewing the witness, he will be better prepared to ask appropriate questions. However, if an investigator tends to be disorganized or keeps a messy office, it would be best not to meet the witness in that setting.

For people to be willing to cooperate with the state authorities, they must trust them. It is very difficult for people to achieve this trust if they do not believe their private lives and other interests will be protected properly. The investigator is the person who must act fairly and cooperatively; he must demonstrate his ability to keep a secret. In practice, this means not making promises of nondisclosure that you cannot keep. It means controlling information leaks. In specific cases, it means that you should prove to witnesses that you are willing and able to alter the course of an investigation simply to accommodate their concerns. Sometimes, this can simply mean delaying some procedures, such as the interrogation of the defendant or the announcement of charges.

Also, appealing to a person's sense of responsibility and civic duty may have influence. Some people do not have strong feelings against prosecutors or police, but they simply do not want to get involved. Their objections may be overcome by stressing the importance of the role they play, making them feel important, convincing them that they can "make a difference," and generally showing appreciation for their contribution. In some cases, it may be possible to persuade the witness that somebody has to stand up to corruption, and if they shrink from the task because of fear or intimidation, the evil will continue to flourish and plague them and their children and their children's children. At the same time, the investigator must keep a positive spin on the investigation or case and not display pessimism or complain about weaknesses or problems in front of the witness. No one wants to board a "sinking ship."

Part of professionalism is honesty. Deal with the witness in an honest fashion. This does not mean the investigator is obligated to answer all witness questions, but at least be honest about it. When there is information that cannot be revealed, say so. And when the investigator tells the witness he will do something or look into something, he should do it. The investigator should also keep the witness informed of significant events, such as when formal charges have been filed or when a trial is beginning.

1.8.4. Self-incrimination

A witness who fears incriminating himself, family members, or close friends, with no corresponding benefit, is unlikely to furnish truthful information. The witness may have had some personal involvement in illegal activities and may be afraid of coming forward to cooperate for fear that if he turns on others, his own criminal conduct will be exposed. This sort of information can surface in several ways during a criminal investigation and

during the work on a case. The witness may have to reveal this information to explain circumstances or facts related to the investigation: the investigators may uncover this information by following up on previous information furnished by the witness; the subject may turn against the witness in order to discredit him or to take revenge; or facts the witness has not revealed to investigators may surface during the investigation of the case, especially during cross examination by the defense attorney, who is fully aware, through his client, of the witness' prior acts.

If the investigator suspects that the prospective witness may have been involved in a crime, the available options are limited. First, if the witness begins to furnish self-incriminating information, the investigator is obligated to interrupt the questioning and advise the witness that he has the right not to incriminate himself.[51] This may result in a delay while the witness obtains an attorney or puts an end to his cooperation altogether. On the other hand, if the investigator suspects that the witness is involved in criminal activity, but the witness refuses to acknowledge it, the investigator takes a dangerous chance in depending on such a witness at all.

What can the prosecutor do in cases when the witness reports a criminal offense and at the same time admits to criminal conduct himself? If the criminal conduct of the witness is minor, compared to that of the subject, the prosecutor should consider whether independent evidence exists, apart from the testimony furnished by the witness, to bring charges against the witness. For example, assume that a witness comes to the police and reports that his treating doctor solicited him to pay money in exchange for his medical treatment. In the course of the interview, the witness admits that he previously paid money to the doctor. But, now that the doctor wants more money, the witness has

51) Article 37 of the CPC

decided to report the doctor. The investigator may be faced with the dilemma of pursuing an investigation of the doctor for passive corruption, while deciding whether to charge the witness with a criminal offense for active corruption. Even assuming that the prosecutor feels compelled to register a case against the witness,[52] the prosecutor is not required to file a case against the witness in court. After conducting his investigation (which often will include the cooperation of the witness), the prosecutor may conclude that the evidence gathered against the witness, based solely on the witness' own words, is insufficient to prove the criminal offense and as a result he will dismiss the case.[53]

In cases when the cooperating witness has been involved in serious criminal conduct, for example as a collaborator of the defendant, it will be difficult, if not impossible, to overlook incriminating evidence against him. This is especially true since further investigation against the subject of the investigation will likely lead to evidence against the cooperating witness as well. However, there are still benefits the collaborator can obtain by testifying. For example, he may be treated as a "collaborator of justice" if he furnishes full information about the facts and circumstances which are fundamental evidence for the discovery, investigation, trial, and prevention of serious crimes.[54] As a justice collaborator, he must enter into a collaboration agreement with the prosecution which will spell out his obligation to testify completely and truthfully. If the court later finds that the collaborator fulfilled his end of the bargain as per the agreement, the court has the authority to reduce the collaborator's sentence or suspend it altogether.[55]

52) Article 287 of the CPC
53) Articles 24/2, 327/2 and 328/1/dh of the CPC
54) Article 37/a of the CPC. In this provision, the term "serious crimes" is wider in meaning than the definition of serious crimes in the law "On the organization and functioning of the Serious Crimes Court."
55) Article 28/7 of the CC

Moreover, a witness who is engaged in active corruption may benefit more directly from the exemption from serving a sentence[56] since it was his denunciation which led to the criminal charges against the public official.

Additionally, even if a witness does not qualify as a "collaborator of justice," he may be eligible for a more lenient sentence due to a series of mitigating circumstances which the court might consider: showing deep repentance; turning himself in to the competent authorities; and taking steps to eliminate or decrease the consequences of his conduct.[57] Also the court may sentence the collaborator below the minimum or impose a lighter sentence when there are several mitigating circumstances, and the crime and the offender represent a low level of risk. All these elements may be demonstrated by a person who willingly and truthfully testifies against other accomplices.[58] Certainly, the recommendation of the prosecutor will have considerable influence in acquiring such benefits.

1.8.5. Strategies for dealing with uncooperative witnesses

The following are some suggested strategies in dealing with uncooperative or reluctant witnesses:

- ***Try to persuade the witness.*** If the witness is concerned about financial retaliation, there is little that you can do. You cannot promise to protect a person's business or reputation from ruin by vengeful competitors or public officials. The most you can do in this situation is to argue that by cooperating, the witness might afford himself the best protection available. By getting out front in the public eye, he may have

56) Article 245/2 of the CC
57) Article 48 of the CC
58) Article 53 of the CC

made himself prone to attacks. At the same time, however, when he is attacked, the motive and identity of those responsible will be more difficult to conceal. This may create a disincentive for the witness' enemies to launch so obvious a retaliatory attack. Investigative agencies sometimes use this same approach employ in dealing with alleged death threats to witnesses. They interview the persons who allegedly made the threat or are supposed to make the hit and inform them that the state authorities know they have a motive and intend to harm the witness. Further, if anything happens to the witness they will be the primary suspects.

- ***Tighten the "screws."*** Obviously there will be many instances where simply being a nice and polite investigator is ineffective. This might be the time to remind the witness of his legal obligations. Under the Criminal Code, witnesses have a legal duty to disclose a crime and failure to do so constitutes a criminal offense.[59] The witness should be advised that he may be accused of withholding evidence. If he continues to refuse, the witness should be made aware of his rights and advised to get an attorney because at this point, the witness is now a subject. Often, once an attorney becomes involved, the investigator manages to secure the cooperation of the witness through the attorney.

- ***Take a statement from the witness***. When a witness is willing to be interviewed but is untruthful, the investigator could take a statement in writing to document those facts which the investigator believes to be untrue. The investigator then conducts an investigation of those facts and if he can establish the falsity, the witness is summoned again and confronted with the results of the investigation. At this point, the witness should be informed that he may face criminal charg-

59) Article 300 of the CC

es for furnishing false information or refusal to testify,[60] and he should be advised of his rights, especially the right to have an attorney. Again, with the attorney's involvement, the cooperation of the witness may be secured. However, the serious disadvantage of this strategy is that the initial statement obtained remains in the file. If the witness ultimately agrees to cooperate and changes his testimony, the first statement may be used to impeach his later testimony.

- ***Create "leverage."*** If there is evidence suggesting that a witness has possible criminal liability, either in the present matter or some other matter, the investigator may try to gather evidence against him as well, while he is working against the primary suspect. The belief that he might face criminal charges may motivate the witness to cooperate to mitigate his own liability. One way of using this strategy involves a carefully orchestrated confrontation during which the witness is invited to the prosecutor's office and confronted with evidence gathered against him, and then given the opportunity to cooperate in the hope of lessening his sentence. This technique should only be used near the end of an investigation, as the witness may not flip, but instead may reveal the existence of the investigation to other subjects.

1.9. Victims

Special considerations apply to victims of a crime. In fact, neither the CPC nor any other piece of criminal legislation provides any definition of the term "*victim of crime*."[61] In legal jargon, the term "victim" is generally used to indicate a person whose death has been caused by a criminal offense. Nevertheless, Al-

60) Articles 305/a and 305/b of the CC

61) CPC, however, uses the term "harmed by the criminal offense" and in specific cases "the injured party accuser," but without providing a definition for these terms.

bania has ratified relevant international conventions, such as the UN Convention Against Transnational Organized Crime, (Palermo Convention) and other UN documents, all of which are binding for Albania and can be directly applied as part of internal regulations. These conventions also may serve as a reference for governmental or nongovernmental agencies involved in criminal law enforcement. One reference is the definition of victim given by the UN General Assembly Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power:

"...1."Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. 3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, color, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability..."

The prosecutor should remember that he represents not only the state, but also the people who have been victimized by the defendant's conduct. It is he who stands up in the courtroom and seeks justice for the victim. Often he completes this task alone. Obtaining justice for the victim can be one of the most

rewarding aspects of a prosecutor's job. The type of relationship established between the prosecutor and the victim may also determine the outcome of the case. It perhaps is worth repeating that the victim should not be revictimized by being treated in an inappropriate fashion. As the injured party, the victim has specific rights which should be respected.

1.9.1. Rules to consider

- Treat the victim with respect. When victims and witnesses are treated with respect, the likelihood of a positive outcome in the case improves. Additionally, the support provided by the case investigators may help a victim overcome emotional distress.

- Keep the victim informed of significant developments in the case investigation if it does not compromise the investigation. If you have decided to drop or dismiss a case, explain this to the victim in person when possible.

- Be honest with the victim. Honesty builds trust and trust leads to cooperation.

- Try to assist the victim in finding social services that may be helpful, for example psychological or medical services. If there is no state agency or funding for such services, then the witness may contact NGOs which could provide assistance in some cases.[62]

- Consider the victim's safety and security. The victim and all witnesses have the right to be free from harassment or fear. Consider whether it is necessary to provide an escort for the

62) Annex 3 "List of some organizations that offer assistance for the victims of crime, especially women"

victim when he appears in the courthouse. In any case, when the victim appears in court to testify, it is a good idea for him to wait in a secure place so as not to risk an encounter with the defendant or his family members.

- Give the victim the dates of relevant court proceedings, especially when he may need to testify, so he will have sufficient advance notice. Keep the victim advised regarding the date when a verdict will be rendered, as the victim has a right to be present if he wishes. In cases involving a large number of victims, for example a pyramid scheme, victim notification may prove to be difficult to achieve, but in the future it may be possible to give notice through email or through the internet (e.g., creating a dedicated website for such notifications).

- Consider asking for punishment of the defendant that may benefit the victim. For example, rather than seeking a 6 year prison sentence, you might ask for 4 years, if the defendant compensates the victim for his loss.

- Seek the forfeiture of assets of the defendant as a mechanism to guarantee restitution for the victims.[63]

2. Informants

Informants are an important tool for investigators, especially for the judicial police. However, informants are frequently criminals. Their motive in cooperating may be revenge, financial gain (such as a payment or reward) or some other personal benefit, such as a reduced sentence for their own crimes. Some informants have direct knowledge of the crime, making them witnesses. However, they may seek to furnish information con-

63) Article 270 of the CPC

fidentially, not wanting to jeopardize themselves or their careers by coming forward publicly. For this reason, this type of informant (often called a "confidential informant" or "CI") is not expected to testify in court, so all information obtained by him must be corroborated in other way.

Although the confidentiality of all witnesses should be preserved, this is especially critical with confidential informants. The names of CIs should be kept out of investigative reports and information, and knowledge of their existence and identity should be limited to a small group of people. To the extent possible, this information should be available only to those who absolutely need to know. In order to facilitate the use of CIs by judicial police, certain procedures should be defined, which may include:

- create and use a written agreement or memorandum of understanding, to be signed by the respective structure and the CI;[64]
- establish a system of either code words or names to replace informant names in acts that may be included in the files, in order to prevent accidental disclosure of their identity;
- limit the number of employees of the respective agency who have access to the files with CIs' data;
- always routinely audit financial records associated with CIs;
- always have a third party present (officer/other agent) if you make payments to CIs, and always obtain receipts, which should be saved according to the previously approved procedure. This is necessary to ensure that an officer/agent of the judicial police is not perceived as being involved in corrupt conduct at the time when the payment is made, or is not accused of engaging in such conduct at a later time;
- the managers of the respective structure should periodically review the CI files as an internal audit protection measure;

64) Annex 4: Collaboration Agreement with Confidential Informant

- do not make any promises to the CI (or any witness) that are not approved by the managers of the structure and the lead prosecutor. Any agreements or promises should be put in writing to protect the integrity of the investigator and the investigative process.

2.1. Proactive use of CIs by the judicial police

The active use of CIs, that is having CIs conduct actions at the request and under the supervision of judicial police officers, is a valuable investigative tool but must be used cautiously. Informants are often indispensable in providing detailed information about crimes under investigation. They may have already earned the trust of the person subject to investigation, and therefore, can speak freely, converse with them, and secretly record them. They can also make the necessary introductions between the undercover agent and the subject. If the decision is made to use undercover agents, the investigators must carefully monitor the activities of informants involved in the undercover activities.

Informants do not have the necessary knowledge to detect crimes provided for in the law. Unlike investigators, they are rarely motivated to fight crime and do right. Their character is often suspicious, and they lack the discipline of investigators. Before there is any covert investigation at all, the plan should rigorously be examined to understand whether an undercover agent can obtain the same evidence that the informant is likely to gather. Often one hears that no investigator can penetrate a criminal organization as effectively as the informant who is already part of that world. In other countries, agents have been able to gather evidence while undercover in parliaments and courthouses. With prior planning and the right introductions, a good agent should be fully able to supplant the informant.

If the investigator determines that the use of an informant is the only way to penetrate ongoing criminal activity, he should consider a plan in order to remove the informant fully from the scene. That can be accomplished by using the informant to introduce an undercover agent to the subject.[65] The undercover agent may be introduced as a business associate, brother-in-law, etc., who is assisting the informant or acting as the financial agent (money man). Over time, as the undercover agent gains the trust of the subject of investigation, the informant should be used less and less with the aim of eliminating the informant's involvement altogether. The goal of these operations is to have a credible witness who can testify at trial. An undercover law enforcement agent will usually have more credibility than a witness with a criminal past.

As long as an informant is in the picture and active, the investigators must maintain tight control over him. The informant must receive clear instructions on what he can and cannot do, and what he should or should not say. Such instructions should be provided in writing as well as verbally. The informant should sign the document and acknowledge reading and understanding it. The investigator must personally explain the instructions to the informant and not assign this task to others. Before any meetings or phone conversations with the subject, the investigator should meet with the informant and go over the scenario again with him, even rehearse it if necessary. After the meeting or the phone call, the investigator should review what has happened and if the opportunity exists listen to the recordings. The investigator should conduct an analysis of the meeting or conversation with the informant in order to draw some conclusions as to what went well and what went wrong. This way the CI can receive better instruction, and the undercover scenario can be strengthened.

65) Article 294/b of the CPC

The investigator should also control the CI by minimizing the occasions in which the informant is the sole witness to important events. One of the advantages of using the undercover technique is the opportunity granted to state authorities to structure and control investigative encounters that produce evidence. This advantage should be maximized by making sure that the undercover agent, as well as the informant, is a witness to important conversations with the subject. If this is not possible, the conversations between the informant and the subject should be audio and/or videotaped. One should remember that uncorroborated evidence given by an informant is unpersuasive to a judging panel.

The CI should be under strict instructions not to initiate any contact with the persons under investigation, without the prior knowledge and consent of the investigator. This may be a problem for CIs who have a close relationship with a particular subject of investigation who may call or drop in unannounced. Therefore, the investigator should equip the informant with the means to corroborate unplanned meetings, e.g. a tape recorder and sufficient tapes. Of course, the required authorizations from the prosecutor or the court should have been granted in advance.

If it is not feasible for the CI to record unplanned meetings with the subject, he should be instructed to report these contacts as soon as possible, and the investigator should obtain his statement as quickly as possible. Based on these statements, the investigator should prepare an investigative report summarizing the contact. Such reports help if the defendant later accuses the prosecutor's office of failure to record, failure of the recording, or later loss or accidental destruction of the recording.

We would like to reemphasize that the CI should be instructed and authorized to record all telephone calls and all conversa-

tions with the subject. Failure to do so could lead to an accusation by the defendant or his attorney that the CI was "selective" and failed to record exculpatory conversations. Additionally, there should be safeguards in place to protect against a recording being altered or erased. The recordings should be given to the investigator as soon as possible. Copies of recordings should be made, and the original stored in a safe place. Use only copies of the recording for making transcriptions of conversations or other purposes. The originals should be used as little as possible in order to avoid damage.

The initial encounter between informant, undercover agent, and the subject is critical to rebut claims of entrapment. Entrapment is the process where a police officer authorizes the informant to intervene in such a manner, without which, the subject would not have committed the crime for which he is being investigated. The essence of entrapment is that the idea to commit the crime did not originate with the criminal but with the investigator/informant. A judge, who suspects this to be the case, will not look kindly on the prosecutor's case, possibly viewing the state, not the defendant, as the truly culpable party. The prosecutor must demonstrate that the authorities had substantial information that the subject was engaged in the crime prior to the encounter.

All of these precautions help discipline the investigative team to stay focused on corroborating the expected testimony by the informant.

You should control the informant by keeping track of what he is doing when no investigator is with him. Under normal circumstances, suspicions about members of your investigative team would be an indication of serious trouble, but in the case of informants, their skill at treachery is precisely what makes them

valuable for the investigation. Therefore, you should make it a rule to be suspicious of your informant even if (or especially if) you grow fond of him personally. In this regard, the investigator should NEVER socialize with informants, become their friend, or accept ANY type of gift or favor from them. By the same token, the investigator should not give gifts or other benefits or do favors for informants, unless it is part of a written agreement and otherwise documented in police reports.[66]

Prior to sending the informant out for action, you should plan how you will keep track of his activities when he does not believe you are watching. One way may be to obtain his telephone call records to track his outgoing calls. On other occasions, spot surveillances may be appropriate to see with whom he meets. Such measures enable you to understand whether the informant is double dealing with the subject, or whether he is using the operations as a cover to commit other crimes. Do not tell the informant that you are checking up on him in this manner.

3. Witness protection

3.1. General strategies

Put very simply, witnesses must be protected from threats and danger. The level of protection provided will vary depending on the nature and extent of the individual's cooperation with law enforcement and the degree of his exposure to risk. Many may require little or no protection after reporting acts of petty corruption. Others, unfortunately, may need major protection. The most cost-effective way of protecting someone is to keep the identity of the witness confidential for as long as possible. However, there might be a need for the flip side of the coin that is to

66) This does not mean that investigators cannot reimburse a CI for expenses he incurs or buy him a coffee or meal if they are working together during a meal time.

say to place him into some type of Witness Protection Program. Witness Protection is offered in several different forms: providing financial assistance; providing a temporary residence; permanent relocation; and the establishment of new identities for the witness and his family members.

Relocation of the witness causes great stress and personal costs for him. Therefore, it is necessary to complete a psychological assessment of the witness and immediate family members, if any, to determine whether they are capable of withstanding the pressures of a complete change in lifestyle. Witnesses, in spite of personal danger, sometimes return to past locations because of their inability to cope with change. On the other hand, some witnesses adapt easily to a new life and identity, and cope successfully with the Witness Protection Program.

Effective witness protection does not always require relocation. Some witnesses may only need a police escort to court or a guard placed near their residence. When it is necessary to move a witness to another location, but he can retain his identity safely, the investigator can help the witness to contact public or private social services which might facilitate temporary housing or employment. It might also be necessary for imprisoned witnesses are kept separately from the other inmates.

Any protection methods adopted should be retained during all stages of a criminal proceeding. Generally, critical periods for the witness are the arrest of the defendant and the court hearing. Once a conviction has been rendered, the threat usually diminishes, but not always. After conviction, any attack on the witness would clearly be revenge rather than an attempt to prevent the witness from testifying.

Working with witnesses requires special skills, and the investigator should expect to encounter difficulties. Some witnesses attempt to disrupt the overall investigation strategy simply to further their own personal goals, since the cooperation of the witness is often motivated by personal interests. Sometimes, the identity of the CI cannot be kept confidential, thus breaking the promise made by the investigator. The witness may also provide false information or exaggerate facts after understanding that the investigator is relying on his truthfulness.

3.2. Special strategies

- The investigator should give the victim/witness an honest assessment of the risks he may face. In many instances, the investigator should assure the victim that there is little risk. He may cite his long experience and state how infrequently there have been any attacks against witnesses, emphasizing that threats and retaliation are separate crimes which would only worsen the position of the defendant. The investigator should inform the witness that he or another person from the respective agency will be available at all times to address any questions or to take actions on his concerns. Of course, this promise must be met.

- Anticipate threats before they actually occur, but be prepared to respond immediately at any time. Always do a threat assessment for the witness, and ask him whether he is afraid of any acts of others.

- Aggressively investigate any threat toward a witness, and do not allow him to feel scared. For example, if there is reason to believe that economic retaliation might be taken against a witness, inform his employer/supervisor that any action regarding his work relationship would be investigated as a

criminal offense.[67] Economic retaliation is certainly a legitimate concern which the investigator should address immediately with the witness' employer.

- It might be helpful to obtain a copy of the witness' personnel file from his employer. The investigator should then document and protect the information contained in the file to ensure against later manipulation of these documents. On the other hand, if the personnel file reveals a poor work history, this should be considered when evaluating the witness' credibility.

- The investigator should keep the witness informed about the criminal investigation and prosecution process, even if only to instill confidence in the witness that he has not been abandoned and to allay fear and apprehension.

- The investigation team should keep a witness' identity confidential for as long as possible. To accomplish this task, delay any actions that bring attention to the witness. Obviously, this will not be possible after the case is filed in court, unless the witness is in the Witness Protection Program, since detailed evidence against the defendant will be in the court file.[68]

- If there is reason to believe the witness is at risk, the investigation team must draft an action plan. For mild to moderate threat situations, protecting the witness' residence should be considered, for example by increasing the number of police patrol cars in the area or calling and paying unexpected visits at the residence. The witness should be given the phone numbers of an investigator or other person he can call in

67) Articles 311, 312/a of the CPC
68) Articles 12/a, 12/ç and 19 of the Law on the Protection of Witnesses and Justice Collaborators

the event of emergency. Again, it should be emphasized that fear is based on a perception of possible harm, and attention given to the witness by the investigator will lessen this fear.

- If by now there have been real threats, the investigation team must consider temporary housing or relocation of the witness. In some cases, temporary relocation to a hotel or to the home of a family member or friend out of town addresses the issue. In extreme cases, the investigator must consider the possibility of placing the witness in the Witness Protection Program.

3.3. Witness Protection Program

On 10/22/09, Law No. 10 173, "On the protection of witnesses and justice collaborators," was approved. This law superseded Law No. 9205, dated 03/15/2004, the original Witness Protection law. The 2004 law only allowed for protection of witnesses in cases of serious crimes, that is criminal offenses under the competencies of the Serious Crimes Courts. Under the new law, the scope of the protection program has been extended to cover all crimes for which the offenders face a minimum sentence of 4 years.[69]

The Witness Protection Program represents the last tool for obtaining witness testimony in a criminal proceeding. For this reason, one of the conditions for admission into the program is the threat of danger to the life and health of the person due to his cooperation with the prosecution.

The essence of the witness protection institution is to protect persons who assist justice by testifying in a public hearing. The

69) Annex 3: List of economic crimes for which the inclusion of witnesses in the Witness Protection Program is permitted.

information, statements, and the assistance given during the process are valuable; however, the witnesses who provide this assistance may be protected in ways that are less costly.

The request for admission to the program is filed by the Prosecutor General to the Directorate for Protection of Witnesses and Justice Collaborators, a body established within the State Police for the enforcement of the Witness Protection Program. Upon receipt of the application, the Directorate will conduct an assessment of the person, including physical and psychological evaluations, to determine whether he is an appropriate candidate for the program. The request is reviewed by the Commission for the Assessment of the Protection Program for Justice Witnesses and Collaborators, which is chaired by the Deputy Minister of Interior and composed of the Director of the Directorate, as well as a judge, prosecutor, and a judicial police officer.

In addition to the person who testifies, close relatives, including family members, other relatives related by blood or marriage, and close friends or business associates may be admitted to the program if their lives are in danger. Protective measures for those in the program vary from professional training to arranging for change of identity and relocation outside the country. Because the program is very costly, it is used in only the most serious cases, which usually require a change of identity of the witness and relocation outside the country.

The persons admitted to the program must sign a protection agreement which spells out their obligations during the program. The obligations may vary according to each situation, but each agreement includes a set of mandatory obligations: obligation to reveal all past criminal conduct; to make a full financial disclosure; to cooperate fully with the prosecution authorities; to notify the program of any changes in living situation; to avoid

any contact with past acquaintances; and to maintain confidentiality of the program.

As a rule, the protection program lasts throughout the life of the protected person; however, it may be terminated in advance if the risk ceases to exist or the protected person violates his obligations by endangering himself and the program.

Annex 4: ***Minutes of "Obtaining statements from persons who are familiar with the circumstances of the criminal offense***

Annex 5: ***List of NGOs which provide assistance services for victims of crime***

Annex 6: ***Agreement of Collaboration with IC***

Annex 7: ***List of criminal offenses of economic nature which permit the inclusion of witnesses in the protection program***

SPECIAL INVESTIGATIVE TECHNIQUES

1. Electronic surveillance

Electronic surveillance refers to the interception of communications of any kind of a person or a telephone number, through the telephone, fax, computer, or any other means; the secret interception of conversations in private places through technical means; the surveillance/interception by audio and video in private and public places; the recording of incoming and outgoing telephone calls; and the use of tracking equipment to determine location.[70] Electronic surveillance in private places and the recording of incoming and outgoing calls is permitted only in a criminal case (from the registration of the case until it is sent to trial or it is dismissed) of intentional crimes with a punishment of no less than 7 years, and also for criminal charges of insult and threat committed by means of telecommunication.[71] Otherwise, photographic or video surveillance of public places, and the use of tracking devices to determine location is permitted when the crime under investigation carries a sentence of no less than two years.[72]

1.1. Who may be intercepted?

Electronic surveillance may be ordered against:
- the person under investigation for a criminal offense;
- the person believed to be communicating with the subject;

70) Article 221/1 of the CPC
71) Article 221/1 of the CPC
72) Article 221/2 of the CPC

- the person who is taking part in transactions with the subject;
- the person whose surveillance may lead to the discovery of the location or identity of the subject.[73]

1.2. Procedure for obtaining approval for electronic interception

To conduct an electronic interception of communications, or of persons in private places, court authorization is required. The prosecutor may authorize photographic or video surveillance in public places, the interception of incoming and outgoing calls, the placing of tracking equipment, and the interception of private communication, when one of the parties to the communication consents to make the recording. In each case, the interceptions are accomplished under the authority and supervision of the prosecutor.[74] It is the prosecutor himself who orders the interception discontinued, and he notifies the court.

To obtain court authorization to allow surveillance, the prosecutor must show that surveillance is necessary to continue the investigation and there is sufficient evidence to prove the charge. If read literally, these two requirements are inconsistent, for if "sufficient evidence to prove the charge" already exists, then continuing the investigation would not be necessary, and there would be no reason to conduct surveillance. In practice, these requirements are given a common sense interpretation. So, courts will generally allow surveillance if the prosecutor is able to show sufficient evidence to believe that the subject is engaging or is about to engage in criminal behavior and that electronic surveillance is likely to yield relevant evidence.

The time limit for an interception is 15 days; however, the prosecutor may obtain extensions of 20 days (or 40 days for crimes

73) Article 221/3 of the CPC
74) Article 223/1 of the CPC

under the jurisdiction of the Serious Crimes Court) if he can show "necessity" of extension.[75]

When emergency circumstances require immediate implementation of electronic surveillance, the prosecutor may authorize the surveillance himself through a reasoned order. In these cases, the prosecutor must inform the court within 24 hours, and the court has 48 hours to either ratify the prosecutor's decision or reverse it. If time limits are not respected, the interception will be invalid, and results cannot be used.[76] The court may authorize judicial police to enter into private places to secretly install appropriate surveillance/interception equipment, which must be done within 15 days of the court's authorization.[77]

The procedure for obtaining a court decision starts with the request of the prosecutor, which summarizes the charges against the person and the evidence gathered up until that moment. The request should explain that the investigation pertains to a crime for which the sentence is no less than 7 years; explain why electronic communications will advance the investigation; and investigators believe that the subject has used or is expected to use the telephone or other communication devices. Evidence, including declarations of witnesses or police reports, should be attached to the request. The request should also reflect the information necessary for the court to decide how the surveillance will be conducted and its duration.[78] The prosecutor is not required to give detailed information on the installation and operation of surveillance equipment, but at the very least, the request should show the amount of time the electronic surveillance equipment will be kept in place.

75) Article 222/3 of the CPC
76) Article 222/2 of the CPC
77) Article 222/3 of the CPC
78) Article 222/3 of the CPC

As a general rule, unless surveillance is conducted at the end of the investigation or is expected to lead to the immediate arrest of the subject, the request, whether of the prosecutor or by court decision, should include a paragraph to postpone the filing of the minutes and records of the interception in the secretariat until the conclusion of the investigation. This should be done in order to satisfy the legal requirement that these records be filed in the secretariat within 5 days of the conclusion of the interception, unless the prosecutor proves that the filing may hurt the investigation.[79]

After receiving the request, the court will conduct a closed hearing with the prosecutor. The prosecutor should use this opportunity to emphasize the key evidence of the charge, the information that supports the necessity for electronic surveillance, and to set forth sufficient evidence to believe that the subject is involved in criminal activity.

If the prosecutor later seeks extensions of the surveillance time limit, he must resubmit the request to the court. The new request should set forth the same information contained in the first request, and include any evidence or facts that have changed. The request should also contain the reasons why the subject will continue to use the telephone/device and that the interceptions will yield or continue to yield valuable evidence. This may be achieved by summarizing some of the most pertinent calls that were intercepted to date and explaining their relevance to the investigation.

For surveillance which requires only the authorization of the prosecutor, the latter should conduct an analysis similar to that performed by the court, that is, to consider the circumstances and determine why surveillance monitoring is necessary to fur-

79) Article 223/3 of the CPC

ther the investigation. This analysis should be documented in a written decision authorizing the interception and giving instructions to the judicial police about how the interception should be implemented. When surveillance should start immediately, the prosecutor may give verbal approval and instructions, and then draft a written decision later.

1.3. What constitutes a "public place" and "private place?"

The answer to this question is critical when the prosecutor is trying to determine whether only his authorization is sufficient to authorize electronic surveillance/interception, or whether a court order should be obtained. A common sense definition is that a public place is any place where, as a rule, a person does not have an expectation of privacy. There is little doubt that areas open to the public, such as restaurants, bars and cafes, are public places. On the other hand, private places include one's vehicle, home, or private office. What about offices in government buildings or government-owned vehicles where conversations might take place? In some cases, prosecutors have successfully argued that government offices are public places where the public servant has no expectation of privacy. The courts have accepted this argument even when the physical space in which the interception occurred was a closed office. By the same token, a court may also accept the argument that users of a government-owned vehicle have no privacy rights either.

However, a prosecutor should be careful not to take this to the extreme. If the subject of the surveillance/interception works in a closed office space within a government building, the prosecutor should determine whether other employees may enter that office or whether the subject of interception has exclusive use and access to this area. If the subject has exclusive use or keeps the office under lock, giving little or no access to other employ-

ees, the prosecutor would be on safer ground to obtain court authorization for the interception. Of course, this dilemma can be avoided when one of the parties cooperates with investigators and consents to the recording of the conversation, in which case no court authorization is required even though the place is private.

To summarize briefly, when in doubt about the type of location, the prosecutor should obtain a court authorization.

1.4. Practical considerations

Investigators love electronic surveillance/interception because, with luck, the defendant may be caught in the act, or at least making incriminating statements that he later will be unable to explain. The downside to electronic surveillance, more specifically surveillance authorized by courts, is that it requires a great deal of work and manpower. At the same time, interceptions are highly intrusive, invade the sanctity of a person's private life, and frequently are ineffective. Before a prosecutor requests the court to allow surveillance, he should consider the following questions:

- Can the charge be proven without conducting any surveillance? Is it worth the manpower, financial expense, and time commitment to obtain evidence that may be superfluous or that reemphasizes what has already been proven?
- Are there less intrusive methods available to accomplish the same result? For example, is it really necessary to obtain a court order to wiretap the telephone of the subject if a cooperating witness may record conversations or phone calls with him, which does not require court authorization?
- Are there any risks of information leaks? Can this risk be lessened by avoiding court processes and using techniques that require only the prosecutor's approval?

- Will the investigators have time to listen to the many hours of intercepted phone conversations and to have transcripts of relevant calls prepared? Are the additional costs to this end worth it?

2. Tracking

Tracking devices are electronic devices which can locate or track the movement of an individual or an object (such as a package or a vehicle). Under the law, the use of such devices is allowed with the authorization of the prosecutor.[80] To approve the use of such a device, the prosecutor should issue a written decision. If the tracking device must be installed in a private place, such as inside a person's vehicle, the best practice would be for the prosecutor to obtain court authorization to enter and place the equipment. Undoubtedly, the prosecutor needs court authorization for electronic interceptions in private locations, if the tracking device also carries the capacity to intercept communications.

Currently, law enforcement structures posses several types of tracking devices. The most up to date equipment possesses GPS (Global Positioning System) technology. Originally developed by the United States military, GPS relies upon a constellation of 27 Earth orbiting satellites. Their orbits are arranged so that at any given time, from any point on earth, there are at least four satellites visible. A GPS receiver locates at least 4 of these satellites, determines the distance to each through the radio waves emitted from the satellites, and in a process that is based upon the mathematical principle of "trilateration," pinpoints its own location.

Some cell phones come equipped with GPS technology which allows the user of the phone to find his own position, but it also allows the investigator to find this location by submitting a re-

80) Article 222 of the CPC

quest to the mobile service provider. The provider has the technical capability to provide historical information to include the previous locations of the phone. Some GPS receivers have the capacity to capture audio. Before the investigator uses such a device in a private place, however, he should obtain a court authorization.

2.1. Cell phone tower - Triangulation

Another less accurate method for determining location is called "Cell Tower Triangulation,"[81] meaning that the cell phone towers which receive a phone's signal may be used to calculate its geophysical location. According to gathered statistics, only a limited number of cell phones in use have GPS capability, and for this reason the triangulation method must be used to disclose the location of most cell phones.

In the best case scenario, a cell phone signal may be picked up by three or more cell phone towers, thus enabling "triangulation" to work. From a geometric/mathematical standpoint, if you know the distance to an object from three distinct points, you can compute its approximate location in relation to the three reference points (towers). This geometric calculation applies in the case of cell phones. Since we know the locations of the cell towers which receive the phone signal, we can estimate the distance of the phone from each of them based on the lag time between the ping[82] that the tower sends and the answering ping back from the phone.

Even in this case, investigators might find the location by submitting a request to the mobile phone provider. The mobile

81) Cell Tower Triangulation

82) In simple terms, the ping is a technical term referring to the sending of a message from one device to the other to test the functioning of the latter and measure the time needed to receive the message and reply.

phone provider also has the technical capability to provide historical information about the previous locations of the phone.

3. Search warrants

The court should grant a request for a search warrant when the prosecutor demonstrates reasonable grounds to believe that objects which are evidence of a criminal offense are located at a specific location.[83] The search of a house or a business may not begin before 7:00 am or after 8:00 pm, except in urgent cases, and when the court has endorsed such an action in its decision.[84] In certain cases, when it is believed that objects constituting evidence may be removed or destroyed, the search of the premises may be conducted beyond these time frames. However, this should be decided on a case by case basis and justified by a reasoned decision showing the existence of exigent circumstances.

The same procedures and decision-making process applies in the case of a vehicle search. Even though vehicle searches are a routine practice of the police, it must be emphasized that any evidence secured through an unwarranted search cannot be used at trial.

To obtain a search warrant from the court, the prosecutor should convince the court that there are reasonable grounds to believe that objects, which constitute evidence, are located in the house of an individual or in other premises. After filing the request, the court will conduct a closed-door session in the presence of the prosecutor only.

Chronologically, the prosecutor prepares the request for authorization of the search setting forth facts establishing a rea-

83) Article 202 of the CPC
84) Article 206 of the CPC

sonable belief that evidence of a crime is located at a particular place. The prosecutor may choose to attach to the request statements of witnesses or other documentation that he deems necessary.

The court decision will specify the location to be searched by providing the address. In most cases, the court order will not specify the evidence that is being looked for during the search. If possible, however, the court order should give the description of the evidence of crimes that is being sought.

If evidence of another criminal offense is found during the execution of a search warrant, no additional search warrant is necessary for collection of the discovered evidence. For example, the search of the business records of a company investigated for tax evasion may reveal evidence of pornography or ties to terrorist organizations. In this case, the investigator may collect the evidence without a new search warrant decision and promptly initiate another criminal proceeding. The two proceedings could be handled jointly, given that both offenses were committed by the same suspect.[85]

The search team should be careful not to take from the search site items of no apparent relevance to the investigation (or to access files that contain privileged information, such as documents relating to the attorney-client relationship). In most cases, this issue will be resolved on a case by case basis during the search by making an assessment of the relevance of the item to the investigation.

If the search concerns evidence found in computers, the latter may be observed as long as necessary or be sequestered to be examined.

85) Article 79/b of the CPC

If the cell phone of the suspect is seized during the arrest, no search warrant decision is needed to obtain evidence from this phone because cell phone examination is not classified as a search but as an examination to be ordered by the prosecutor.[86] However, it is important to emphasize that the admissibility of evidence gathered in these situations, unlike evidence gathered pursuant to prior court decisions, will be assessed by the court *post factum*.

3.1. Securing and evaluating the scene

A special team of judicial police officers/agents will perform the search, while the prosecutor may choose to participate if he deems it reasonable. Indeed, this is highly recommended in cases of economic crime when complex and delicate material is searched.

First of all, the investigator's primary consideration should be the safety of himself and everyone at the search scene. After securing the scene and all persons at the scene, the investigator should identify all potential evidence and ensure that it is not destroyed and is preserved intact.

When securing and evaluating the scene, the investigator should:

- Follow internal procedures of his agency for securing crime scenes;
- Refuse offers of help or technical assistance from any unauthorized persons;
- Remove all persons from the crime scene or the immediate area;
- Ensure that the condition of the item that might be evidence is not altered.

86) Article 198 of the CPC

3.2. Preliminary interviews

Investigators should register the location of all adult persons of interest at the moment of entering the scene. These individuals should be separated from each other and identified. No one should be allowed access to any files or electronic devices that may be subjected to search or seizure. Investigators should obtain as much information from these individuals as possible, including:

- Identifying information, such as names, addresses, phone numbers;
- Their relationship to the search scene, and if related to business, what is their job position;
- The physical location of specific files, documents or evidence, if these are specified by the search warrant;[87]
- A preliminary assessment as to whether the individual may have knowledge pertaining to the criminal matter under investigation. If so, follow up interrogations should be arranged for a later time.

3.3. Documenting the scene

Documentation of a crime scene or search location creates a record that is included in the investigation file. For this reason, it is important to record accurately the location of the scene, the scene itself, the condition of the premises, and items that may be found there.

The initial documentation of the scene should include, at least, notes and sketches to indicate what areas were searched and where each seized item was located. The documentation of the scene should be complete and include the type, location and po-

87) Article 203 of the CPC

sition of furniture, work desks, shelves and locked file/dossier cabinets. If documents are removed from a particular work desk or cabinet drawer, it should be documented from which drawer those documents were taken. When possible, the investigator should photograph the scene, and if a video camera is available, record the scene both pre-search and post-search. When a particularly significant piece of evidence is discovered, for example a firearm, a photograph should be taken showing the item in its exact location before it is removed and placed into an evidence bag.

If evidence found at the search scene reveals other locations that should be searched, the prosecutor should approach the court for an additional search warrant, unless the urgency of the situation permits a prosecutor to approve the search. [88]

3.4. Evidence collection

The investigator must have proper legal authorization[89] to search and collect evidence from a location. In any case the investigator must be able to identify the authorization which allows him to seize evidence. He should follow agency rules and consult a supervisor or prosecutor if any question of appropriate authority arises.

Evidence must be handled carefully to preserve its integrity. Some evidence, such as digital evidence, requires special collection, packaging, and transportation techniques. Therefore, the investigator must have the necessary tools and means for its collection. These may include:

88) Articles 202/3 and 299 of the CPC
89) Court decision or prosecutor order

- Cameras (photo and video);
- Cardboard boxes;
- Notepads;
- Gloves;
- Evidence inventory logs;
- Evidence tape;
- Evidence paper bags;
- Evidence labels or stickers;
- Crime scene tape to surround the location;
- Anti-static bags;
- Permanent markers;
- Nonmagnetic tools.

3.5. Search team

Frequently, the search is conducted by a search "team." This team should be briefed prior to arriving at the scene so they know precisely the type of evidence they are looking for. It is important that a team leader be appointed to coordinate the actions of the team members. For example, if the search location is a house, the team leader would assign different team members to specific rooms and even to sections of rooms. In a business location, some team members could be assigned to search certain offices or areas, while others might be assigned to gather information from employees. The investigators should be disciplined and not be wandering around the premises or otherwise stepping outside their assigned areas. They also should not be handling evidence that was not directly seized by them.

Investigators should be equipped with the proper tools for gathering evidence. As items are gathered, they should be placed by the seizing investigator into a bag or container that is clearly marked with: 1) the name or initials of the seizing investigator; 2) the date and precise location where the item was seized;

and 3) general description of the seized item. Items seized from different locations should not be placed in the same bag or container. The bags or containers will be moved to a central location where the team leader or another designated person prepares an inventory log of the evidence. Prior to transportation, the bag or container should be sealed with sealing tape to avoid any removal of evidence or "contamination" with items seized from other locations.

The investigator should remember that evidence, even documentary evidence, may also contain latent evidence, traces, or biological evidence. The investigator should, therefore, take appropriate measures to avoid contamination of the evidence, such as by wearing latex gloves.

3.6. Transportation and storage procedures

When transporting and storing seized evidence, the investigator should be mindful of the type of evidence seized and avoid environmental factors, such as heat, cold, and humidity that could adversely affect the evidence. Also evidence that is fragile must be packaged in a way to avoid damage during transportation. The transportation should be handled by law enforcement employees, so there is no loss of the chain of custody on all evidence transported.

3.7. Inspection of the evidence

After concluding the search, the investigator should review the seized evidence. Before doing this, a decision should be made whether any other form of forensic examination, for example fingerprints, biological materials, etc. is needed. Forensic examination should be performed before any other examination is conducted. Any inspection of the evidence should be performed

in a way that minimizes loss or any confusion with evidence obtained from different locations. If it is necessary to remove the sealing tape to allow inspection, the bag or container should be resealed after the inspection, and it should be documented who looked at the evidence and when.

With documentary evidence, if a preliminary examination reveals that certain records are likely to have evidentiary value, then photocopies of the original documents should be made and future work with the records should be limited to those copies. It would be best to assign a numbering system for the documents, scan them, and save them in the computer. The investigator may create an index/spreadsheet by identifying the documents numerically to allow easy retrieval of the document in the future.

4. Digital evidence[90]

As digital storage of information becomes more widespread, digital forensics - the acquisition and analysis of digital information - will become increasingly important to prosecutors and judicial police. The collection of these data and their presentation to the court must abide by the general rules of evidence gathering. As with other exhibits, such as a corpse, documents and digital storage devices must be carefully preserved to avoid any claims of tampering or contamination.

Essential evidence can be obtained from any digital storage device. For example, erased numbers can be obtained from a cell phone and may indicate that one person knows another, even though the cell phone owner denies it. Also appointments stored on a hand-held device can establish a chronology of events.

90) Portions of this chapter are adapted from the "Electronic crime scene investigation, a guide for first responders," US Department of Justice, April 2008.

Even television shows recorded on a digital video recorder can confirm or destroy an alibi, revealing when a recording started or was paused. All of this evidence is theoretically recoverable.

Below, we will provide an overview of the types of evidence that may be extracted from such systems and provide guidance to prosecutors for obtaining and securing such evidence. Of course, prosecutors must rely on skilled judicial police officers and computer forensic officers to obtain and analyze the data, but they should know what is technically possible and what should and should not be done during the collection of electronic evidence. The prosecutor's task is to ensure that investigators are fully prepared and have the relevant knowledge in this area.

General forensic and procedural principles should be applied when dealing with digital evidence:

- The process of collecting, securing, and transporting digital evidence should not change the evidence;
- Digital evidence should be examined only by those specifically trained for this purpose;
- Every action carried out during the seizure, transportation, and storage of digital evidence should be fully documented, preserved, and available for review.

Investigators engaged in the seizure of electronic storage systems must use caution. Computer data and other digital evidence are fragile; so investigators who do not have the proper training and skills should not examine their contents or try to recover information. The only action they should take is to register what is visible on the display screen.

In almost all cases, judicial police officers should consult with the prosecutor before seizing or examining the contents of elec-

tronic devices, and the prosecutor should issue an examination warrant if needed.

4.1. What is electronic/digital evidence?

Digital evidence is information or data of value to an investigation that is stored on, received by, or transmitted by an electronic device. This evidence is acquired when data or electronic devices are seized for examination.

Digital evidence has several characteristics:

- It is latent, meaning that its evidentiary value is usually not apparent to the naked eye, but a special process or forensic examination will "reveal" its nature (like fingerprints or DNA evidence);
- Crosses jurisdictional borders quickly and easily;
- Is easily altered, damaged, or destroyed;
- Can be time-sensitive, and thus, should be examined quickly.

Investigators should consider that digital devices may contain evidence such as DNA, fingerprints, or blood stains. Physical evidence should be preserved for appropriate examination.

4.2. Electronic devices: types, description, and potential evidence

Memory computer equipment, internal or external hard drives, and other electronic devices found at the crime scene or search site may contain useful information which can be used as evidence in prosecution. The devices themselves and the information they contain may be used as digital evidence.

Some devices require internal or external power to store information. These devices should be linked to power outlets to preserve the information. When in doubt, the judicial police should consult the device manufacturer's official web site or any other reliable source of information to determine whether it is safe to disconnect the device.

4.2.1. Computer Systems

Computer systems consist of hardware and software that process data. A computer system is likely to include:

- A metal case that contains circuits, microprocessors, hard drives, interface equipment;
- A monitor or video display device;
- A keyboard;
- A mouse;
- Peripheral components or memory drives and other external components.

Computer systems can take many forms, such as laptops, desktops, tower computers, rack-mounted systems, minicomputers, and mainframe computers. Additional components and peripheral devices include modems, routers, printers, scanners, and docking stations.

A computer system and its components can provide valuable evidence in an investigation. Potential evidence includes the hardware, software, documents, photos, image files, emails and attachments, databases, financial information, internet browsing history, chat logs, buddy lists, event logs, and data stored on external devices, and identifying information associated with the computer system and its components.

4.2.2. Storage devices

Storage devices vary in size and the manner in which they store information. These devices may contain information that is valuable to an investigation or criminal prosecution.

The types of storage devices:

- ***Hard drives*** are data storage devices, usually located within the computer casing, that consist of an external circuit board, external data and power connections, and internal glass, ceramic, or magnetically charged metals, which retain information. The hard drive is the brain behind the computer and contains all the software programs necessary for all computer functions. It stores the functions performed or saved on the computer, such as documents, opened e-mails, and email attachments. Investigators may also find at the scene hard drives that are not connected to or installed on a computer. These may still contain valuable evidence.

- ***External hard drives*** can also be installed in an external drive case. They may increase the computer's data storage capacity and they are also portable. Generally, this equipment requires a power supply and a USB, FireWire, Ethernet, or wireless connection to a computer system.

- ***Removable media*** are different types of discs and are typically used to store, archive, transfer, and transport data and other information. These devices help users share data, information, and applications among different computers and other devices. These include Floppy Disks, Zip Discs, Digital Versatile Discs (DVDs), and Compact Discs (CDs).

- ***Flash/Thumb drives*** are small, lightweight, and removable devices with USB connections. These devices are easy to

conceal and transport. They come in the form of a wristwatch, a pocket knife, and other forms of common use devices.

- ***Memory cards*** are small data storage devices commonly used with digital cameras, computers, mobile phones, personal digital assistants (PDAs), video game consoles, and other handheld electronic devices.

Storage devices may contain photographs, image files, e-mail messages and attachments, databases, financial records, internet browsing history, internet chat logs, buddy lists, and event logs that can be used as evidence.

4.2.3. Handheld electronic devices

These are portable data storage devices that provide communications, digital photography, navigation systems, entertainment, data storage, and personal information management.

Handheld electronic devices such as mobile phones, PDAs, digital multimedia (audio and video) devices, pagers, digital cameras, and global positioning system (GPS) receivers may contain software, applications, documents, and information such as e-mail messages, internet browsing history, internet chat logs, buddy lists, photographs, image files, databases, and financial records which can serve as evidence in a criminal case.

4.2.4. Peripheral devices

Peripheral devices are connected to a computer or a computer system to enhance users' access and expand the computer's functions. They include the keyboard and mouse, microphones, USB and FireWire hubs, memory card readers, VoIP (voice over internet protocol) devices, and web cameras.

The devices themselves and the functions they perform or facilitate are all potential evidence. Information stored on the device which demonstrates its use is also evidence, including incoming and outgoing phone and fax numbers, recently scanned, faxed, or printed documents, etc. These devices can also be sources of fingerprints, DNA, and other identifiers.

4.2.5. Other potential sources of digital evidence

Investigators should be aware of and consider as evidence other elements of the crime scene that are related to digital information, such as every electronic device, software, hardware, or device of any other type, and every piece of technology that can function independently, or be attached to computer systems. These devices may be used to enhance the users' access and expand the functionality of the computer system or other equipment. These devices may include data storage tape, surveillance equipment, digital cameras, video cameras, digital video recorders, digital audio recorders, video game consoles, chat assisting equipment, keyboards, mouses, video (KM) sharing switches, SIM card readers, global positioning system (GPS) receivers and reference material pertaining to all of these items.

4.2.6. Computer networks

A computer network consists of two or more computers linked by data cables or by wireless connections that share or are capable of sharing resources and data. A computer network often includes printers, other peripheral devices, and data routing devices such as hubs, switches, and routers. A computer network may include a remote server, that is, a computer that is not attached to a user's keyboard but over which he has some degree of control, whether it is in the same room, another part of a building or in another city or country. The remote server

may serve as the primary storage device or as a backup device to functions being performed at the user's computers.

The networked computers and connected devices themselves may be evidence that is useful to a criminal investigation. The data they contain, which also may be valuable evidence, includes software, e-mail messages, internet browsing history, chat logs, buddy lists, image files, databases, financial information, event logs and data stored on external devices. The device functions, their capabilities, and any identifying information associated with the system, including IP and LAN protocols of computers and devices, broadcast settings and media access cards (MAC), and also the network interface card (NCI) addresses may all be useful evidence.

4.3. Obtaining electronic evidence during a search

Digital evidence on computers and other electronic devices can be easily altered, deleted, or destroyed. Such evidence should be collected and analyzed by someone trained in the collection of forensic electronic evidence. The first investigator at the search site should ensure that the condition of any electronic device is not altered. This would include, for example, not turning off a computer that is currently operating and not turning on a computer or electronic device that is currently turned off.

Components such as the keyboard, mouse, removable storage media (flash drive), and other items, may contain latent evidence (fingerprints, DNA, or other physical evidence) that should be preserved. The first investigator to the search scene should take appropriate steps to ensure that physical evidence is not compromised during documentation.

The investigator should be alert to the search site. He should look for pieces of paper with possible passwords, handwritten notes, and blank pads of paper with impressions from prior writings, hardware and software manuals, daily calendars, literature, and text or graphic material printed from the computer that may reveal information relevant to the investigation. These forms of evidence should also be documented and preserved in compliance with the law and the by-laws.

4.3.1. Preliminary interviews

In addition to gathering general information from persons at the search location, investigators should also try to obtain specific information about the computer systems, including:

- Names of all users of the computers and devices;
- All login names and passwords for computer and internet users;
- All login names and passwords for email and internet account users;
- Purpose and uses of computers and devices;
- Existence of servers or remote servers;
- All passwords;
- Any automated applications in use;
- Type of internet access;
- Internet service provider;
- Any offsite electronic storage means;
- Installed software documentation;
- Security provisions in use;
- Data access restrictions;
- All instant message (chat) screen names;
- All destructive devices or software installed;
- MySpace, Facebook accounts, or other online social networking;
- Any other relevant information.

The investigator should also record any network and wireless access points that may be present and may link the computers and other devices to each other and the internet. The existence of network and wireless access points indicates that additional evidence may exist beyond the search scene.

The investigators may not be able to collect all electronic devices or their components at the search scene, due to applicable laws, agency policies, or other factors which may prohibit collecting some computer or electronic systems and the information they contain. However, these devices should be included in the investigator's documentation of the search scene.

4.3.2. Collection of digital evidence

Digital evidence is collected, packaged, and transported using special techniques as this evidence can be damaged or altered by electromagnetic fields generated by static electricity, magnets, radio transmitters, and other devices. Therefore, the investigator must be careful and should use gloves, anti-static bags, and non-magnetic tools.

4.3.3. Computers, components, and devices

To prevent the alteration of digital evidence during its collection, investigators should first:

- Document any activity on the computer, its components, or devices;
- Confirm the power state of the computer. Check for flashing lights, running fans, and other sounds that indicate the computer or electronic device is powered on. If the power state cannot be determined from these indicators, observe the monitor to determine if it is on, off, or in sleep mode.

If the computer is ON:

For practical purposes, removing the power supply when a computer is seized is generally the safest option. If evidence of a crime is visible on the computer display, however, the investigator should request assistance from personnel who have experience in volatile data capture and preservation.
In the following situations, immediate disconnection of power/ power source is recommended:

- Onscreen information indicates that data is being deleted or overwritten;
- There is reason to believe that a destructive process is being performed in the computer's data storage device;
- The computer uses the operational system Microsoft® Windows®. Pulling the power plug from the computer will preserve information about the last user, the time the login occurred, most recently used documents, and other valuable information.

In the following situations, immediate disconnection of power is NOT recommended:

- Data of apparent evidentiary value is in plain view on the screen;
- Indications exist that they are active or in use;
  - o Chat rooms;
  - o Open text documents;
  - o Mobile data storage;
  - o Instant message programs;
  - o Financial documents;
  - o Data encryption;
  - o Obvious illegal activities.

If the computer is OFF

For desktops, towers, and minicomputers follow these steps:

- Document, photograph, and sketch all wires, cables, and other devices connected to the computer, and also the respective entry of each cord, cable, wire, or USB;

- Photograph the uniquely labeled cords, cables, wires, and USB drives and the corresponding labeled connections;

- Remove and secure the power supply cord from the back of the computer and from the wall outlet, power strip, or battery backup device;

- Disconnect and secure all cables, wires, and USB drives from the computer and document the devices or equipments connected through them;

- Place tape over the floppy disk slot, if present;

- Make sure that the CD or DVD drive trays are retracted into place; check whether they are empty, contain disks, or are unchecked and tape them closed, in order to prevent them from opening;

- Place tape over the power switch;

- Record the make, model, serial numbers, and any user-applied markings or identifiers;

- Record the computer and all its cords, cables, wires, and components according to the agency procedures;

- Package all evidence following the agency procedures to prevent damage or alteration during transportation and storage.

For laptop computers:

- Document, photograph, and sketch all wires, cables, and other devices connected to the computer, and also the respective entry of each cord, cable, wire, or USB;

- Photograph the uniquely labeled cords, cables, wires, and USB, and the corresponding labeled connections;

- Remove and secure the power cord and the battery from the back of the computer;

- Disconnect and secure all cables, wires, and USB drives from the computer and document the devices or equipments connected through them;

- Place tape over the floppy disk slot, if present;

- Make sure that the CD or DVD drive trays are retracted into place; check whether they are empty, contain disks, or are unchecked and tape them closed, in order to prevent them from opening;

- Place tape over the power switch;

- Record the make, model, serial numbers, and any user-applied markings or identifiers;

- Record the computer and all its cords, cables, wires, and components according to agency procedures;

- Package all evidence following the agency procedures to prevent damage or alteration during transportation and storage.

Computers in a business environment:

Business environments frequently have complicated configurations of multiple computers networked to each other, to a common server, to network devices, or a combination of all of these. Securing a scene and collecting digital evidence in these environments may pose challenges to the investigator. Improperly shutting down a system may result in lost data and potential civil liability of the agency.

The investigator may find a similar configuration in residences, particularly when a business is operated from home. In some instances, the investigator may encounter unfamiliar operating systems or unique hardware and software configurations that require specific shutdown procedures.

4.3.4. Packaging, transportation, and storage of digital evidence

Digital evidence, computers and electronic devices on which the evidence is stored are fragile and sensitive to extreme temperatures, humidity, physical shock, static electricity, and magnetic fields. The investigator should take necessary precautions to avoid alterations, damage and destruction of data when documenting, photographing, packaging, transporting, and storing digital evidence.

All actions related to the identification, collection, packaging, transportation, and storage of digital evidence should be thoroughly documented. When packing digital evidence for transportation, the investigator should:

- Ensure that all digital evidence collected is properly gathered, documented, labeled, photographed, video recorded or sketched, and inventoried before it is packaged. All connections and connecting devices should be labeled for easy reconfiguration of the system later.

- Remember that digital evidence may also contain latent evidence, micro traces, or biological evidence and take the appropriate steps to preserve it. Copying of digital evidence (imaging) should be done before latent evidence, micro traces, or biological evidence analysis are conducted on the evidence.

- Pack all digital evidence in plastic bags, paper envelopes, cardboard boxes, and antistatic containers. Plastic materials should not be used when collecting digital evidence, because plastic can produce static electricity and allow humidity and condensation to develop, which may damage or destroy the evidence. The investigator should also ensure that all digital evidence is packaged in a manner that will prevent it from being bent, scratched, or deformed.

- Label all packaging material used to package and store digital evidence clearly and properly.

- Leave cellular, mobile, or smart phone(s)[91] in the power state (on or off).

- Pack mobile or smart phone(s) in signal-blocking material such as faraday isolation bags, radio frequency-shielding material, or aluminum foil to prevent data messages from being sent or received by devices. The investigators should be aware that if inappropriately packaged or removed from

91) Equipment used for many purposes, such as telephone and electronic mail (e.g. BlackBerry)

shielded packaging and if within the range of a communication signal, they may be able to send and receive messages.

- Collect all power supplies and adapters for all electronic devices seized.

When transporting digital evidence, the investigator should:

- Keep digital evidence away from magnetic fields such as those produced by radio transmitters, speaker magnets, and magnetic mount emergency lights. Other potential hazards that the investigator should be aware of include seat heaters and any device or material that can produce static electricity.
- Avoid keeping digital evidence in a vehicle for prolonged periods of time. Heat, cold, and humidity can damage or destroy digital evidence.
- Ensure that computers and digital devices are packaged and secured during transportation to prevent damage from shock and vibration.
- Document the transportation of the digital evidence and maintain the chain of their custody.

When storing digital evidence, the investigator should:

- Ensure that the evidence is inventoried in accordance with the agency's policies;
- Ensure that the digital evidence is stored in a secure, climate-controlled environment and that it is not subject to extreme temperature or humidity;
- Ensure that the digital evidence is not exposed to magnetic fields, moisture, dust, vibration, or any other elements that may damage or destroy it.

NOTE: Potentially valuable digital evidence including dates, times, and system configuration settings may be lost due to prolonged storage if the batteries are discharged or the power source that preserves this information fails. Where applicable, the investigator should inform the evidence custodian and the forensic examiner that electronic devices are battery-powered and require prompt attention to preserve the data stored in them.

If several computers are seized as evidence, they should be labeled to facilitate reassembly if necessary, along with their cables and the devices connected to them. For example, the first computer may be designated as computer A and all its connecting cables may be marked with an "A" and a unique number; the second computer and its cables with "B" and so on.

4.4. Forensic examination

The examination of computers and other electronic storage media should be handled only by persons with high-level knowledge of digital forensics. However, the investigators may assist in the examination process by informing the forensic expert of the type and nature of information they are looking for. Therefore, when possible, investigators should give the expert the following information:

- A summary of the case;
- Known passwords to digital evidence seized;
- Preliminary reports and documents;
- Keyword lists;
- Names of suspects and associates, including nicknames;
- A contact point with the investigation team.

4.4.1. Two-stage examination

In the vast majority of cases, forensic analysis of a hard drive takes too long and cannot be performed on-site during the initial execution of a search warrant. Thus, the specialists must complete the examination in another location. This process has two steps: 1) imaging the content of the hard drive; and 2) analysis, during which the copy of the device is analyzed to search for relevant evidence.

Imaging is the process of creating an image copy of the hard drive content, duplicating every bit and byte of the subject drive, including all files, the slack space, Master File Table, and metadata in exactly the order they appear on the original device. A good image is vitally important because the copy will be used to carry out all the forensic examination to avoid the risk of damage or alteration of the original hard drive. Additionally, in a case when the computers of a business or workplace must be examined, the imaging makes it possible for the original computer to be returned quickly and for work not to be interrupted.

After imaging, the second step of the forensic review process begins, the analysis of the hard drive and the identification of the data that can be used as evidence. Forensic examiners may also be able to retrieve items that the user believes he has deleted. Using various computer software tools, such as Encase, the examiner can search the free space of the hard drive where "deleted" files actually reside, and, if the file has not been overwritten by new data, the file can be retrieved.

4.5. Digital evidence and financial crimes and corruption

The examination of electronic media may be ordered by the prosecutor if necessary for the discovery of traces and other

material consequences of the criminal offense.[92] The type of evidence that may be found depends on the facts of the specific case. Below is a non-exhaustive list of evidence which may be found in electronic storage media and which could be valuable in an economic crime and corruption case. In addition to evidence retrieved from electronic storage devices, the investigator should search for links between the media and the individuals using the media through the retrieval of fingerprints, DNA, etc. In such a case, non-destructive analyses of these traces should be performed carefully before the devices are submitted for internal forensic examination. Any destructive processes associated with recovering or analyzing latent and biological evidence, mini-traces, or other evidence should be postponed until after digital evidence has been recovered for examination and analysis.

- E-mails:
  - communications overtly related to the criminal offense;
  - communications which establish ties/relationships to potential accomplices or other suspects;
  - communications that reveal the links between the suspects or their family members with financial institutions, investments, and purchases, thus, furnishing leads for follow-up investigation;
  - communications which reveal other criminal or immoral conduct or questionable behavior.[93]

- Documents and files:
  - drafts of letters, memoranda, contracts, etc. related to

92) Article 198 of the CPC

93) The investigator should not discount the value of such information. While it may not be used as evidence in the underlying case, it could used during the interrogation of the defendant. This information could also lead to prosecution for other criminal offenses or put pressure on a suspect to cooperate, plead guilty, or request a summary trial.

the criminal offense. This is especially valuable when the physical copies of such documents have been retrieved elsewhere and it is important to connect the subject with the preparation of such documents;
    - drafts of letters, memoranda, contracts, etc, not overtly related to the criminal offense, but which establish the relationship between the subject and other possible accomplices, or with assets, investments and specific purchases;
    - lists of contacts and address books;
    - calendars and personal schedules;
    - lists of usernames and passwords to web sites, banking and credit card institutions, etc.

- Financial records:
    - financial records, from software such as QuickBooks, Quicken, Microsoft, etc;
    - charts, summaries, tables, and databases detailing financial history or purchases of the subject;
    - tax declaration or other tax documents;
    - credit card records.

- Photos and videos:
    - may depict the relationship between the subject and other accomplices or suspects;
    - may depict or verify the relationship of the subject to certain properties or assets, e.g. photos sitting behind the wheel of his Ferrari;
    - may confirm or provide new leads regarding personal expenditures such as travel, jewelry, and the like;
    - may depict other illegal, immoral, or questionable behavior or conduct.

- Internet activity:
  - banking, securities, brokerage and other financial institutions web sites, which may provide leads to accounts or assets;
  - travel and online retail and auction sites, which may furnish leads regarding travel taken or purchases made;
  - internet chat rooms, social networking (e.g. Facebook accounts, etc) which may provide further leads or evidence;
  - pornographic or dating web sites, which may provide leads to illegal, immoral or questionable behavior or conduct.

- Software:
  - Online banking activity software;
  - Account/accounting software.

5. Special Investigative Means in the Jurisprudence of the European Court of Human Rights.

The growing sophistication of criminal activities and the complexity of financial (white collar) crime in particular have been matched in recent years by an expansion in the tools available to the state to penetrate ever more intrusively into individuals' private lives. The tension between the need to combat crime effectively and protect security on the one hand, and the individual's right to lead a private life, on the other hand, is obvious. The European Convention of Human Rights and the decisions of the European Court of Human Rights are slowly becoming a pan-European standard in this regard for the use of special investigative techniques. The approach taken by the ECHR to these techniques is essentially pragmatic. It recognizes that such means are required if crime in all its forms and variations is to be adequately tackled. Thus, the Convention and ECHR do not preclude covert surveillance, telephone tapping, and undercover operations. The Convention does require, however, that before

engaging in these strategies, the state must show that the interference with privacy and its degree are necessary. Furthermore, the Convention requires that the strategies be accompanied by sufficient procedural safeguards to ensure that they are not utilized in an arbitrary, unpredictable, and uncontrolled manner.

The two key rights safeguarded by the Convention that may be infringed upon by the use of special investigative techniques are the right to privacy and the right to a fair trial.[94]

5.1. Secret surveillance

In Klass vs. Germany case (1979-80 2 EHRR 213, paragraph 49), the ECHR recognized that secret surveillance can severely undermine the freedoms associated with a democratic society. The ECHR held that while the prevention of crime is necessary for a democratic society and secret surveillance is a vital tool in the police armory, if unregulated it poses "*a danger... that may undermine or even destroy democracy instead of defending it.*" Even though secret surveillance has been considered lawful by the ECHR, it has repeatedly required the state to provide clear evidence of the necessity of such a strategy, as well as to establish procedures containing adequate and effective safeguards against abuse.

5.1.1. When is secret surveillance justified under Article 8(2)?

The ECHR has dealt with numerous cases that involve the use by the states of a range of surveillance strategies such as:

- Interception of telephone and correspondence;
- The metering and verification of telephone calls (e.g. ascertaining the numbers called to and from a phone);

94) Article 6 "The right to fair trial" and Article 8 "The right to personal life."

- Interception of a pager;
- Use of secret listening devices;
- Video surveillance.

The ECHR has repeatedly held that all these techniques interfere with the right to privacy (Article 8) and require justification under Article 8(2).

The Court also treats surveillance in a police station and work premises similarly to surveillance in a residence. In other words, the Court has said that secret surveillance used to record conversations in a police station or work premises is an interference with Article 8 (1) if the defendant has a reasonable expectation of privacy under those circumstances.

Additionally, the Court has held that Article 8 applies when a telephone conversation is recorded by a member of the public on the advice and with the assistance of police.
The Court has noted, however, that if an individual walks along a street, he will be inevitably visible to the other members of the public, and thus he will have no reasonable expectation of privacy, whether he is seen with the naked eye or recorded, for example, by a closed circuit television/camera.

5.1.2. Safeguards in surveillance operations

Once it is determined that Article 8 is engaged (that privacy has been violated), the state has the burden of justifying the surveillance. The state should prove that the surveillance was strictly proportionate to a legitimate aim, such as the prevention of crime.

Moreover, in addition to showing that the surveillance was a proportionate measure, the state must also show that safe-

guards exist to protect against arbitrary, unfair, and over-intrusive practices. These safeguards have been developed in cases spanning a number of years, and the applicable standards are becoming gradually stricter.

Law enforcement rules must be enacted to regulate the circumstances in which intrusive surveillance is permitted and must contain adequate and effective safeguards against abuse to ensure that surveillance is not used without due care (for example when overt means of investigation can be effective). The safeguards must include "accessible and precise" laws which govern the powers of surveillance and which should be sufficiently clear and certain.

While these rules do not contain exhaustive definitions, they cannot simply leave the decision as to whether the surveillance will take place to the discretion of the executives or courts. If such a degree of decision-making is allowed, the law must indicate the scope of such decision-making with sufficient clarity.

The rules must be legally binding and must be publicly available. The rules must define the categories of people who may become subject to surveillance, the offenses whose investigation will justify the use of secret surveillance, its permitted duration, and the circumstances in which all the recordings are to be preserved by the state.

The rules must also indicate the scope and manner in which surveillance is to be carried out in actual practice. And there must be proper methods of accountability over the authorization and use of surveillance and its review and supervision. This supervision need not invariably be entrusted to a judge, even though that is desirable and sometimes it is vital, but it must be entrusted to someone sufficiently independent and able to

exercise effective and continuous control.

Once surveillance has been suspended, it may be necessary to inform its subject that it has occurred. This is not mandatory, however, where such disclosure is impractical and would undermine the efficacy of the operation.

5.1.3. Undercover operations

Even though undercover operations may, on certain occasions, lead to a violation of Article 8 (on privacy), the Court usually acknowledges their legality and admits the evidence obtained through such operations, primarily under Article 6 (fair trial) of the Convention. According to the ECHR, the evidence obtained by an undercover agent, who overhears a criminal acknowledge the commission of a crime, will not be considered in breach of Article 6. Therefore, it will be admissible evidence provided that the evidence secured by the undercover agent is confirmed by other circumstantial evidence, and the individual who revealed the commission of the crime to the undercover agent was not compelled to do so in any manner but spoke freely.

5.2. Entrapment/provocation

Entrapment or provocation is when an undercover officer goes further than simply obtaining evidence about a crime (e.g. by overhearing somebody state that he committed a crime) and participates in its commission, for example by buying drugs from a person under investigation or by offering a bribe. In other words, entrapment or provocation refers to any involvement of the police operatives, or other state agents, in any form of a trap to obtain evidence of the commission of an offense, where more than merely an opportunity to offend has been given to the subject.

A prosecution under these circumstances may be in breach of Article 6, even though the Court has not held that such a breach is inevitable. Of course, the fact that there has been a trick or a trap in a covert operation does not necessarily mean that the evidence gathered will be regarded as unfair and will not be considered. This reflects the understanding that such methods may be essential when investigating certain forms of crime, especially where there is no victim to report the offense (very typical in cases of economic crime and corruption), where this may be the only way to gather evidence against a given offender.

Entrapment is likely to be raised as an issue by the defense when there is no other line of attack against the prosecution's case, or where the evidence obtained is so powerful as to be conclusive. The Court has said that the right to a fair trial may be violated by the use of entrapment, due to procedural failings, or other failings on the side of the investigating entity.

The Court has defined a number of factors for consideration by the investigating entity for determining whether there has been a breach of Article 6. More specifically the Court has formulated these tests:

- Have the police caused the commission of the offense or simply given the defendant the opportunity to commit it?
- Is the offense one which would be difficult to detect by overt means/methods?
- The police must act in good faith, e.g. they must show that they had reasonable grounds for suspecting the defendant was engaged in criminal activities.
- The operation must be properly supervised/guided.

The Court has elaborated on some of these tests. Namely, in establishing whether the police had reasonable grounds to suspect that the subject was engaged in criminal activity before

using the entrapment strategy (for example police had reliable intelligence information), it is not necessary that the suspicions relate to that specific individual (the defendant). If the police show that the suspicions related to a group of individuals to which the defendant is a member, the Court will very likely accept that police acted in good faith, and they had reasonable grounds to suspect.

When establishing whether the police caused the commission of the offense or simply gave the defendant the opportunity to commit it, it is not essential that the state agent act in an entirely passive manner. A degree of provocation will be acceptable; however, the greater the inducements or overtures that are made, the more likely the Court will conclude that the action was an unacceptable violation.

In establishing whether evidence obtained through entrapment is admissible (does not violate the right to a fair trial), the Court has also ruled that the defendant's circumstances/vulnerability should be considered. However, generally, the Court has shown in several occasions that it is more concerned with the conduct of the investigation (was it properly authorized and supervised, did it cross the boundaries of permissible provocation, etc.) than the background/past of the defendant.

The above principles, including the need to have a proper intelligence basis for an undercover operation make up the ECHR framework and position relevant to the use of special investigative means in the investigation of crime (including economic crime).

5.3. Informants

An informant is required to use his relationship with the subject to gather information covertly. Therefore, it is likely to be

a breach of the right to the private/personal life of the subject (Article 8) or more importantly there may be a breach of Article 6 at trial. This is true in particular with regards to individuals who become informants and are offered immunity from prosecution.

The ECHR has held that the use of evidence of an accomplice who is offered immunity could, in principle, "put in question the fairness of a trial under Article 6." Whether this would amount to a violation of the Convention depends on the consideration of all the circumstances. The Court will consider evidence secured by an informant admissible (thus, not in violation of Article 6) if the following conditions are met:

- This kind of evidence is strictly scrutinized by the domestic court;
- This kind of evidence is subjected to effective cross examination by the opposing party, the defense;
- This kind of evidence is not the only evidence relied upon in the conviction.

Annex 8: List of economic crimes for which electronic interception in private places and recording for incoming and outgoing calls is permitted.

Annex 9: List of economic crimes for which photographic or video surveillance and the use of tracking devices is permitted.

Annex 10: Summary of jurisprudence of ECHR regarding the special investigative techniques.

FINANCIAL INVESTIGATION

1. Introduction

Some of the most incriminating and persuasive evidence in a financial crime or corruption case is evidence showing that unreported or illicit income went into the subject/public official's "pocket." For example, evidence that a public official has deposited large sums of cash into bank accounts, purchased expensive items in cash, or spent significantly more money than he has made through legitimate sources of income, can be strong corroboration of other testimony or evidence showing that the defendant has taken bribes or has been engaged in other illegal activity.

In some instances, the investigator may be able to link specific financial transactions directly to specific criminal conduct. However, even when the financial transactions cannot be directly linked, unexplained wealth may give rise to the inference that the money came from an illegal source. Also, the investigation into unexplained wealth may uncover evidence showing that the defendant's criminal conduct is much more extensive than previously believed. In the end, the investigator may establish that the defendant has committed other crimes, in addition to the one under investigation, such as other bribe-taking, tax offenses, or false financial disclosure.

Additionally, a thorough financial investigation of the defendant may provide ammunition for cross-examination, should he choose to testify at trial, or it may be one of the reasons that force the defendant not to testify at all, by anticipating that he

will be asked in detail about his financial status. In the second scenario, his defense will be weakened as he would not be able to refute some key elements or accusations. Considering these potential benefits, a thorough review of the financial status of the defendant should be considered a significant part of a complete investigation.

2. Direct method of proof (specific items)

Proof of income by specific items is the simplest way to prove the defendant's receipt of illegal proceeds. This method refers to the collection of evidence directly related to the crime.

For example, evidence that the defendant made bank deposits exactly on the days/dates when the witnesses have paid him bribes would strongly corroborate the testimony of such a witness. Of course to strengthen the link between the two facts other evidence might be needed, for example, demonstrating that the defendant did not have another reasonable explanation for the deposited funds.

For example: A municipal official has his girlfriend placed on the payroll of a private company which bids for municipal contracts. She receives 300 Euros per month in "salary," even though she never shows up at work. If such an agreement is proven, this would be corroborating evidence of the testimony provided by the witnesses, that is, that the public official received benefits in exchange for granting contracts. The same evidence might also be used in a separate criminal case to demonstrate that the public official failed to declare truthfully his income on his annual Financial Disclosure Form.

Whenever the prosecution has a witness who is willing to testify that he gave bribes to a public official himself or on behalf of a

third party, this testimony is also evidence of the "specific item" and supports the criminal charge.

Even though the indirect methods of proof, which will be explained later, may be very effective, it should be emphasized that the direct method of proof is always the best evidence when it exists. For example, the defendant may keep records documenting his financial transactions. He may be recording how much bribe money he has received and from whom, or he may be keeping good records of purchases that he has made. Such records may be kept in logs, journals, daily planners, notebooks, or in electronic storage in computers, external storage devices, etc., which may be kept in the home or office of the defendant or another secure location. This type of data is great help during an analysis using the indirect method of proof. The investigator should also assess whether there is a basis for obtaining a search warrant which could produce records to corroborate other evidence establishing the criminal activity.

3. Indirect method of proof

The theory behind the indirect method of proof is that a criminal can only do three things with the proceeds of a crime: spend them, deposit them, or hoard them. The indirect method of proof tracks financial transactions and accounts for funds spent, deposited or hoarded. Three of the most common indirect methods of proof are: a) net worth analysis; b) expenditures analysis; and c) bank deposits analysis.

3.1. Net worth analysis

The use of the net worth method of proof is appropriate when a defendant is accumulating assets and there are insufficient records to establish the source of funds that were used to pur-

chase those assets. The increase in the net worth over a specific period of time, minus known lawful income and other lawful revenues, would represent illegal proceeds.

Of course the net worth method can only be used when an investigator is able to establish a baseline and to show/demonstrate accumulation of assets. When records to establish a defendant's accumulation of assets do not exist, this method is not very effective.

Calculating Net Worth: Net worth is simply the difference between a person's assets and his liabilities. The formula is: Assets - Liabilities = Net Worth.

An asset is anything of value that a person owns (or has an ownership interest in). An asset can be "liquid," meaning it is cash or easily convertible into cash, or it is "non-liquid," meaning it cannot be easily converted to cash, such as real estate. Liabilities or debts are amounts owed to others.

Another concept is "equity." This is the part a person possesses in a property that is jointly owned or the value of the property when liabilities on the property are subtracted. For example, a person may jointly own a piece of property which is valued at 20,000,000 lekë and which has a 16,000,000 lekë mortgage on it. The value of the jointly owned assets after liabilities have been paid off is 4,000,000 lekë, so that the equity of the person is 2,000,000 lekë.

Examples of assets:
- cash;
- jewelry;
- art work;
- stocks, bonds, other investments;

- home furnishings;
- wardrobe;
- automobiles;
- real estate (homes/apartments/land);
- percentage of interest in a business;
- outstanding loans made to others.

Examples of liabilities:
- outstanding loans/mortgages;
- credit card debt;
- other debts.

To begin a net worth analysis, the investigator must establish a baseline prior to the criminal conduct of the subject. At this moment, the net worth value of the defendant should be known or established. This is established through traditional investigative sources and financial records, including the following:
- information furnished by the subject and his personal records;
- informants, cooperating witnesses;
- financial disclosure forms;
- tax returns;
- real estate records;
- vehicle purchases;
- credit card payment records;
- home mortgage applications or other loans;
- records of lawsuits/court decisions;
- family records, especially related to divorce;
- brokerage/securities agent payments;
- bank records.

Assuming a baseline can be established, the investigator will conduct the same analysis for another point in time during or after the alleged criminal conduct (if this were a tax evasion in-

vestigation, the analysis would be performed for each tax year under investigation). The difference in net worth between the baseline and the end point is the first step of the analysis.

Example:
Arben Hysi is the director of a regional directorate. He was appointed to this post in September 2004, when he completed his M.A. studies in Finance. The investigator has received information from informants that he is taking bribes to perform his duty. Given that the investigators have his asset declaration from 2004 available, they perform a financial net worth analysis.

In March 2005, Hysi declared the following assets and liabilities:

Assets	Liabilities
Money in bank 500,000 lekë	MA student loan 750,000 lekë
Automobile valued at 250,000 lekë	Credit card debt 150,000 lekë

In this example, Hysi's net worth in March 2005 was as follows:

Assets (750,000 lekë) - Liabilities (900,000 lekë) = Net worth (- 150,000 lekë).

The investigator would then reconstruct the defendant's current net worth value. Based on bank account records, as well as other sources of financial data (including the asset declaration), the investigator is able to document the following assets through March 2008:

Assets		Liabilities	
Money in Bank	650,000 lekë	MA student loan	600,000 lekë
Shares in a company	500,000 lekë	Home mortgage	6,000,000 lekë

Apartment	9,000,000 lekë	Credit cards	200,000 lekë
Automobile	2,000,000 lekë	Auto loan	1,000,000 lekë
Home furnishings	750,000 lekë		

The records of the real estate office show that the apartment was purchased in June 2008 for 9,000,000 lekë, from which 1,500,000 lekë was a cash down payment, while 7,500,000 lekë was a bank loan.

Automobile records show that the car was purchased in January 2008 for 2,000,000 lekë, from which 1,000,000 lekë was a cash down payment, while 1,000,000 lekë was a bank loan.

Bank records revealed that credit cards were used to buy furniture, and their invoices were paid from the bank account

Under this slightly more complicated scenario, Hysi's net worth as of December 2008 can be calculated as follows:

Assets: 650,000 + 500,000 + 9,000,000 + 2,000,000 + 750,000 = 12,900,000
Liabilities: 600,000 + 6,000,000 + 1,000,000 + 200,000 = 7,800,000
Assets - Liabilities = Net Worth 5,100,000 lekë

So in a 4-year period, Hysi's net worth increased by 5,250,000 lekë (5,100,000 minus the base year – 150,000). The next step is to factor in Income and Expenses.

From Hysi's financial statements and other sources, we learn that Hysi earned a salary of 80,000 lekë per month in 2005 and 2006; 100,000 lekë per month in 2007; and 110,000 lekë per month in 2008. He also reported his earnings as a part-time professor at a private university at 150,000 lekë in 2007 and

150,000 lekë in 2008. Hysi claimed no other income, the total amount of which for 4 years adds up to 4,740,000 lekë.

Already we can see a discrepancy between the amount of income and the increase in the net worth, but we are not finished. Next we have to offset income with expenses.

From the bank account records, investigators are able to piece together a good part of Hysi's monthly recurring expenses. From January 2005 to June 2008, Hysi lived in a rental apartment, in which the monthly rent was 55,000 lekë a month. His utility bills were about 10,000 lekë monthly, and he paid 5,000 lekë monthly for parking. Beginning in February 2008, he began making car loan payments of 20,000 lekë per month. So, from January 2005 to June 2008, his base expenses were 70,000 lekë per month or over a 42-month period, 2,940,000 lekë, plus an additional 100,000 lekë in car payments, totaling 3,040,000 lekë.

Beginning July 2008 to December 2008, after Hysi bought the apartment, he made mortgage payments of 60,000 lekë a month, plus 10,000 lekë for water, electricity, TV, high-speed internet and phone, 5,000 lekë for parking and 7,500 lekë as a building maintenance fee, all totaling 82,500 lekë per month. His car payments of 20,000 lekë per month continued for those 6 months. Thus, his expenses for the last 6 months of 2008 totaled 615,000 lekë. Adding the two sums, total expenses for this investigated period are 3,655,000 lekë.

Notably, the base (recurring) expenses fail to factor in other expenses, such as food, clothing, and entertainment expenses. Let us suppose that Hysi acknowledged to a person at some point in time that he spends approximately 5,000-7,500 lekë per week on meals. Even if no witness can attest to this, the

prosecutor can estimate the meal expenditures for a person of the defendant's stature. If the low end of this estimate range is considered, these expenses would total approximately 250,000 lekë per year or about 1,000,000 lekë over 4 years. Hysi's total expenses could be estimated as approximately 4,655,000 lekë for 4 years.

Thus, the prosecution can show that the salary income, totaling 4,740,000 lekë over a 4-year period barely covered his living expenses for the same time period. Moreover, the reported income fails to account for Hysi's increase in net worth of 5,250,000 lekë.

The formula for calculating/estimating unlawful income, using the net worth analysis is as follows:

Assets minus Liabilities = Net worth
Net Worth less base year's net worth = net worth increase (decrease)
Net worth increase (decrease) plus living expenses = income or expenditures
Income or expenditures minus funds from known sources = funds from unlawful income/unknown sources

The following is an example of a chart that the investigator can prepare using the above formula to calculate illegal proceeds in Hysi's case:

	Dec. 2004 (base year)	**Dec. 2008**
Assets (in lekë)		
Cash on hand		
Bank account balances	500.000	650.000
Automobiles	250.000	2.000.000
Real Estate		9.000.000
Jewelry		
Home furnishings		750.000
Company shares		500.000
Total Assets	**750.000**	**12.900.000**
Liabilities (in lekë)		
Student loans	750.000	600.000
Home mortgage		6.000.000
Auto loan		1.000.000
Credit card debt	150.000	200.000
Total Liabilities	**900.000**	**7.800.000**
Net Worth Value	-150.000	5.100.000
[Less base year net worth]	-150.000	
Net worth increase	**5.250.000**	
Add		
Personal living expenses*	3.435.000	
Car loan payments	220.000	
Other personal expenses	1.000.000	
Total	**9.905.000**	
Less		
Wages	4.440.000	
Other Income	300.000	
Total funds from known sources	**4.740.000**	
Total funds from unknown/illegal sources	**5.165.000**	

* If calcuations are made on annual basis, then this amount would be split in separate columns for each year.

This net worth analysis reveals that our subject has 5,165,000 lekë income from unknown sources. That leaves two possible explanations, neither of which is good for Hysi: 1) he has re-

ceived lawful income, cash, gifts, loans or inheritances that he never reported, meaning that he lied on his asset declaration; or 2) he has an illegal source of income.

To complete the analysis, from the very beginning the investigator should anticipate possible explanations or claims the defendant may raise and should also calculate the amount of money saved or gifts received before the baseline date. He may also try to find explanations for money borrowed or gifts received, especially before the defendant learned of the financial investigation, so that the latter is cornered and not able to find a convincing explanation for his net worth increase.

Even if the defendant claims that he has received gifts or inheritance, he will have to identify the source of these funds, such as a friend or family member. This may require an "extension" of the investigation to include the alleged source of the money and to establish whether these persons have the funds to give such a gift. The investigator could question the existence and the form of the financial transaction carried out, if there are no records supporting it. For example, if Hysi claims that he inherited $50,000 USD from a deceased uncle in the USA, some of the questions that could be posed to him or his family members are:

- When did the uncle die? What official records corroborate his death?
- What records support the uncle's wealth? Was there a will? What about the uncle's own children? What did they inherit? What about the uncle's other relatives, his parents, brothers or sisters, have they inherited anything? Was the defendant the only beneficiary of the uncle's generosity? How plausible is that?
- How was the money transferred? In the case of a bank wire, where are the bank records? If the money was delivered in

cash to Albania, how was this done? Were there customs declarations filed?

Several additional rules must be followed in the net worth analysis. Assets should be valued at cost, and no adjustments should be made to erase their appreciation or depreciation. For example, even if Hysi's apartment was worth 10,000,000 lekë in the market, the calculation should be made based on the purchase price, thus 9,000,000 lekë. If he were to sell the apartment at the market price, the difference of 1,000,000 lekë would be calculated as profit from known sources.

If the defendant is married or cohabiting, of course the assets, liabilities and income of the spouse or partner should be factored into the equation. In some instances the assets may be jointly held, and in other instances they may be in the name of one spouse alone. If the spouse is not earning substantial income, the assets registered in her name may add to the discrepancy between income and increased net worth. In the same way, other assets may be put in the names of third parties, including children, other relatives, or friends. Before an asset that appears in the name of somebody else is added to the defendant's balance sheet, the investigator should have solid evidence that he is not the real owner but is a cover for the defendant.

It is worth repeating that the biggest problem the prosecution will face is to negate all arguments that the defendant might furnish to explain the increase in net worth.

3.2. Total Expenditures Method

This method, also referred to as "source and use of funds," is a variation of the net worth method. The total expenditures method is useful when it is clear that the defendant is living

beyond his means but is not accumulating visible assets. This method is based on a simple concept: if the defendant's spending in a given time period exceeds his salary income or other known sources, he must have an unknown source of income. Of course, the unknown sources will be explained by means of the same evidence that proves the criminal activity he is being investigated for.

The formula for this method is:
Expenditures - Known sources of funds = Unknown or illegal funds

Just as with the net worth method, the investigator starts by calculating the expenditure of funds for the period of time under investigation, including, but not limited to:

- personal living expenses, e.g. rent, mortgage and loan repayments, water, electricity, car expenses;
- travel expenses;
- purchase of big ticket items, real estate, cars, jewelry, artwork, etc;
- school tuition;
- weddings, gifts, home remodeling/refurbishing;
- credit card repayments;
- cash expenditures for entertainment, socializing, gambling, etc;
- increase in cash on hand;
- increase in bank account balances;
- purchase of bank instruments (cashier checks, money orders).

Next the investigator needs to establish a baseline of known sources of income for a given time period. These will include:

- salaries and other personal income;
- interest, dividends or other investment income;
- rental income;

- bank account balances;
- cash on hand;
- proceeds from the sale of property;
- loans, cash advances;
- gifts, inheritances;
- repayment of loans made to others.

Example:

	2006	2007
Expenditures (in lekë)		
Personal Expenses	840.000	915.000
Other personal expenses	240.000	240.000
Tuition payments	120.000	120.000
Credit card payments	650.000	1.100.000
Car purchase (cash paid)		1.000.000
Apartment purchase (cash paid)		1.500.000
Car payments		220.000
Increase in bank balances	500.000	250.000
Total Expenditure	**2.350.000**	**5.345.000**
Less Known Sources of Funds (in lekë)		
Income	1.350.000	1.470.000
Interest on bank accounts	30.000	40.000
Decrease in bank balances		
Gifts	50.000	50.000
Total of known sources	**1.430.000**	**1.560.000**
Funds from unknown sources	**920.000**	**3.785.000**

In the example above, the investigator has been able to piece together expenses from financial record sources, such as bank records, credit card records, asset declarations, loan applications, admissions made during preliminary investigations, etc.

Note that the results obtained through the expenditure method may differ from the results obtained from the net worth analysis. Certain events/actions might not be calculated as an as-

set or liability and may not be calculated during the net worth analysis (such as credit card purchases and payments), but they may be considered as expenditures and be calculated during the expenditure analysis. However, both methods illustrate the same thing, e.g., that the defendant has unexplained sources of wealth or income.

3.3. Cash Expenditures Method

Another financial method that may be used to support criminal charges is the cash expenditures method. This method can be useful in corruption cases or other cases involving public officials and unlawful cash/benefits generation. This type of financial analysis deals solely with the defendant's use of cash, for example cash purchases, bank deposits in cash, cash withdrawals, cashing salary, receipt of cash gifts or loans, etc.

By totaling all of the defendant's cash expenditures (depositing cash into an account, purchasing items or services in cash, paying bills in cash, etc.) and subtracting from this total all the known sources of income (salary, previously accumulated cash, etc.), the investigator can determine the amount of cash expenditures the defendant made in excess of his legitimate income. The difference between the two may represent previous cash bribes or other income illegally acquired resulting from the defendant's criminal conduct.

The greater the difference between the expenditures and income, the more persuasive the results of this analysis and the more difficult it will be for the defendant to devise some plausible explanation for the excess cash expenditures. This method, focused solely on the use of cash, is simple and persuasive, especially in cases of public official corruption due to the nature of this crime and the way the bribe has been taken.

3.4. Bank Deposits Method

This method considers known and unknown sources, but also analyzes the defendant's banking activities rather than just his assets and expenditures. This method works well if it is combined with the cash expenditure analysis, as the investigation focuses on the defendant's cash deposits and other cash expenditures during a given time period.

However, the bank deposit method can only be used if the defendant has bank accounts and uses them regularly. This method of analysis is especially useful when the defendant has a steady salary that is deposited into his bank account.

The formula for the third method is:

Total deposits to all accounts - transfers and redeposits = net deposits to all accounts
Net deposits to all accounts - funds from known sources = funds from unknown sources

Note that transfers of funds between accounts and any money that is withdrawn and redeposited in the same or another account must be subtracted, as these transactions do not constitute income. To be on the safe side, therefore, any cash deposits made with a previous cash withdrawal from bank accounts should be considered a "redeposit," unless it can be proven otherwise.

The bank deposits method is more effective if there are known cash expenditures. In this case, cash expenditures that exceed previous cash withdrawals should be added to the total amount of funds from unknown sources. In other words:

Total deposit to all bank accounts - deposits made subsequent to cash withdrawals (with an equal or lesser value than the withdrawal) + cash expenditures that exceed withdrawal value = income from unknown sources

Example:
The bank account of Ilir Kurti shows that in 2008, in addition to salary deposits, he made 4 other deposits of 200,000 lekë respectively in March, June, September and December. In July, he withdrew 100,000 lekë, while in August he withdrew 600,000 lekë. In late September he purchased an automobile, making a cash down payment of 1,000,000 lekë. The income value from the known sources would be calculated as follows:

800,000 lekë (total deposits to all bank accounts) – 100,000 lekë (deposits made subsequent to cash withdrawals + 400,000 lekë (cash expenditures that exceed cash withdrawals) = 1,100,000 lekë (income from unknown sources)

The defense to a bank deposits analysis would be similar to defense of other methods, that is, that the additional money came from gifts, inheritance, cash hoards, loans, and repayment of debts. The investigator should anticipate these defense strategies and attempt to rule them out during the investigation.

4. Other Types of Financial Evidence

4.1. Limited cash analysis

In many instances, it may not be practical or possible to conduct a full-blown financial analysis. Records may be insufficient, or the investigation time limits may not allow for undertaking the necessary steps. In these cases, a modified or simplified version of any of the above methods may be performed which may yield

useful evidence against the defendant. The sudden increase in cash expenditures or other unusual developments in the defendant's handling of money may be probative in a criminal case. For example, why would an individual who maintains a bank account, and regularly uses it, suddenly start expending large sums of cash especially if the amounts do not correspond to withdrawals from bank accounts? Evidence that during the time period under investigation the defendant used cash to pay his bills, despite maintaining a bank account which he previously used regularly for this purpose, proves that he is trying to hide illegally-obtained cash. Similarly, if it can be shown that the defendant purchased cashier's checks with cash and later used these to pay bills (such as clothing, utilities, mortgage), instead of depositing the cash and paying through his account, it can be argued that he sought to conceal his illegal proceeds by choosing methods of payment that would make tracing the source of funds more difficult.

4.2. No Checks or Credit Charges

Often, the absence of checks or credit charges during the period of time under investigation proves the claim that the defendant was spending sums of cash that derived from his unlawful conduct. Thus, where it can be shown that the defendant took trips or vacations (through an isolated hotel/restaurant bill paid by credit card or personal check in another country), then it can be deducted that during the trip, he spent cash. Since it takes money to travel, and because the use of credit cards or checks has been limited, he cannot account for other likely expenditures incurred in the course of such travel.

Similarly, where the defendant's checking account and credit card slips reveal no expenditures for living expenses (food, clothing, entertainment, etc.), it can be argued that the defen-

dant spent his cash bribes/payoffs to pay for living expenses that everyone incurs in normal living.

Likewise, where changes can be shown in expenditures and their payment method during the time period when the criminal activity occurred and other time periods of the defendant's life, the prosecutor can argue that during the respective period there has been an alternative source of income.

4.3. Indirect and *"in-kind"* benefits analysis

A thoughtful criminal will seek to evade detection by receiving money and other benefits indirectly, through family members or third parties. The same could be accomplished through the use of corporate or business bank accounts by disguising the defendant's illegal payoffs as business expenses. Therefore, in searching for illicit wealth or proceeds, the investigator must also be mindful of the possibility of payments to spouses, parent, siblings, children, paramours and other nominees of the defendant. In some instances, a net worth analysis of expenditures or bank deposits may be necessary for one or more of these persons. In other cases, the connection may be obvious.

During the analysis of books, records or bank accounts of a party related to the defendant or a suspected accomplice of the defendant (individual or company), the investigator should look for:

- checks/payments/transfers to the defendant, spouse, children, paramours or other suspected complicit individuals or nominees;
- checks written to cash, but endorsed by the defendant, family members, etc;
- checks/payments/transfers to credit card companies for credit cards issued to defendant, family members, etc;
- checks/payments/transfers for expenses that can be linked

to the defendant, family members, etc. such as mortgage payments, rent payments, utilities, travel, vacations, automobile purchases, tuition payments;
- money orders/cashier's checks purchased which are used to pay one of the above benefits of the defendant, family members, etc.

In addition to cash benefits, there is also the possibility of indirect or *"in-kind"* benefits, such as the use of vacation homes, automobiles, private watercraft, etc. In these cases, we are not referring to money that changes hands, and there is no financial documentation directly connecting the defendant to these events. The proof of these benefits may be limited to testimony, but it may be bolstered by admissions of the defendant or of persons that offered him this benefit. The value of such benefits should be added into any calculation of income.

4.4. Safe boxes activity

When it is revealed that the defendant has a security box in the bank, the investigator should analyze the actions involving the box during and beyond the time under investigation. If the data show that frequent actions were performed during the period under investigation, this constitutes a strong basis for arguing that the defendant may have hidden bribes in the box and withdrew them as needed. Also, if the dates of the use of the box coincide with major purchases or expenses in cash, the prosecutor could argue that the benefits of illegal activity were hidden in the safety box and were used to pay for purchases or expenses. Non-activity of the box beyond the time period under investigation supports the same argument. If he was not committing any illigal activity, he had no need for the safety box. Non-activity with the box in the time period preeceding the period under investigation can be used to rebut any argument that he had

savings which explain his expenses during the period under investigation.

5. Financial investigation of corruptive schemes

In conducting an investigation designed to uncover financial evidence of receipt of cash or other corruptive payoffs, the investigators may follow these avenues:

- Secure the salary payment logs of the defendant and whether the salary was paid in cash or it was deposited into a bank account. This helps the investigator determine the main bank of the defendant. In addition to the salary, investigators should obtain information on other income of the defendant, e.g. through tax returns on the personal income. If possible, this information should be obtained for 2-3 years prior to the criminal offense for comparison purposes and to establish a baseline of income. If the defendant has generated income in another country, try to obtain copies of tax returns filed by the defendant there.
- Subpoena or seize all records of the defendant's financial transactions and his relationship with all known banks/financial institutions.

A standard attachment should accompany every subpoena seeking information pertaining to the defendant, his spouse, and every other person whose financial affairs may be intertwined with the defendant, including: checking account records, savings account records and bank deposits, deposit slips, signature card, financial statements and correspondence, deposit slips, deposited items, cancelled checks, wire transfers, withdrawal slips, loan files (including financial statements, credit reports, loan applications), safe boxes, investment records, documents relating to credit cards, etc.

The deposit slips especially may reflect the type of banknotes used by the defendant, when the deposit occurred. Copies of the defendant's cancelled checks[95] may provide leads to other financial institutions, business ventures, travel agencies, brokerage agents, credit card companies, paramours, stores and restaurants frequented by the defendant, as well as funds converted to cash.

If a financial institution does not keep a list of the individuals who purchase cashier's checks, money orders, or traveler's checks, a manual search of their archives should be conducted.

Example:
In a corruption case, a manual search of the cashier's checks sold at the defendant's bank produced thousands of lekë in cashier's checks purchased by the defendant. Because the bank did not keep records of the manner in which the cashier's checks were purchased, a manual review of all deposited items on the days of the purchase of cashier's checks was done in order to preclude the possibility that the defendant negotiated any other instrument to purchase the checks. Because it was determined that he had not used such instruments to buy the cashier's checks, the obvious inference (as argued in the court) was that the defendant used cash derived from bribes to purchase the cashier's checks.

- Obtain statements of proprietors of businesses, stores, and restaurants identified in the cancelled checks to determine the extent of the expenditures made by the defendant, in cash or otherwise.

The investigator should obtain the statements of individuals paid by checks to determine their relationship with the defen-

95) It is possible that the original copies of the checks may be obtained from the defendant's personal records as well.

dant and to preclude any later fabricated testimony that they were the sources of income for the defendant (cashed checks for the defendant, cash gifts or loans to the defendant, etc.).

- Subpoena or seize information related to registration of real estate to determine whether the defendant owns or has owned any property.

From these records, try to determine whether the defendant has or had any home mortgage or unpaid loan.[96] Then, obtain the mortgage file from the respective institution (including tax declarations he has filled out for the application) which will be helpful to establish a baseline of the defendant's financial status and to develop leads to other financial information.

- Subpoena or seize credit card records, which identify payments made through them, and the method of invoice payment (cash or wire transfer).

- Obtain the defendant's passport (reflecting country entry and exit records) and declarations of cash and other instruments to the Customs Service.

- If the defendant is a member of any organization or has a secondary activity, the investigator should obtain evidence that documents this relationship, in order to preempt or rebut claims that he obtained cash from the organization or the activity as reimbursement for personal expenses and used this during the period under investigation.

- Obtain declarations of assets and private interests of the defendant. These documents reflect the financial status of

96) Data on bank loans can be obtained from the Bank of Albania which maintains the Loan Register.

the defendant and limit his ability to show fake sources of income. The investigators should obtain information on inheritance and other legal benefits (debt payment deriving from insurance contracts or damage reimbursement, different legal decisions, etc.).

- Consider the possibility of a proactive investigation, because even if the defendant knows he is under investigation, he may not know certain persons are cooperating against him. These persons might be in a position to consensually record conversations with the defendant. These conversations may provide financial information that exculpates the defendant. Even though these situations are rare, the defendant may attempt to contact an accomplice in committing the offense (who has become a collaborator of the prosecution without the knowledge of the defendant) and try to secure his silence. The cooperating witness may discuss with the defendant the bribe payoffs using various scenarios such as: *"My lawyer tells me I may be summoned to the police, and I'm worried that they may have discovered I paid you money. You didn't deposit any of the cash I gave you, did you? What should I say about the cash I paid to you if the prosecutor grants me immunity?"*

- Interview the defendant early in the investigation if the investigation is overt. This may lead to admissions regarding the lack of accumulated cash, other financial information, and false exculpatory statements which may be voided later making his situation more serious.

- Obtain the statement of the person who prepares the financial documents of the defendant, if one exists (accountant, financial advisor, etc.). These individuals may be in a position to provide leads to financial institutions, the names of

defendant's business associates, and handwritten notes and memos submitted by the defendant.

- Subpoena defendant's telephone records for the time period under investigation. The analysis of these records may reveal his relationship to other subjects, business ventures, banks (in which he has deposited his illegal profits), travel agencies, real estate offices, other financial institutions where he is doing business.

- Obtain records on all the registered vehicles of the defendant or members of his family. These records are useful to determine the vehicles owned by the defendant and his family members and also the dealers or dealerships these came from. Later, information may be obtained from the seller on the method of payment for the purchased vehicle (e.g. cash).

- Request or seize business-related notes, diaries, appointment books, desk calendars, personal agendas of the defendant or his accomplices. If the defendant during or around the time of the criminal offense made regular entries, they may be used as evidence of meetings with accomplices, telephone numbers, vacation schedules, travels, leads to expenditures (restaurants, businesses), and names of business associates.

- When the bribe-payer is a prosecution witness (attorney who paid off a judge, businessman who paid off public official, etc.), attempts should be made to secure any evidence that may be furnished by this person and corroborate his testimony. For example, a diary kept by a businessman who has noted down every bribe paid to public officials.

- Obtain statements of all potential financial witnesses. The investigator should anticipate who will be the potential witnesses of the defense, who may be identified as sources of income for the defendant (friends, business associates, etc., who might say that they gave or loaned money to the defendant). The prosecutor should attempt to limit their testimony as much as possible by obtaining their testimony at the beginning of the investigation (before they have a chance to fabricate a story that is favorable to the defendant) and to secure any useful information regarding the defendant. Also, a defendant who knows that his finances are being scrutinized may feel compelled to attempt to "fabricate" evidence. Thus, summoning business associates as witnesses may result in statements that the defendant asked them to offer false testimony.

- Conduct internet searches. The investigator should search internet sites such as Facebook, Twitter, etc. for any public postings by the defendant or his family members. Such information may come from friends, associates or business partners, photos, information on assets, vacations, other expenditures, or statements of the defendant on his lifestyle, hobbies, or other pertinent facts to the case.

MONEY LAUNDERING AND ASSET FORFEITURE

1. Money laundering[97]

Generally, money laundering refers to a transaction or series of transactions undertaken to conceal the source of illegal funds that someone wants to spend or invest. Put another way, money laundering is the process of making "dirty money" appear clean.

For many financial crimes and corruption, money laundering is simply the byproduct of criminal activity because after the criminal receives proceeds of the crime, then he usually wants to do something with these proceeds. After all, keeping cash in a shoebox at home is unproductive and risky. Frequently, efforts to spend the money will violate the anti- money laundering provisions of the law. Money laundering can be very simple, for example a person purchases a car, real estate, or other item with the proceeds of the crime and registers the purchase in the name of another person. On the other hand, money laundering can also be a sophisticated component of substantial criminal activity enabling international organized crime groups to control and legitimize proceeds from a wide range of criminal activities, from narcotics and arms trafficking to terrorism and human trafficking.

Money launderers come in different types. One type includes the criminals who are simply trying to hide or spend money obtained from criminal activity. Another type includes individuals

97) CC uses the term "laundering of criminal proceeds."

who assist the criminals in concealing or disposing of the proceeds. These collaborators may not be involved in the underlying crime; but, for reasons usually associated with greed, they are willing to assist the criminal by engaging in personal and financial transactions to conceal the funds, which constitutes illegal activity. Such persons may be professionals such as bankers, lawyers, accountants, businessmen, and financial advisors. There are essentially two approaches to a money laundering investigation. One approach is to investigate the underlying crime and then attempt to trace the money. The other approach is to locate the money and try to trace it back or connect it to an underlying crime. Each method has its value. In any case, gathering financial information is an important key to success.

The investigator should consider investigating money laundering in any criminal investigation involving financial crime or corruption. Obviously, the evidence gathered in such an investigation establishes not only the extent of the profit generated from the illegal activity, but often, the defendant's criminal intent, which is revealed in his attempt to conceal his profits and/or sources of funds. Even if the defendant is ultimately not charged with a money laundering offense, the prosecutor is more likely to obtain a conviction for the underlying crime if he has managed to discover the extent of the defendant's profit from his activity.

Another significant benefit to the money laundering investigation is the identification of assets that could be subject to forfeiture. Since financial benefit serves as the motivation for many crimes, there is nothing more painful to the criminal, sometimes including incarceration, than to see his assets taken away.

2. Elements of the laundering of crime proceeds

The criminal offense of the laundering of crime proceeds is provided for in Article 287 of the CP:

1. Laundering of proceeds of crime committed through:
   a) *exchange or transfer of an asset that is known to be a proceed of crime, with the purpose of hiding or concealing the origin of the asset or providing help to evade the legal consequences of having committed the criminal offense;*
   b) *concealment or disguise of the nature, source, location, position, shift of ownership or other rights related to the asset which is a proceed of crime;*
   c) *performance of financial activities and fragmented/ structured transactions to avoid reporting responsibilities according to the money laundering law;*
   ç) *abrogated;*
   d) *counseling, incitement or public call to commit any of the offenses specified above;*
   dh) *use and investment in economic or financial activities of the money or objects that are proceeds of crimes is punishable by three to ten years of imprisonment and to a fine from 500,000 up to five million lekë.*

2. When this offense is committed during the exercise of a professional activity, in conspiracy, or more than once, it is punishable by five to fifteen years of imprisonment and to a fine of 800,000 to eight million lekë, while if serious consequences are incurred, it is punishable by not less that fifteen years of imprisonment and a fine of three million to 10 million lekë.

As it can be observed, the CC provides for several instances of this criminal offense.

2.1. Elements of Money Laundering under Article 287/1/a

To establish a violation of Article 287/1/a of the CC, all the following elements must be proven:

- ***there has been an exchange or transfer of assets:*** the law does not appear to restrict the manner in which the asset is exchanged or transferred. Of course, any type of financial transaction, such as a bank deposit, purchase of a cashier's check, exchange of cash to another currency or a purchase of goods, would meet this definition. Likewise, a nonfinancial transaction, such as the movement or delivery of the cash from one person to another, would meet this definition.

- ***the assets were the proceeds of a criminal offense:*** under CC, the laundering of crime proceeds is not limited to currency transactions but may involve the transfer or exchange of any assets derived from a criminal activity; for example, the transfer of items acquired through fraud would meet this element.[98] Additionally, there is no limitation as to the type of crime that must be proven to establish a money laundering offense. Unlike the anti-money laundering laws of many other countries, which require that proceeds must derive from certain "specific predicate criminal offenses," any criminal offense resulting in illicit proceeds can form the basis of a money laundering investigation. To establish whether assets are the proceeds of criminal activity, proof through indirect evidence may be necessary. It is not sufficient for the prosecutor merely to show that the defendant has no legitimate source of income or wealth to explain his financial transactions; instead, he must prove the connection between the crime and the assets.

98) One should distinguish the criminal offense of funds or stolen goods embezzlement, Article 287/b of CC.

- ***the defendant knew the asset was the proceeds of a criminal offense:*** This can be one of the most difficult elements to establish. When the defendant has been directly involved in provable criminal activity, then his knowledge of the origin of funds is obvious. However collaborators who assist criminals in the use or disposition of their assets will frequently claim they had no knowledge the asset was the proceed of a criminal offense. Under such circumstances, the prosecutor must rely upon indirect evidence. For example, evidence that a businessman received large quantities of cash from another individual under suspicious circumstances, or that the supplier of the money was known to be involved in criminal activity, or obtained the money through a series of complicated transactions which make no sense for his business, may support the conclusion that the defendant knew the money was proceeds of some unlawful activity. It is an established standard of jurisprudence that certain objective features of the criminal offense suffice to convince the judge about the criminal intent of the defendant. The prosecutor should not give up during the money laundering investigation merely because the evidence of the defendant's knowledge is not direct.

- the defendant has committed laundering of crime proceeds ***willingly;***

- exchange or transfer was done ***with the purpose of hiding of concealing the origin of the asset*** or to assist in evading the legal consequences associated with committing the crime. The fact that the subject sought to hide or conceal assets or to assist another to do so may be established by direct or indirect evidence. Direct evidence includes instances when the subject conducts transactions using fictitious names or false paperwork (such as invoices), or when

he opens bank accounts for shell companies. The use of nominee owners, who allow their names to be used as replacements or apparent owners, is another example. Some of these elements overlap, and proof that the subject was aware of the criminal nature of the proceeds supports the notion that certain financial transactions were conducted for the purpose of concealment. Other evidence supporting the conclusion of the concealment of the criminal offense proceeds includes: 1) meetings or financial exchanges in secret or remote places; 2) the unusual manner in which the asset is packaged, delivered or stored, such as hiding currency in commercial goods or "gift" wrapping it; 3) engaging in highly unusual business transactions, such as multiple or convoluted layers of transactions; 4) commingling legal and illegal funds in the same bank accounts, especially when the illegal funds obviously did not come from the activities of the business; 5) falsifying or lying about the nature of the transaction or the origin of funds to third parties; 6) exchanging currencies, e.g. small bills to larger ones, or lekë to Euros. All of these activities and others may support a finding that the defendant intended to conceal.

2.2. Elements of money laundering under Article 287/1/b and 287/1/c

Article 287/1/b prohibits concealment or disguising of the nature, source, location, position, shift of right of ownership, or other rights related to the asset, while Article 287/1/c prohibits structuring[99] transactions to avoid reporting requirements. If the evidence supports any of these provisions, it should be easier to prove this offense than offenses under Article 287/1/a.

99) Structuring refers to breaking up a larger transaction into smaller ones, usually to avoid suspicion or to avoid the bank's obligation to file a report with the FIU. Persons who engage in structuring, e.g. traveling to multiple branches of the same bank to deposit or withdraw money, are sometimes referred to as "smurfs."

3. Three stages of money laundering

The money laundering process has been described as having three stages: placement, layering, and integration.

Placement: In the placement stage, the form of the asset (generally currency) is changed or converted into some other form of currency or asset. This stage may involve physical movement of the currency. Criminals use various methods to achieve placement. One method involves any number of schemes to put the illegal money back into the banking or financial system. This may be accomplished by opening bank accounts, often in the names of accomplices or third parties, then depositing small amounts of cash into these accounts in a series of structured transactions. The purpose is to keep the deposited amount below the bank's reporting requirements for cash transactions. Another method involves utilizing the cooperation of a business owner or company that deals in large quantities of cash. The cash is given to the owner/administrator who deposits the funds as if they were part of the company funds. The funds are then returned to the criminal, perhaps through payment of phony expenses or invoices for alleged services rendered. The same can be accomplished if the criminal or his family own or purchase a business, like a restaurant, and then commingle illicit funds with legitimate income and deposit these in the bank. When funds are mixed together in this manner, an investigator may have difficulty distinguishing between cash received as legitimate revenue and that which is being laundered. Likewise, shell businesses or fake storefronts are also used to create the appearance of a business that generates cash in order to mask subsequent bank deposits.

Placement may also be achieved by direct cash purchase of goods that can later be converted back into currency, such as

gold, diamonds, or jewelry. The illicit funds may be laundered through the purchase of assets in the names of nominee parties. By using third parties, a criminal removes himself from any legal association with the property. Criminals will usually use family members or trusted friends or associates to act as nominee owners of property.

Another form of placement involves the physical transportation of bulk currency out of the country (smuggling). The money may be hidden on persons traveling across borders by vehicles, boats or through commercial shipments of goods. Sometimes, for smaller quantities of cash, mail or international courier services are used. Often, the smuggler will need to exchange smaller bills for larger bills to lower the weight and volume of the currency. Currency exchange services could be used for this purpose.

Layering: In the layering stage, launderers attempt to hide their tracks through layers of transactions, business entities, storefronts or other concealment mechanisms. Layering may also involve other countries where bank secrecy rules make following money difficult. The layering stage is designed to confuse investigators by creating a paper trail of illegal proceeds that moves the funds through a variety of different accounts and/or transactions. Layering may involve dummy transactions which involve wiring money from one account to another with a business purpose as the disguise. False invoicing in commercial trades, the creation of false loan documents in banking transactions, or the creation of payment slips that purport to show that funds are a legitimate business transaction are all common layering schemes.

Example:
An Albanian criminal group is involved in credit card fraud in the United States. The fraud generates large amounts of cash

that the members of the group want to bring back to Albania. The group sets up two commercial companies in the United States and Albania, where the American company claims to import Albanian products into the United States. Product is actually imported, but the invoices are grossly inflated (or perhaps nothing is exported but fictitious bills of lading are prepared). The US company deposits illegally generated cash into a bank account as alleged sales revenues and pays the "*invoices*" to the Albanian company through wire transfers.

Integration: The third stage, integration, involves using the funds that have been placed or layered making it appear that the funds have come from a legitimate source. For example, in a case where the launderer is able to place illicit money into a business that he owns, the funds may come back to him in the form of salary to himself and family members, or as "*loans*" from the business. He may even pay taxes on this money. The launderer might then choose to invest the funds into real estate, luxury assets, or other business ventures. Integration provides a legitimate explanation for the source of funds after layering.

4. Investigation of money laundering

The investigation of money laundering is accomplished through financial investigation techniques that have been previously discussed. The driving force for such an investigation might be the knowledge or suspicion that the defendant was involved in criminal activity which generated significant income. The challenge is to find what happened to the funds. Alternatively, a person may become a subject due to his having accumulated wealth or assets that are inconsistent with his stated occupation or income. Often the cooperation of insiders will be essential to unraveling the money laundering scheme.

All potential money laundering financial transactions should be investigated through the various stages of laundering, from placement to integration. The investigation can start at any stage, but the money trail must be followed either forwards, backwards, or both ways. Unraveling financial transactions, especially complex ones, may be very difficult and slow; however, with patience the reward will be great.

5. Asset forfeiture

"*Asset forfeiture is the reverse image of a nuclear bomb - it leaves the people standing but takes all their property away from them.*"[100]

Asset forfeiture is the legal process by which the state takes away properties that were the proceeds of illegal activity or were used as an instrument in the commission of the crime. The concept is simple: a criminal should not be allowed to keep the fruits of the crime he has committed or the means used to commit the crime. In addition to being another weapon in the prosecutor's arsenal to punish a defendant, asset forfeiture can be profitable for the state. The assets and money forfeited can be transferred to agencies that fight the crime, providing them with needed resources for carrying out their functions.

5.1. Criminal vs. civil forfeiture

A prosecutor should be thinking about the possibility of asset forfeiture in every aspect of the financial crime investigation. Forfeiture may be accomplished either through a criminal action in the main criminal prosecution, or through a separate civil action.

100) John Mattinger, IRS investigator and author.

What are the advantages and disadvantages of each? A few arguments are listed below:

Criminal forfeiture is considered a "punishment" against the offender. Therefore, the defendant must be criminally charged and convicted of the offense for a forfeiture proceeding to take place. This will require proof "beyond every doubt" of the defendant's guilt.[101] Civil forfeiture is an action filed against the property, not the defendant. Thus, it does not matter if the defendant is found guilty of the criminal offense. This is particularly helpful if the defendant is a fugitive or deceased. If the property is generated from certain criminal activity, then it is forfeitable. Also, the burden of proof is much different. After the state requests civil forfeiture of assets and establishes a minimum standard of suspicion (based on indicia) of the defendant's involvement in criminal activity and the discrepancy between his known legal income and assets, the burden of proof shifts to the defendant/property owner to establish that the assets are derived from legitimate means.

Additionally, a civil forfeiture action can be instituted before or as substitution for a criminal prosecution. This strategy could be advantageous when the state needs more time to investigate the criminal offense or when there is no certainty regarding the success of the criminal case, and there is a concern that the assets will be hidden or dissipated.

In a criminal matter, the defendant has the right against self-incrimination and cannot be compelled to testify. In a civil action, the person against whom the forfeiture of assets is sought does not have any protection against self-incrimination. He could be called/subpoenaed to testify. If he fails or refuses to appear, or refuses to answer questions about the property, this failure

101) Article 4 of the CPC

would obviously be considered by the court in delivering the verdict and certainly it would not be in his best interest. These types of procedures can put the suspect in the precarious situation of having to testify to protect his property interest, thus putting himself in a position to answer questions and possibly incriminate himself, or remaining silent or being absent from the proceeding which could result in the loss of his property.

Most importantly, during a civil forfeiture procedure, the burden of proof does not entirely lie with the prosecutor. Rather once the prosecutor succeeds in proving the suspicions about the defendant's involvement in certain crimes and that he has unjustified assets or living standards, and then the burden of proof shifts to the defendant to show that his assets derive from a legal origin. If the defendant fails to meet his burden of proof, the assets will be forfeited. On the other hand, criminal forfeiture does have certain advantages over civil forfeiture. In a criminal forfeiture action, the prosecutor is not required to prove that the proceeds derived from a specific criminal activity. Proceeds from any crime are criminally forfeitable, while civil forfeiture is allowable only if the proceeds derived from specified criminal offenses.

When criminal forfeiture is ordered, the state can seize substitute assets up to the value of the forfeitable assets, if the forfeitable assets identified by the prosecutor have been transferred or otherwise cannot be located. In civil forfeiture, if the proceeds have dissipated or cannot be located, the state cannot recover substitute assets.

Annex 11: Law No. 9917, dated 05/19/2008 "On the prevention of money laundering and terrorism financing"

Annex 12: Legislation on criminal forfeiture

BANKS AND BANKING TRANSACTIONS

1. Introduction

Bank account records can be one of the most important sources of financial information available to a criminal investigator. Although many Albanians have not maintained bank accounts in the past, their use is becoming more prevalent, especially with new laws requiring the direct deposit of salary payments into bank accounts. Bank records can be used to prove unreported income and illegal income, as well as to follow the money trail from the source of the money to its final destination. Bank accounts may also provide leads to sources of funds, expenditures, hidden assets, and personal transactions.

2. Obtaining Bank Records

Under bank secrecy laws, bank records are confidential and not available to the public. Prosecutors, however, may obtain actual bank records by issuing a subpoena to the bank. Prosecutors may also request FIU to obtain bank account information and to identify all banks where a particular subject has accounts. Making one request to FIU is more efficient than sending a request to all banks of the second level. The prosecutor should include in the request the names and other identifying information for all family members of the subject, as well as any companies or businesses the subject owns or participates in. Other ways to determine the existence of bank accounts belonging to the subject include (1) interviewing the subject or family of the subject (if the investigation is not secret) and directly asking

about bank accounts; (2) asking witnesses, cooperating collaborators, or informants for information about the subject's bank; (3) asking institutions or businesses with whom the subject has done business; (4) conducting searches of the subject's home or work place.

The request for records should include a specific list of the records to be provided by the financial institution. It should include a particular period of time and require the production of records on all open and closed accounts. The request should require the production of all records for accounts maintained in the name of the subject of the investigation as well as other accounts to which the subject maintains control or has a known financial interest.[102] Even if the subject is simply a signatory on the account in another customer's name, this information should be provided. A sample of a subpoena/request for bank records is included in the appendix of this Guidebook. If any documents lead to potential evidence in the case, the prosecutor will need an order of sequestration.[103]

Obtaining a subject's foreign bank records is more difficult. Prosecutors must proceed using a rogatory letter request to the foreign government to obtain actual bank records. Alternatively, the prosecutor may request that FIU make a request to the foreign country's FIU for any bank account information of the subject. Such FIU requests are often not successful, despite the fact that most FIUs are members of the Egmont Group and have agreed to cooperate with one another.

Informal methods of obtaining bank account information should not be overlooked. Many U.S. law enforcement agencies are operating in the region and may be able to provide helpful

102) Annex 14
103) Article 210 of the CPC

information. For contact information on specific agents, speak with the OPDAT office at the U.S. Embassy.

Banks may charge a fee for their search-and-retrieval time and reproduction and printing costs. When records are voluminous, the charges can be very expensive. However, some investigations do not require an in-depth analysis of all records. Therefore, you should carefully consider what records you will request, keeping in mind the time and expense in obtaining the records and the benefit you expect them to provide to your investigation.

3. Banking Regulations

Both the FIU and the Bank of Albania have regulatory authority over banks. FIU may impose fines on banks if they fail to report suspicious activity or to otherwise comply with various anti-money laundering laws and regulations. For example, banks are required to keep customer identification records for a certain number of years after an account has been closed and to maintain financial transaction records for a certain number of years after the transaction. The time frame for record retention is very important to a criminal investigator because it takes time to obtain records and to analyze them to determine the source and application of funds and to follow the money trail of a single transaction. Additionally, records obtained in the initial record request frequently reveal the existence of other accounts in both local and foreign banks. These leads should be followed with additional bank record subpoenas, rogatory letter requests and/or FIU requests as appropriate. It may often take several weeks or months to accumulate all of the financial records necessary to provide a complete financial picture of expenditures made by the subject. You may also want to review bank records for transactions over a multi-year timeframe in an attempt to establish

patterns of activity that may not be obvious from review of a single transaction or even a single year's worth of transactions.

4. Information Available From Bank Records

4.1 Deposit Accounts – Savings, Checking, and Current Accounts

Bank deposit accounts include savings, checking and current accounts in which customers deposit and make withdrawals or expenditures of their own funds. The following is a summary of the bank records available to the financial investigator for deposit accounts and should be requested for both open and closed deposit accounts

- Account application
- Signature cards
- Bank statements
- Deposit tickets/deposited items
- Canceled checks (front and back)
- Wire transfer records
- Credit and debit memos
- Government reporting income forms
- Corporate Resolutions, partnership and trust agreements

4.2. Account Application (Opening an Account)

Based on international standards developed by the Basel Committee on Banking Supervision and the Financial Action Task Force and adopted by most countries, financial institutions are required to properly identify the beneficial owner of all accounts. In order to satisfy these requirements, financial institutions should require a customer (individuals, trusts, business organizations, etc.) to complete an account application to open an account. The application should include who owns the account and may require that the account owner provide an ad-

dress, occupation, employer, date and place of birth, and identity number (identity card, passport number, etc.).

When a business organization opens an account, corporate resolutions and partnership or trust agreements, if applicable, often are included as part of the background information requested by the bank. The business organization may have to provide the bank with a list of names of corporate officers that are able to represent the business in its financial transactions.

The account application may be important for discovering personal information about the subject as well as the date the account was opened. If the account includes other persons who are authorized to use the account, these persons could also be suspects or accomplices. If the account is listed in fictitious names, this could indicate an attempt to conceal funds or provide evidence of some other criminal violation. The account application may also provide key names or associations for any business entities.

4.3. Signature Record

Financial institutions require that a customer complete a signature record when opening an account. This document should include the signature of the account holder as well as any additional persons who are authorized to use the account. This record identifies who has authority and control over the account, how long the account has been open, and may provide valuable leads to other witnesses or unknown accomplices. In addition, the record will have the signature of the bank official who opened the account who may have other information on the subject not included in the formal records. Since the card contains the signature of the account owners, it can serve as a sample of the owner's handwriting. Additionally, if the account

is titled in fictitious names, the signing of the signature card with a fictitious name may be an additional criminal offense,[104] or it may be another criminal violation to be pursued under Article 287/a of the CC.

4.4. Bank Statements (Record of Transactions)

Bank statements provide a summarized history of all transactions conducted within an account. Details of all financial activity affecting the account for a specific period are shown on a bank statement.

The prosecutor should attempt to obtain all bank statements for the period relevant to the investigation. Some criminal activities are well under way prior to detection; therefore, bank statements must be obtained for a period of time prior to the detection of criminal activity. Through bank statement analysis, the prosecutor will be able to reconstruct financial transactions occurring during the period of criminal activity. The bank statements should be analyzed for suspicious or unusual activity. Some examples of suspicious or unusual activity include:

- Unusually high monthly balances in comparison to known sources of income;
- Unusually large deposits, deposits in round numbers, currency deposits, or deposits in repeated amounts not attributable to legitimate sources of income;
- Timing of deposits - particularly important when dates of illegal payments are known;
- Checks or wire transfers in unusually large amounts (in relation to the subject's known practices);
- Little or no account activity which may indicate transactions in cash or the existence of other unknown bank accounts.

104) Article 287/a of the CC

Whether financial activity is unusual or suspicious must be determined from the facts of each case and the subject under investigation. You should look for patterns, items, and activity that match the crime under investigation and transactions that contradict legal or legitimate business activity or common accounting practices.

Example:
Banks are required to report to FIU any currency transaction deposits of more than 2 million lekë. Therefore, multiple deposits of less than 2 million lekë which exceed that amount in the aggregate, made on the same day to different financial institutions or made at different times on the same day (or even on different days) to the same bank, are certainly suspicious and may be evidence of structuring transactions to evade reporting requirements in violation of criminal anti-money laundering laws. You can detect this type of activity by obtaining bank records, analyzing the transactions, and sorting by dollar amounts and dates. You may also detect structuring activity from information provided by FIU.

4.5. Deposit Slips/Deposit Items

A bank statement is only a summary of transactions in an account. In order to find the details of the transaction, you must obtain the source documents behind the summary. A suspicious deposit on a bank statement does not provide enough detail of the financial transaction. If a deposit appears to be suspicious, you will want to examine the corresponding deposit slip.

When reviewing the deposit slip, you may be interested in determining the source of currency or checks that were deposited. “Cash In” and “Cash Out” tickets (also known as receipts) are prepared by a bank for deposits and withdrawals of currency.

The tickets should be obtained by the criminal investigator to corroborate currency deposits shown on a deposit slip and withdrawals of currency. These records will also show the name of the bank employee accepting the deposit, who should be interviewed to determine if the employee has any other information about the subject. Bank statements and deposit slips are only a portion of the bank records you should request. By obtaining and analyzing the deposit items, you may find additional leads and evidence.

4.6. Withdrawals

Most withdrawals from a bank account are made by check, withdrawal slips, automated teller machines (ATM), transfers between accounts, or by wire transfer (also called electronic funds transfer or EFT).

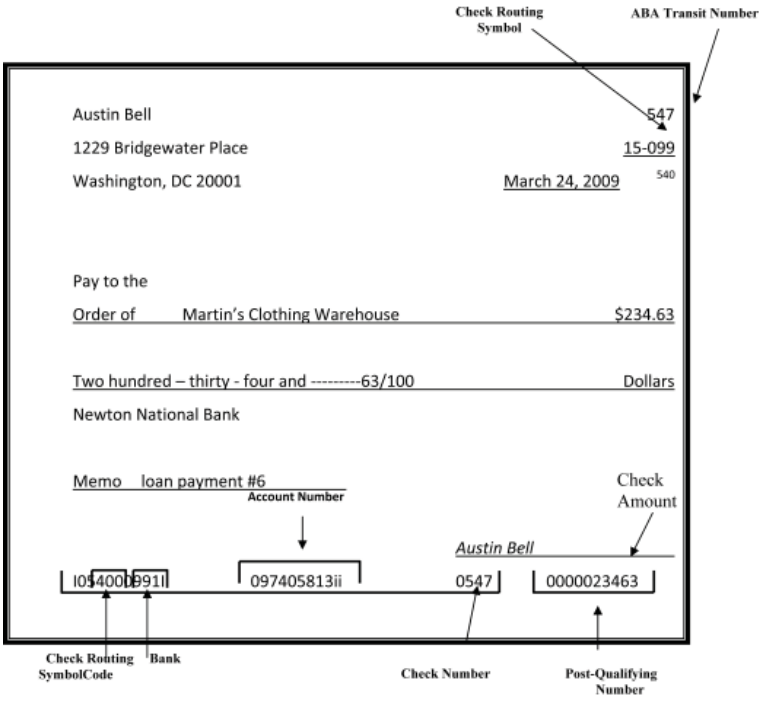
Checks: Although checks are not commonly used by the average person in Albania, they are used by businesses and are also common in other countries, especially in the U.S. Therefore it may be useful to know the basics of checks and checking accounts. Checks are basically an authorization or instruction by an account holder to his bank to pay the amount listed to the person listed as the recipient or payee. By issuing a check, the account holder is representing that he has sufficient funds in his account to pay the amount listed. The account holder or authorized person signs the check to confirm instructions to the bank. The recipient of the check will either deposit the check into his own bank account or cash the check at his bank or another financial institution that accepts checks. Depending on the relationship the person seeking to cash the check has with the financial institution, the bank may or may not immediately cash the check until it "clears," that is, until there is confirmation from the issuer's bank that there are sufficient funds to pay. This is especially true in Albania where checks are rarely used,

and cash will not be given by most banks until the check "clears" the issuer's account. Checks establish a financial link that cannot be overcome by verbal denials. Checks may identify other bank accounts, credit cards, the purchase or location of major assets, and loan transactions that directly impact financial investigations.

Checks are rarely used in Albania; therefore this Guidebook does not include a description of such records. A check is a very basic document that simply contains the person's name, a handwritten account number and the amount of the transaction. As more criminal investigations lead to international banking transactions, however, it will be helpful to know the basics of the information contained in checks from other countries. In the U.S., checks are still commonly used. So, in cases involving U.S. subjects or person with dual citizenship, checks from a U.S. bank are likely to appear as evidence in your investigation.

Below is a sample of a check from a U.S. bank, along with descriptions of the information on the check.

Figure 1



As shown in this example, the information available from the front copy of a check includes the bank of origin, date and amount of the check, name of the payee (the entity to whom the check was made payable), and a signature. Usually, the signature will be one of the authorized persons listed on the signature card, but be aware the signature may not match.

The following information also appears on the face of a check:

American Bankers Association (ABA) Transit Number and Federal Reserve Routing Code – The number on the upper right-hand corner of a check that looks something like a fraction pro-

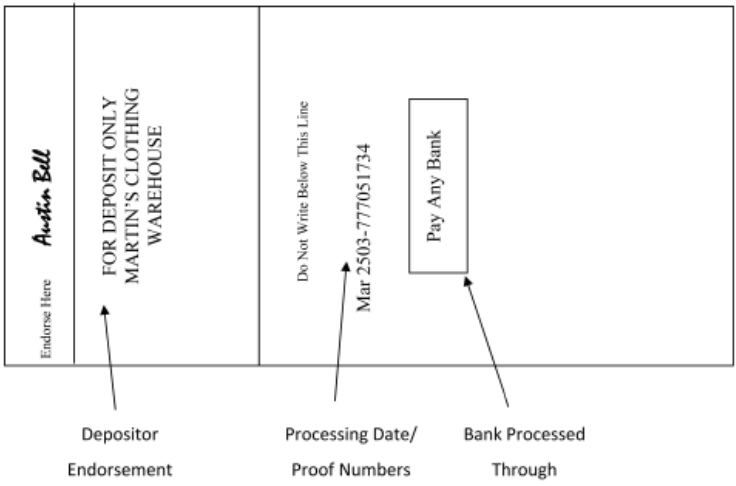
vides several pieces of information. The numerator contains the ABA transit number; the denominator is the originating bank's check routing symbol. An ABA transit number is a two-part code assigned to banks and savings institutions by the American Bankers Association. The first part shows a two or three-digit number that corresponds to the city, state, or territory where the originating bank is located. The second part of the ABA transit number identifies the bank itself.

Information available on the bottom line of the check includes:

- The check routing number – The check routing number indicates bank of origin information such as the paying bank's number and check routing symbol.
- The account number – The next series of numbers is the customer's account number for the account maintained at the bank.
- The check number – The next pre-printed number on the bottom line is the check number which corresponds to the check number in the right-hand corner of the check.
- The post qualifying number – The final number in the series of numbers on the bottom line in the right corner shows the monetary amount processed by the bank for the check.

Figure 2 is an example of the back or negotiated side of the check. When you request a copy of a check, you should ask for copies of both sides because the back side of a check also contains valuable information.

Figure 2



The negotiated side of the check shows who endorsed the check. If the check was issued to an individual, it should contain that person's signature; if it was issued to a business organization, it will probably contain a stamped endorsement. The endorsement may also include an account number reference if the check is deposited into another bank. The back of a check will also contain proof numbers from all of the banks that processed the check. In this case, the check appears to have been endorsed by Martin's Clothing Warehouse and deposited into a bank account on or about 25 March 2009.

When a payee receives a check, he or she may either deposit it or cash it. Checks that are cashed are recognizable by teller stamps or "cashed" codes that are encoded or stamped on the face of the check itself. These codes can lead you to the teller who cashed the check and who therefore needs to be interviewed about the specific transaction. A teller's stamp or "cashed" code also can

be a link between a specific teller and the subject. In the previous example, had the check to Martin's Clothing Warehouse been cashed, you would try to determine why a "loan payment" was cashed and who cashed the check. The investigation may reveal the check was cashed by the subject, Austin Bell and that Martin's Clothing Warehouse is a business front used by Bell to launder his illegal drug proceeds.

Wire Transfers/Electronic Transfers: A wire transfer is the electronic movement of money between bank accounts. Most banks require some type of paperwork, such as a Wire Transfer, to document the movement of money from a customer's account and the destination of the wire transfer. This document may be signed or verified by the customer. Some banks record telephone calls by customers initiating wire transfers from their accounts. When money is moved by means of a wire transfer, and neither the source of the funds nor the date of the transfer is known, retrieval of any identifying information is very difficult. The following is a general listing of records relating to wire transfers:

- Federal Wire, Swift or other documents reflecting transfer of funds, to, from, or on behalf of the customer;
- Customer instructions for wire transfers;
- Documents reflecting the source of funds for wire transfer out of customer's account;
- Documents reflecting the disposition of wire transfer into customer's account.

Automated Teller Machines (ATM)/Debit Cards: Withdrawals from automated teller machines are cash withdrawals made with the use of a plastic ATM card. Usually ATM withdrawals are limited to a certain amount per day, depending on the rules of the customer's bank. ATM withdrawals are listed on the bank account statement and may reflect the location of the machine

from which the withdrawal was conducted. The location may be important if you are tracking a suspect's whereabouts. Most bank ATMs now have video cameras which record or photograph the person conducting the transaction. These photographic records should be included in your request to the bank for records.
The use of debit cards also results in debit memorandum entries on bank statements. In most cases, the debit card transaction will be reflected on the bank statement and show the date and amount of the purchase and the seller of the item. You can obtain documentation regarding a purchase made with a debit card from the place of purchase.

5. Analyzing Bank Records

5.1. Deposit Analysis

Deposited items can be organized to reveal patterns of financial activity through an investigative technique known as a deposit analysis. A deposit analysis allows you to organize the information contained in the copies of deposited items. This analysis will allow you to identify any missing records not provided by the bank as well as identify leads for additional interviews. Your analysis may reveal additional bank accounts which will require you to obtain additional bank records.

To perform a deposit analysis, you should list the deposited items from the financial records in an organized manner. Typically, Microsoft Excel or a computerized spreadsheet program should be used for the deposit analysis. A deposit analysis allows for some modification to include information you think is relevant to the investigation. Figure 3 is a sample deposit analysis, using deposited items from our suspect, Mr. Ermal Hysi.

Figure 3

Deposit Analysis-Ermal Hysi						
Date	Total Deposit	Cash deposit	Check/ wire Deposit	Check/ wire #	Source of deposit/ Memo on check/ wire in	Notes/ Comments/ Leads
01/04	$1,645.97	$1,000.00	$645.97	3234	Porsche Albania/ week ending 1 April 2009	Identify Porsche Albania and purpose of this deposit (salary?)
02/04	$6,750.00	$4,500.00	$2,250.00	101	Genti Rama	Identify Rama and purpose of this deposit
15/04	$1,645.97		$645.97	3275	Porsche Albania/ week ending 15 April 2009	Same as previous deposit – likely salary
16/04			$1,000.00	711	Century 21 Real Estate/ Refund	Identify Century 21 and purpose of this deposit
April Totals	$10,041.94	$5,500.00	$4,541.94			

In this example, Hysi deposited a total of $5,500 in cash during the month of April. Assuming you knew Hysi worked for Porsche Albania, you should confirm that the two deposited checks represent salary payments. Finally, this deposit analysis has revealed two important leads. The first is to identify Genti Rama and the purpose of check #101 for $2,250 that he issued to Hysi. The second is to contact Century 21 Real Estate to determine why that company issued a $1,000 check to Hysi that referred to the payment as a refund. This lead may reveal that Hysi canceled the purchase of real estate or the payment may

be a refund for the overpayment on a purchase of real estate. This could be an important lead to identify an asset for potential forfeiture. If Hysi had paid cash to Century 21 Real Estate to purchase property in someone else's name, this could also be an important lead to determine the nominee name used by Hysi as well as locate other cash expenditures Hysi has conducted.

Whenever possible, deposit analysis should be input into computer spreadsheets. By inputting the deposits into a spreadsheet, you can easily sort the deposits by date, total deposit, or source.

5.2. Withdrawal or Check Analysis

Checks or wire transfers out also can be organized to reveal patterns of financial activity through an investigative technique known as check spread analysis. It is referred to as a check spread because the information on the check is placed on a spreadsheet into columns and rows. To perform a check spread analysis, you list a suspect's checks by payee. Figure 4 is a sample check spread analysis, using checks obtained from our subject, Ermal Hysi.

Figure 4

Check/ wire out by Payee Analysis			
Date	KESH	Date	Torre Drini Apts.
23/01	$101.79	3/01	$950.00
21/02	$121.32	2/02	$950.00
21/03	$92.56	1/03	$950.00
25/04	$87.87		
21/05	$59.12	2/05	$950.00
27/06	$63.45	2/06	$950.00
22/07	$79.73	1/07	$950.00

20/08	$98.92	3/08	$950.00
23/09	$92.83	2/09	$950.00
21/10	$64.55	1/10	$950.00
24/11	$58.52		
28/12	$87.62	2/12	$950.00

In the sample check spread analysis, you listed all of Hysi's checks or wire transfers out to KESH for one calendar year. From this list, you are able to determine that Hysi paid his electric bill every month. You then listed all checks or wire transfers out to Torre Drini Apartments, where Hysi rents an apartment. You find checks for rental payments are missing for the months of April and November. You will want to interview the apartment manager or owner at Torre Drini to find out if Hysi paid his rent for those months, and if so, did he pay in cash or from some other bank account. The absence of a check may indicate a currency payment that can lead to possible undisclosed sources of illegal income.

5.3. Multiple Account Analysis

A multiple account analysis is also useful in many investigations. In this type of analysis, the investigator combines the transactions of all the subject's accounts into one spreadsheet. By combining all accounts into one document, the investigator is able to see the entire scope of financial activity by the subject. This analysis is very important if the subject moves money between accounts. This will allow the investigator to follow the money through several accounts.

When preparing a multiple account analysis, the investigator should include all accounts the subject has control or authority over. This may include accounts in business names or nominee names. It may also be beneficial to include accounts held by ac-

complices in order to analyze the movement of funds between the subject and others involved in the crime.

Figure 5

Bank	Account Number	Payee/Payor	Date	Credit	Debit
Bank 1	...123	Currency	04/08/2009	$ 5,000.00	
Bank 1	...123	Ermal Hysi	05/08/2009		$ 5,000.00
Bank 2	...456	Genti Rama	05/08/2009	$ 5,000.00	
Bank 2	...456	Arben Kalaj	06/08/2009		$ 5,000.00

The above example shows an account analysis of the transactions in two accounts. From this analysis, you learn that Genti Rama deposited $5,000 currency into his account at Bank 1. He then wrote a check for $5,000 to Ermal Hysi. Ermal Hysi deposited the check into his account at Bank 2. The next day Ermal Hysi wrote a check to Arben Kalaj for $5,000. This analysis is evidence that the currency deposited by Genti Rama could likely be the same money received by Arben Kalaj. It also links the three individuals together through their financial transactions.

6. Certificates Of Deposit

Technically, a Certificate of Deposit is a promissory note for which the bank is the borrower. It is an account for which the bank agrees to pay the customer a particular amount of interest or earnings, and the customer agrees to leave the funds on deposit until the maturity date. Records available from the financial institution relative to Certificates of Deposit, both purchased and redeemed, include the following:

- Certificate copies;
- Items used to deposit into the Certificate of Deposit account;
- Records pertaining to interest (or profit sharing) earned, withdrawn or reinvested;
- Government income reporting forms.

7. Investment or Security Accounts

Many financial institutions offer their customers investment accounts. The customer deposits funds into accounts that are invested in securities by the financial institution or at the direction of the customer. Relevant records for these accounts, including both open and closed accounts, include the following

- Purchase of security documents;
- Negotiation of security documents;
- Safekeeping records and logs;
- Records for receipt or delivery of securities;
- Annual interest or dividend paid statements.

8. Loans or Mortgage Accounts

Loan or mortgage records can also provide you with details about how money is being spent by a suspect. The following is a list of records available from the financial institution in reference to both open and closed loan or mortgage accounts

- Loan application;
- Loan ledger sheet (showing money loaned to the customer and loan payments);
- Copy of loan disbursement documents;
- Copy of loan repayment documents;
- Loan correspondence file;
- Collateral agreements;
- Credit reports;
- Statements that verify income and expenses including tax

returns, net worth statements, income statements, and bank statements;
- Notes or other instruments reflecting the obligation to pay;
- Real estate mortgages, chattel mortgages (such as a car loan) or other security for bank loans;
- Annual interest (or income) paid statements;
- Loan amortization statements.

A loan application usually requires a financial statement completed by the individual requesting a loan. The loan application includes personal information such as the applicant's name, address, identity number, asset holdings, liabilities, and sources and amounts of income. The loan application package may include copies of tax returns or other documentation of earnings by the applicant. Loan applications most often contain a statement that the applicant is aware that, by signing the application document, it is a crime to knowingly make false statements when applying for a loan.

The loan repayment schedule and correspondence files can be used by you to detect:
- Repayment methods—Lump sum, accelerated, or unusual repayments. Items used to repay loans may originate from bank accounts, money orders or cash unknown by the financial investigator. Copies of repayment items for loans may provide additional leads.
- Final disposition of loan proceeds—the disposition may be within the bank or elsewhere. Either situation is traceable through the bank's recordkeeping system. The subject may divert loan proceeds and use them to pay for other expenditures such as payments to accomplices or the purchase of concealed assets.
- Loan collateral—the security pledged for the loan, if any, may be an unknown asset.

- Down payment—the loan proceeds may have been used to finance an asset; however, the down payment may have originated from illegal funds.
- Credit checks and internal memoranda—The investigations done by the credit department when attempting to determine the risk for the bank relative to a loan may lead you to additional assets, loans, bank accounts, etc.

9. Bank Credit Card Accounts

Many banks offer credit cards to their customers. Credit card accounts should be treated as if they are checking accounts. The main difference between a credit card account and a deposit account is that credit card accounts do not have money on deposit. Charges are made to the account, and payments are made for the charges at a later date. Banks keep records on the charges and payments for credit card accounts. You may find leads to purchases of jewelry, cars, or other expensive items through these records. The following is a list of records to request regarding current and closed bank credit card accounts:

- Applications for credit card on behalf of (the subject);
- Monthly statements;
- Charge documents;
- Documents used to make payments on accounts.

Bank credit card accounts should be analyzed in the same manner as a bank checking account. The records should be input into spreadsheet format. Items you should look for when analyzing credit card records include:

- Items purchased;
- Location of purchases;
- Source of payments to the account.

You can obtain more specific information about credit card purchases from the vendor. For example, during an investigation you may discover the subject of your investigation had a credit card account with Raiffeisen Bank. You obtain the credit card statements for the account from the bank. The statements indicate a charge made on 25 November 2005 for $5,000 from Austrian Airlines. You visited Austrian Airlines, interviewed an official representative, and obtained documents relating to the charge. The charge was for 3 airline tickets departing on 3 December 2005 from Tirana to Vienna and returning on 4 December 2005. As a result of analyzing one charge on a credit card account, you learned where the subject traveled, who the subject traveled with, the dates traveled, and the amount spent on the travel. When pieced together with other investigative information, this financial information may become very important to the investigation.

Credit card accounts can be analyzed in the same manner as savings and checking accounts using deposit analysis, check spread analysis, and multiple account analysis.

10. Other Miscellaneous Records

10.1. Non-Account Transactions

Non-account transactions are financial transactions that occur at a financial institution but do not always flow through an account. Examples of non-account transactions include the purchase or negotiation of cashier's (bank) checks, money orders, traveler's checks, smart cards, and currency transactions such as exchanging aggregates of small bills for larger bills. For investigative purposes, entries into a safe-deposit box are also considered non-account transactions. Non-account transactions may have limited documentation, but you should request

all such documentation in your records request to the bank.

10.2. Cashier's Checks, Certified Checks, Traveler's Checks, and Money Orders

These financial documents are known as monetary instruments which require special handling because they involve various departments inside the bank. Cashier's checks, also known as bank checks, are checks drawn by the bank on its funds and are issued by an authorized officer of the bank. The bank employee will ask the customer to designate a remitter (person purchasing the check) and a payee in order to fill in these lines on the check. A certified check is a check where the bank guarantees there are sufficient funds on deposit for that particular check. A money order is a negotiable instrument that serves as a substitute for a check. The money order is issued for a specific amount of payment and the customer fills in the name of the purchaser and payee. The bank employee imprints only the amount of payment. A traveler's check is an internationally redeemable draft. It is purchased in various denominations, such as $20, $50, and $100, and is only valid with the holder's own endorsement against his original signature.

The retrieval of cashier's checks, money orders and traveler's checks by a financial institution is significantly more difficult if the funds used for the transaction were not withdrawn from a known bank account. In most situations, retrieval requires a hand search of each bank check written, which is a very labor-intensive process. If you are able to give specific details about the check, the bank will be able to search for it faster and more accurately. The information you should look for regarding bank checks includes the check number, date of issue, the monetary amount, and the payee.

10.3. Stored Value Cards

Stored value cards (sometimes referred to as prepaid cards or smart cards) are an emerging cash alternative. The term "stored value cards" can cover a variety of uses and technologies. Some cards have embedded data processing chips, some have a magnetic stripe, and some cards (e.g. prepaid phone service cards) just have an access number or password printed on them (the card itself cannot access or transfer cash). Stored value cards can operate within either an "open" or "closed" system. Open system cards can be used to connect to global debit and automated teller machine (ATM) networks. These cards can be used for purchases at any merchant or to access cash at any ATM that connects to global payment networks. Such open system card programs generally do not require a bank account or face-to-face verification of cardholder identity. Funds can be prepaid by one person, with someone else in another country accessing the cash via ATM. Open system stored value cards typically may be reloaded, allowing the cardholder to add value. Closed system cards are limited in that they can only be used to buy goods or services from the merchant issuing the card or a select group of merchants or service providers that participate in a network that is limited geographically or otherwise. Examples of closed system cards include retail gift cards, shopping mall cards, and mass transit system cards. These cards may be limited to the initial value posted to the card or may allow the card holder to add value.

Smart cards can cause problems for you because the financial institution may not require that an account be established. A smart card has the characteristic of having the anonymity of cash without the bulkiness in size and weight of cash. They are more difficult for you to discover and trace. You should be aware of the use of smart cards and look for them during your investi-

gations. If a smart card from an open system is found, it should be taken to the financial institution where it was purchased in order to obtain a record of transactions made with the card. If you find a smart card from a closed system (for example, a gift card), you should contact the vendor listed on the gift card to determine any transactions made with the card.

10.4. Currency Transactions

Documenting the movement of money involved in a pure currency exchange is difficult. Currency-for-currency exchange transactions, such as a subject exchanging $20 bills for $100 bills, generally leave no paper trail inside the bank system unless the amount requires special accounting or reports to be completed by the financial institution. For most currency-for-currency exchanges, the best source of information is the testimonial recollections of bank personnel. However, currency ledger or reports on currency transactions may also provide leads to currency-only transactions.

In some countries financial institutions maintain a monetary instrument ledger for the purchase of monetary instruments in amounts less than the threshold amount for reporting to FIU. The ledger serves as a good starting point for identifying these types of transactions, and includes the date, dollar amount, and name of the person conducting the transaction. Interviewing bank employees in an attempt to pinpoint the transaction date and the amount may also prove successful. If the subject goes to the same bank and uses the same bank officer or teller to complete his or her bank transactions, these employees may be able to assist in narrowing the search for the retrieval of the bank checks purchased by the subject. Tellers may also be able to identify nominee names used by a subject to purchase monetary instruments.

10.5. Safe Deposit Boxes

Some financial institutions rent or lease storage facilities in secured areas of the bank to their customers. At a minimum, for each customer who rents one of these storage areas, the bank should have a rental agreement and a record documenting the customer's access to the storage area.

The safe-deposit box rental agreement indicates the date the box was first rented and the identity of the renter. An entry ledger maintained by the bank shows the date and times of visits to the box and also reports the identity of the visitor. This information may be very important for your investigation. For example, even though banks do not have information about the contents of the box, records of entry into a safe deposit box can corroborate testimony relating to the receipt of illegal currency or the proceeds from illegal activities. Safe deposit boxes may also be discovered during searches of a suspect's home or business. Criminal investigators should search for rental agreements and keys to safe deposit boxes. You should ask about the existence of safe deposit boxes during interviews of witnesses who would know about, or have reason to know about, safe deposit boxes.

11. Summary

Bank records may be difficult to obtain and will require time and effort to analyze. Despite these difficulties, bank records may be the most important evidence in a successful investigation.

Banking transactions create a paper trail. Obtaining and analyzing bank records are important steps to a financial investigation. First, you must determine how you can obtain bank records. Once the records are obtained, a deposit analysis, check analysis, and/or multiple account analysis should be conducted

to analyze the transactions in the account. Depending on the goals of the investigation, the analysis may uncover unreported income, illegal income, terrorist financing, money laundering, hidden assets, accomplices and witnesses.

Annex 15: List of information required by the bank

CRIMINAL RESPONSIBILITY OF LEGAL PERSONS

Legal persons, just like natural persons, can commit crimes. Although initially the concept sounds odd, if one considers the idea for a moment, it becomes more familiar. The Law "On Criminal Responsibility of Legal Persons" sets forth how and when a legal person may be held responsible for a crime. As with all other laws imposing criminal responsibility, this law must be read in conjunction with the CC and the CPC. For purposes of this discussion, a legal person may be an entrepreneur, company, limited liability company, general partnership, joint stock company, or in the case of many international companies, a corporation. The important concept is that no matter the form of the business, if it commits a crime, then it may be held criminally responsible.

So, when does a corporation commit a crime? Or, a better question, how can a corporation be held liable for a crime? The answer is in the law, which describes three possibilities:

- Actions on behalf of the company committed by its representative (legal representative or by special agency agreement/authorization);
- Actions on behalf of the company committed by a person authorized by the legal representative; and
- Actions by other persons which occurred due to the lack of control by the company's legal representative.

In all three of these cases, the legal representative may be a person who works for the company, the board of directors of the company, a committee acting on behalf of the company (a bud-

get committee, for example), or any other such representative body acting on behalf of the company.
The law also defines the types of punishments to be given to the legal person who is found "guilty" of a crime which are:

- The main punishments, which may not be applied to local government agencies, public legal entities, political parties or syndicates:
  - Fines;
  - Termination of the legal entity.

- The supplementary punishments, which may be imposed together with the main punishments, are:
  - Closure of one or more activities of the legal person;
  - Putting the legal person under controlled administration;
  - Prohibition to participate in public funds procurements. (For more detailed information, see Article 10 of the law on CRLP.)

The law also refers to the rules of Article 36 of the CC on criminal forfeiture of crime proceeds. Furthermore, this law specifies the circumstances for a case-by-case application of these punishments such as rules on what will be considered a mitigating circumstance (e.g. when the company has totally eliminated the damaging conditions or organization deficiencies or has voluntarily delivered assets to be confiscated) or an aggravating one (such as request of the criminal offense, etc.).

One example for imposing liability on a corporation is the criminal prosecution of AmSouth Bank in the U.S. AmSouth adopted a set of rules for reporting suspicious activity to the U.S. Financial Intelligence Unit, known as FinCEN.[105] Essentially,

105) Financial Crimes Enforcement Network (FinCen) is the counterpart of the General Directorate for the Prevention of Money Laundering.

AmSouth had rules in place which violated the U.S. Criminal Code on reporting suspicious transactions. AmSouth was worried that if it reported suspicious activity involving its own employees, especially if the bank was being sued in civil court for those actions, that such reporting would ultimately be disclosed and be viewed as an admission of liability which might be used against the bank in the civil case. Because the entire system of the bank was in violation of the law, there was not a single person or a group of persons to be held criminally responsible. The prosecutor, in this case, would have to prosecute all bank employees in many states, since all were violating the law by applying the illegal rules. The case ultimately resulted in a $40 million forfeiture from AmSouth to the U.S. government. The bank was allowed to continue operating and had one year to comply with a specific set of corrective measures. If it complied, then the criminal charges would be dismissed, although the $40 million remained with the U.S. government.

Annex 16: Method of business organization

TRIAL ADVOCACY

1. Introduction

In countries that have a strong adversary system, trial advocacy is sometimes referred to as an "art" because the skill and the talent of the attorneys frequently make a difference in the outcome of the case. This is true because those who decide upon the facts are human beings, and they can be influenced by the personalities of the prosecutors, lawyers, their persuasiveness, their ability to present their version of the facts in a logical and understandable way, and the power of their convictions/arguments.

In the United States of America, the country with one of the strongest adversary systems, jury research has shown that jurors reach their decisions based upon a number of factors including: 1) the credibility of the person providing the information ("sender"); 2) the ability of the listener ("receiver"); and 3) effective messaging techniques.

1.1. Credibility of the sender

In a trial, the senders of information are the representatives of the parties (the prosecutor and defense lawyer), witnesses and experts. Credibility is established by three factors: 1) integrity, 2) expertise, and 3) dynamism. Integrity is determined by the perception that the witness or defense lawyer is unbiased, consistent, and sincere. For prosecutors, integrity means always acting in an upfront, ethical, and candid manner. The prosecutor

should never try to hide or distort the facts and must always be reliable and truthful to the tribunal and to opposing counsel.

Expertise refers to the knowledge the sender has about facts and issues related to the case. In the case of the prosecutor and defense lawyer, expertise is demonstrated by being prepared and able to present the case, and handle factual and legal issues smoothly and intelligently. For witnesses, expertise is established by showing that the witness had the ability to see, hear, and recall the events he is testifying about. In the case of the expert, it is established through the expert's education, training, experience, and the thoroughness of his analysis.

Dynamism refers to the senders' ability to communicate. Senders who are likeable and who project energy, self-confidence, and enthusiasm are more likely to be believed than ones who do not have these qualities. All the components of effective delivery -- verbal content (the actual spoken words) and delivery (body language, hand movement, gestures, eye contact, speech rate, word emphasis and inflection, etc.) -- play an important role in how the message is received and processed.

1.2. Receiver capacities

The receivers (the members of the judicial panel) have different abilities to process information and remember what they saw and heard. Most people's attention spans are short, with the average person able to fully concentrate for only about 15 to 20 minutes at a time before attention begins to drop. Some people then tune out entirely, while others drift in and out. Additionally, some people are more visual learners than auditory learners; that is, they absorb information better from what they read or see than from what they hear. Also, people tend to process information based upon their personal opinion of how the

world operates, that is, based upon their own life experiences, personal beliefs, and biases.

1.3. Effective Messaging

Knowing your audience and playing to that audience is a key component for successful trial advocacy. For prosecutors, this could mean knowing the background and attitudes of the judges based upon prior personal experiences with those judges or the experiences of your colleagues. Also, messaging must be formulated in such a manner that it can be easily absorbed. Most people begin to forget much of what they are told within a few hours, assuming they were even listening. After a few days there is very little remaining in one's memory. Given that some trials take weeks or months to conclude, with numerous recesses between the presentations of various segments of the case, this can be a big problem. However, the prosecutor can use strategies to increase the capacity of the judges to remember, through the use of key words and phrases, themes, visual aids, and of course, repetition.

Key words and phrases serve as memory devices to help the listener retain bulk information. Themes are memorable words or short phrases which sum up the essence of the case. An important part of trial preparation is the selection of themes that are emotionally based, easy to remember, consistent with the evidence, and fit with the previous belief systems of the judicial panel. These themes and key words can then be used during the trial to remind the judges what it is that you intend to prove or have proven. For example, in a case against a former employee of a business who gained unauthorized access into the company's computer system, key words or phrases could include: "*hacker,*" "*disgruntled ex-employee,*" "*revenge,*" and "*vindictive,*" while the theme could be, "*this is a case about revenge*" or "*this is a case about greed.*"

Visual aids, such as charts, exhibits, Power Point presentations, photographs, etc., can significantly improve the memory of the listener. First, these means create variety during the presentation, and variety is more likely to keep the listener engaged, and even entertained. Second, visual aids form a secondary method of absorption of information, as it has been shown that people who both hear a message and see a visual representation of the message retain far more information than the ones who only hear the message.

Also, the impact of verbal information can be greatly enhanced by the choice of appropriate words and phrasing. Witnesses and advocates can learn to use powerful language to improve their persuasiveness and minimize speaking styles that detract from credibility. Words such as *"I guess," "I think,"* or *"it seemed like"* should be avoided, and replaced with words or phrases that signify personal conviction such as *"I am sure," "I am positive,"* and *"I submit."*

Repetition is a powerful tool for retaining information. Repeating a message, such as a theme or key words, both in the opening statement and the closing argument, can substantially improve retention of the information by the listener. However, one must take care not to overuse certain phases so that presentation does not become tiresome or boring.

In summary, even though trial advocacy is a form of art in itself, and just like in any other art form some people are more gifted than others, there are a number of skills that even non-gifted prosecutors and attorneys can learn to increase their chances of presenting a winning case.

1.4. Planning the Trial

Even though a case may not be sent to trial or it may conclude in a summary trial, the prosecutor should be thinking about the possibility of a contested trial from the beginning of the investigation. This means that he should secure the testimonies of key witnesses, both favorable to the prosecution as well as to the defendant, and should also use all available investigative techniques that will enhance the trial, and not just the investigation.

The first consideration is that all trial preparation should be centered on putting together a courtroom presentation that will be meaningful to the judicial panel. In some legal systems, prosecutors believe that they must present everything to the court, and let the court decide what is significant and what is not. *This is not trial advocacy*. It is the *prosecutor's* responsibility, not the judicial panel, to figure out which evidence advances the case. Otherwise, allowing the judges to determine what is important sends a message to the court that the prosecutor either does not know his case, does not care about his case, or both. Therefore, to start with, the prosecutor must first formulate a theory of the case - a theory of the criminal prosecution.

The "theory of the case" is a clear, simple story of what really happened, according to prosecutor. To have a theory of the case, the prosecutor should have reached conclusions as to what actually occurred. If he does not know what happened and the witnesses and evidence have failed to convince him as to what happened, then he cannot be an effective advocate, and he probably should not be prosecuting the case to begin with. But, assuming that he knows (or firmly believes) that certain facts are true, he should formulate his theory of the case around those facts. The theory of the case, therefore, must be consistent with the undisputed

facts and with the prosecutor's version or interpretation of the disputed facts. It also must make sense in the real world.

The prosecutor's theory of the case can be very simple in a case of assault.

"*On such and such date, X, the victim in the case, was attacked by the defendant, Y. While X and Y had been in an argument, X was not the aggressor and did nothing to justify the physical assault by the defendant Y. Defendant Y had been drinking and had been verbally abusive to other persons that night...*

Or in a case involving a pyramid investment scheme:

"*Between January 2005 and July 2007, the defendants committed fraud against hundreds of investors by advertising an investment in a newly established telephone company. They lied to investors by assuring them of a 20% annual return on their investment, when they had no reasonable basis to believe that the company was capable of earning profits. Furthermore, they spent much of the investors' money on themselves, rather than on the business; they also created the illusion of profitability by paying "interest" to old investors, using money received from the new investors.*"

Next, develop your themes and labels, that is, words and phrases that you can use as buzz words to summarize your case. The themes should have emotional impact, create memorable images, and clearly state the prosecutor's position. For example:

In an assault case: "*This is a case about loss of self-control.*"

Or in the pyramid scheme case:

"This is a case about lies and deceit" or *"This is a case about greed and lies,"* or *"This is a classic case of a pyramid scheme."*

Next, create a story that is compelling. Good stories humanize and dramatize. They have a plot, characters, and emotions. Usually it is the human element which is appealing to most listeners. Who were the victims? Who were the defendants? What was the motivation? If you can include these elements in formulating your version of the facts, it will be a more interesting trial.

Trials involve much more than merely introducing a set of facts; those facts must be organized and presented as part of a memorable story. Effective storytelling is the basis for much of what occurs during a trial, including opening statements, direct examination of the witnesses, and closing argument. The best prosecutors and defense lawyers are invariably good storytellers.

2. Opening statement

The opening statement is the prosecutor's first opportunity to tell the judicial panel what the case is all about. As such, it is a critical part of the trial and should be carefully planned, developed, and delivered. Various studies from countries that conduct trials by jury have shown that jurors most often deliver a verdict that is consistent with their initial impression of the case formed as a result of the opening statement. This is consistent with the psychological principal of "primacy," where first impressions often become lasting impressions. The same psychological factors will influence the judicial panel that is going to decide upon guilt or innocence.

If the prosecutor fails to make a strong opening statement, he loses an opportunity to advance his case. Put another way, the

prosecutor who simply reads the request for prosecution is not necessarily going to lose the case, but he resembles a Grand Prix driver who, having been awarded the pole position, begins the race slowly and loses the advantage he has been granted. Accordingly, the prosecutor should make sure his case begins on a strong foundation, with an opening statement that clearly establishes the themes or theories of the case.

2.1. Elements of the opening statement

An effective opening statement has the same recurring components. It is delivered forcefully, states the facts of the case simply, and is organized in a manner that is easily understandable to the court. The opening statement must, at a minimum, adhere to the following rules:

2.1.1. ***Explain your theory of the case.*** There are two sides to every criminal case, the prosecutor's and the defendant's. Your theory of the case is your version of the truth, which is based upon facts that are uncontested and your version of the disputed facts. The theory must be logical, fit the legal requirements of establishing the elements of the crime that you intend to prove, and easy to understand. The theory should be consistent with common sense, and how the judicial panel is likely to perceive the real world.

2.1.2. ***Establish your theme.*** Every case can be distilled into one or more (but not more than three or four) themes that summarize the prosecutor's position in a meaningful and easy-to-remember way. Sometimes a theme can be a word, sometimes an easily remembered phrase. The theme is something that can be stated in the opening statement and then referred back to at the end of the case during closing argument.

Examples of themes:

- In a fraud case: *"This is a case about greed." or "This is a case about lying, cheating and stealing."*
- In an embezzlement case: *"This is a case about betrayal of trust."*
- In a public corruption case: *"This is a case about arrogance" or "This is a case about abuse of power (or authority)."*
- In an assault case: *"This is a case about the brutal unprovoked attack on an innocent woman."*

2.1.3. ***Start out strong***. The theme and the theory of the case should be established as soon as possible, certainly in the first couple of minutes of the opening statement. The judicial panel will be most attentive in those first few minutes, so you need to make those minutes count.

2.1.4. ***State the facts clearly.*** The most common mistake trial lawyers make during opening statements is that they fail to state what the facts are, or they fail to state them in a clear and coherent way. Instead, they often talk about the facts, but in a way that assumes the listener is already familiar with the case. The prosecutor should not assume the judges have read the file or, if they read it, that they comprehend anything other than the basic accusations. An effective opening statement must state the facts that you will expect to produce during the trial and, as you will later argue, form the basis for a conviction. The case should be explained in a logical way, which means that the events should be related chronologically. A good way to practice is to tell the story to others, for example to a young adult, in a simple way. If you can make the case understandable to a 14-year-old, it should be understandable to the judicial panel.

2.1.5. ***Make the case interesting.*** Effective opening statements are usually ones in which the prosecutor is able to tell a compelling story. Several ingredients create good storytelling. For one, an interesting story focuses on the people involved, not legal complexities or arcane factual details. For example, you may personalize the victim or the witnesses, telling a little about their backgrounds, or what they were doing or thinking (but only if it is relevant and you are going to prove it).

"Honorable members of the judicial panel! The evidence gathered in this case will show that the defendant, Ilir Kurti was planning revenge. Kurti and the victim, Arben Hysi, had had conflicts for three months. Back in April of last year, Mr. Hysi, a hard-working building contractor and father of two little girls had gotten into an argument with the defendant at a coffee bar, where the defendant, who smelled of alcohol and was unsteady on his feet, tripped and knocked over Mr. Hysi's drink. No punches were thrown, but they exchanged words and the manager of the bar evicted the defendant from the bar. As he left, he was heard making curses and threats against Mr. Hysi. That takes us to July 11, the date that the crime occurred on. At about 7:00 pm that evening, Mr. Hysi stopped by Relax bar in the Bllok area in Tirana. Suddenly, he was confronted by the defendant, who smelled of alcohol. The defendant began to taunt Mr. Hysi, who tried to ignore him. But finally, out of embarrassment, Mr. Hysi turned around to see what his problem was. At that moment, the defendant struck him on the side of the head with a beer bottle. The attack was completely unprovoked. Mr. Hysi received a large gash on his forehead, which required 30 stitches to close. He lost a lot of blood, was out of work for 10 days, and has a permanent scar..."

2.1.6. ***Be clear, forceful, and positive.*** To be convincing, an opening statement must be clear. This means that your sen-

tence structure must be simple and direct, and your choice of vocabulary basic. Your statement must be progressive and logical and disclose facts and not just the conclusions.

2.1.7. ***Be efficient.*** As stated earlier most people begin to lose concentration after 15-20 minutes. Even during that time, minds wander away from time to time. Research also shows that memory decays rapidly and that within a short period of time, people have forgotten much of what they heard. A key ingredient to improving memory is repetition. It is also assisted by visual stimulation. Thus, keeping these realities in mind, a good opening statement should be as short as possible, and in any case, not longer than 30 minutes. The major themes, important facts, and details must be repeated several times during the opening statement. Obviously, in complex cases, it may be impossible to relate all the key facts within 30 minutes, but the prosecutor must keep in mind that the longer he talks, the less effective his opening will be. *The least effective opening is the mere reading of the charges.*

2.1.8. ***Consider using exhibits or visual aids.*** Exhibits or charts can be an effective tool for making key facts clear to the judicial panel. Exhibits that are graphic or vivid can hold the panel's attention and increase their capacity to remember. Exhibits can serve to list key prosecution points - much like a lecture - or they can emphasize a chronology of events, a time line, if that is important to the case. Power Point presentations that highlight key exhibits or documents can be presented. If they are properly prepared and are consistent with the evidence presented, the same exhibits could then be used during the closing argument. Obviously the prosecutor has to know his judicial panel to ascertain whether they will permit the use of such exhibits, but there is no harm in requesting permission and being prepared to use these exhibits. If courts begin allowing such

exhibits for demonstrative purposes, perhaps their use will become a standard practice for all prosecutors.

2.1.9. ***Do not be argumentative or state personal opinions.*** Arguments are not part of the opening statement, but should be reserved for the closing argument. In order to tell the difference, it should be kept in mind that the opening statement states facts, while the closing argument, in addition to emphasizing evidence, can also argue conclusions, inferences, credibility of the witnesses, common sense, and other matters beyond the evidence itself. A rule you may use in drafting the opening statement is to ask yourself: "Do I have a witness that will state the facts I am listing in my opening statement?" If so, then these facts are proper for opening statement.

In the following examples, the first version is factual and the second is argumentative.

I: *He was going approximately 50 km per hour in a 30 km/hour zone.*
II: *He was racing his car, driving like a crazy man.*

I: *He drove off a straight road on a clear, dry day.*
II: *He negligently drove off the road.*

I: *She will testify how she took a handgun away from a man who weighed over 140 kilos.*
II: *Her testimony about how she got the handgun is neither convincing nor credible.*

2.1.10. ***Do not "oversell" your case.*** Nothing is more damaging for the prosecutor than to overstate the facts. Your credibility is the most important commodity that you have in a trial, and overstatements will undermine you not only in the present

case, but in future cases that you may have with the same trial judges. Additionally, during closing arguments, your opponent will point out each statement you have made but have failed to prove. When in doubt, understatement during opening is the best course of action. The judicial panel will not hold it against you if you have understated your case, but instead may find that your case was even better than it was presented to be initially.

2.2. Other strategic and evidentiary advice

2.2.1. How extensive should the opening statement be? While every opening statement should adequately and positively state the evidence of the prosecution, there are obviously different levels of how complete the statement should be. For example, a thorough review of all your evidence is not the most effective strategy in every case. The best way to present the case will depend in large part on the character of witness testimony, that is, whether you have one key witness or several witnesses who corroborate each other. When the case is based on one principal witness, you should give a full and detailed opening statement that will parallel the witness' testimony. When the witness testifies, he will repeat what the judicial panel has already heard. This will enhance the credibility of the witness as well as of the prosecutor.

When your case has a number of witnesses that corroborate each other or furnish different pieces of the story, it is not effective to recite in detail what each witness will say. Under these circumstances, it may be more effective to tell what happened only once and simply mention that several witnesses will corroborate the alleged events. You may also choose to highlight the testimony of one or two witnesses whose statements are more important.

Example of the Narrative Form - Several witnesses observe a robbery:

"On April 25, 2009, around 7 pm, the owner, a waitress, and several patrons were at the Relax bar located at Ismail Qemali Street in the former Bllok area. Everything was normal when suddenly, two men armed with shotguns burst through the front door and announced a robbery. The patrons were told to place their money and wallets on the bar counter. One of the robbers came behind the bar, collected the money and wallets, and placed them in a cloth bag. The second robber stood by the front door holding the shotgun in his hands. After collecting the wallets of the customers, the first robber instructed the waitress to open the cash register. She followed his instructions and he scooped the money away from the register and into the bag. Both suspects then fled. All of this took about 1 minute. The first robber was described by the witnesses as tall, about 183-185 cm, weighing from 85 -90 kg. He had dark curly hair. The second robber was shorter, about 170-172 cm. Witnesses put his weight at about 66-68 kg..."

Example of the Witness Testimony Form - The only eyewitness to the robbery was the bartender:

"On April 25, 2009, Ilir Kurti went to work at the Relax bar, where he worked as a bartender. At 4 pm, the place was empty. He sat down on a bar stool furthest from the front door. From that location, he could see the bar, the front door and the window facing the street, while he was waiting for the after-work crowd. Suddenly, around 4:15 pm, while the bar was still empty, Mr. Kurti saw a man armed with a shotgun burst through the door and point the shotgun at him. The man was about 25 years old, 180 cm tall, and weighed around 80 kilos. He wore jeans, a grey shirt, and brown boots. His hair was brown and short. This man approached Mr. Kurti and put the gun barrel to his head ..."

2.2.2. How and when to volunteer weaknesses. Often a difficult decision for the prosecutor in opening statements is whether to volunteer weaknesses in the prosecution case, and if so how. This involves determining what the weaknesses are and predicting whether counsel for the defense is aware of thee weaknesses and whether he intends to use them at trial. If your weakness is apparent and known to your opponent, you will probably want to "front" the information, that is, disclose it, but without emphasis, and present it in its least damaging light, when it will blend easily into the story. When possible, the best strategy is to turn an apparent weakness into a strength of the prosecutor's case by reframing it into something positive. For example, assume a robbery victim had initially misidentified someone else as the robber, before she realized her mistake. The prosecutor could reframe this mistake into a positive development, or at least takes the "sting" out of it as follows:

"The evidence will show that shortly after the robbery, Mrs. Kurti was shown several photographs by the police and she picked out one of the pictures as she thought that person most closely resembled the man who had robbed her. However, when that person was brought to the police station and Mrs. Kurti had a chance to see him in person, she immediately realized that he was not the robber. And thanks to Mrs. Kurti's honesty and her desire to see that the right person was caught, that man was immediately released. Five days later the police contacted the victim and asked her to come again to the police station, where she was shown the defendant. She immediately and without any doubt recognized the defendant as the man who had attacked her..."

When the defense tries to attack the witness for her misidentification, the prosecutor can deflect her initial mistake and argue that it supports her reliability and honesty.

2.3. Structure of the opening statement

The opening statement must have a structure, as this will force you to prepare, organize, and deliver an opening statement that will present your evidence in a logical and clear progression that the judicial panel can follow and remember. This structure should be modified to meet the unique facts of each case, your personality and style, as well as that of your opponent. Like any other phase of the trial, the opening statement must be carefully organized, planned, and delivered. Giving an opening statement without preparation usually leads to disaster. A model structure may be:

- Introduction
- Theme or theory of case
- What happened?
- Introduction of parties
- Damages/injuries
- Address/rebut anticipated defenses or factual issues
- Legal elements or issues
- Conclusion

Introduction: In your introduction, reintroduce yourself to the judicial panel. Many trial attorneys today avoid standard introductory routines and immediately get to the facts of the case, but you should not take it for granted that the panel or other parties know you.

"Honorable members of the judicial panel, my name is Ermal Gjoni and I have the privilege and responsibility of representing the charges/case against Ilir Kurti, who is accused of inflicting a serious intentional injury upon Arben Hysi, a criminal offense stipulated in Article 88 of the Criminal Code of Albania."

Theme or Theory: As stated earlier, the theme or theory of the case should be a one or two sentence summary of the whole.

"This is a case about an unprovoked attack upon an unarmed and defenseless person."

What happened? You should make an uninterrupted description of the actual event, with the kind of force and pace that allow you to recreate the event and make it come alive. In some criminal cases, the scene of occurrence is important. In these cases, you must carefully describe the scene so that the judges can visualize it. Remember that the key to describing scenes is to develop verbal pictures so that if you close your eyes and listen to the description, you will actually be able to form a mental picture of the scene. Also, in cases when the date and the precise time of an event or the weather conditions are important, describe these in detail.

Introduction of parties: One section of the opening should introduce the essential witness or witnesses and the victim. Remember that the credibility of the key witnesses is determined not only by what they say and how they say it, but also by who the witnesses are. As always, make sure that whatever you say about any witness will be supported by testimony and evidence at trial.

"There are a number of people whose names will be frequently mentioned in this case, and I would like to tell you a little about them. First, there is the injured party, Mr. Hysi, who is a building contractor. Before July 11, 2009, Mr. Hysi enjoyed good health. He had worked steadily supporting his wife and three children..."

Damages/injuries: The prosecutor should emphasize the human element of the case. In most criminal cases, someone is harmed by the defendant's actions and the prosecutor should not hesitate to talk about this. In cases where there was no real victim, or the victim is the state, the prosecutor could remind the panel of the unjust enrichment received by the defendant.

Address and refute defenses: You may consider a short statement in which you anticipate the probable defense and refute it. However, keep in mind that this can be tricky. You cannot directly mention the evidence that you expect the defense to produce, since the defendant does not have the burden of proof, and he is not required to present evidence. You can, however, refer to your evidence and state indirectly yet strongly that this evidence is not favorable to the defendant.

"The evidence will show that at no time was the victim armed in any way, nor did he do anything to provoke the defendant's assault."

Legal Elements: All crimes have elements that must be proven to establish that a criminal offense has occurred. The prosecutor should discuss these elements and explain how they will be proved.

"For the defendant to be declared guilty under Article 88 of the Criminal Code, the prosecutor must prove that the defendant inflicted a serious injury upon the victim, Mr. Hysi, and that the defendant's actions were intentional. We will prove that the injuries to Mr. Hysi were serious in that he sustained a permanent scar to his face from the broken beer bottle. We will also prove that the actions were intentional, in that the defendant was aware of his actions and its consequences when he struck the victim in the face with the beer bottle."

Conclusion: The prosecutor should conclude the opening statement by simply and directly stating that the facts of the case will support his side and ask for a conviction and sentence.

"After hearing all the evidence, I am confident that you will find the defendant guilty of inflicting a serious intentional injury upon Mr. Hysi under Article 88 of the Criminal Code."

3. Direct examination

Direct examination is that phase of the trial when a party questions a witness that the party has subpoenaed or requested to testify. Usually, the one who has requested the witness to testify believes that the witness has *favorable* testimony to give, that is, testimony that *advances* his theory of the case. For prosecutors, direct examination constitutes the heart of the case, upon which all other phases of the trial depend. Your ability to make assertions of fact during your opening and to argue the evidence during closing depends to a large extent on the testimony elicited during direct examinations.

3.1. Basic goals of direct examination

The primary goal of direct examination is to introduce relevant facts to the tribunal in an understandable way. Therefore, the questions need to be clear and precise, in order to elicit answers that are clear and unambiguous. Direct examination provides you the opportunity to:

- ***Introduce undisputed facts***: In most trials there are important facts that are not in dispute by the parties. Nonetheless, such facts cannot be considered by the judicial panel and will not be part of the record on appeal, unless they have been brought forward through a witness' testimony. Undisputed facts are often necessary to establish an element of the

case; thus, failing to include them in the direct examination of the witness could harm the case.

- ***Introduce disputed facts:*** The most important facts in a trial are those in dispute by the parties. Direct examination is an opportunity to put forth your version of the disputed facts in a light most favorable to your case. In other words, you must not only introduce these facts, but you must do it persuasively. The true art of direct examination consists in large part of establishing the certainty that the truth is exactly what the defendant is claiming to be untrue.

- ***Lay foundation for the introduction of exhibits:*** Documents, photographs, writings, tangible objects, and other forms of real evidence are often central to your case. With some exceptions, it is necessary for the direct examination of the witness to lay the foundation for the admission of such an exhibit by the court. This rule is observed whether or not the evidence is disputed by the defendant.

- ***Dispute or discredit defendant's version:*** The defendant or his witnesses will offer their version of events that you can discredit with the direct examination of your witness.

- ***Hold the attention of the tribunal:*** No matter what the purpose of examining someone, it must be conducted in a manner that holds the attention of the judicial panel. Depending on how the witness is presented, the testimony may be compelling and riveting or routine and boring. Since direct examination has none of the inherent drama or tension of cross examination, you must take extreme care to prepare your direct examination to maximize its impact.

3.2. Legal Considerations

The CPC regulates the type of testimony that may be received in court. All persons, except those with a physical or mental disabilities that prevent them from giving testimony, may appear as witnesses in court. However, spouses and others in close kinship with the defendant have the right of choice to testify or not, unless they lodged the complaint and are victims of the crime.[106] Additionally, certain freelance professionals, including religious representatives, attorneys, doctors and others, may not be compelled to testify about information learned as a result of their profession,[107] while state employees are prohibited from testifying about state secrets, unless their testimony is fundamental for resolving the case and the necessary approval has been obtained.[108]

3.3. Some rules for direct examination

Establish the Credibility of your Witness: The credibility of a witness offering contested facts is always at issue. Thus, in every direct examination, the prosecutor must attend to the credibility of his witness, in addition to eliciting the facts that are important to the case. This is especially critical when the witness is also the victim of the criminal offense.

For this reason, direct examination often begins with some background information about the witness, such as asking where the witness is from, where he lives presently, what he does for a living, etc. The aim is to "humanize" the witness so that the tribunal can relate to him, or at least accept him as a credible person. Obviously, these preliminary background questions cannot be overdone, since they normally have nothing to do with the case,

106) Article 158 of the CPC
107) Article 159 of the CPC
108) Article 160 of the CPC

but most courts will allow some leeway. Also, be careful to avoid eliciting background information that does not enhance credibility.

Question: *What do you do for a living?*
Answer: *I'm not working.*
Question: *How long have you been unemployed?*
Answer: *Six years.*

The above questions had no point and should have been avoided, or perhaps the witness could have been asked other questions.

Ask open-ended, non-leading questions: The principal rule of direct examination is that the party should not ask questions that contain or suggest the answer. The questions should be open-ended, meaning that the answer is not obvious from the manner in which it was asked. Open-ended questions often begin with interrogatives such as "*who,*" "*what,*" "*when,*" "*where,*" and "*how*." Leading questions, on the other hand, aim at a specific answer and often begin with phrases such as, *"isn't it true that…..", or "would you agree with me that ……"* or end with the words, … "*right?*" *or "correct?*"

The reason for prohibiting leading questions during direct examination is because the testimony should be coming from, and appear to be coming from, the lips of the witness and not from a prosecutor who is asking the witness to agree with him.

Leading questions: *It was only after you heard the crash that you looked up, correct?*
Open-question: *When did you look up?*

Leading question:	*You were able to see the defendant for more than a minute, weren't you?*
Open-ended question:	*How long were you able to observe the defendant?*

Of course there are exceptions to the rule against leading questions during direct examination. The prosecutor may lead the witness during preliminary questions or the ones leading up to the main question. The leading questions may also be permissible in matters that are not in dispute, or in order to direct the witness' attention to a particular time or place, or in transitioning to a new topic. In addition, the court may permit flexibility when the witness is very young or old or appears to be infirm, confused, or frightened. Finally, some courts may be more lenient than others in permitting leading questions, or the defense attorney may simply not be aware of them and may not dispute them. Nevertheless, the prosecutor should make it a practice to get in the habit of asking proper questions, regardless of the skill level of opposing counsel.

Avoid narratives: "Narratives" refer to answers by a witness that run on beyond a specific fact or point. The prosecutor should be asking open-ended questions that do not imply the answer (e.g. questions starting with "who," "what," "where," "when," and "how") but he must avoid questions that are too broad or contain no factual or time limitations. In other words, a question that is not specific allows a witness to give lengthy explanations during which he may talk about irrelevant matters or give personal judgments. If the witness is allowed to ramble on and on, it gives the impression that the prosecutor has lost control of the witness, which is what he has essentially done. Just as a horseman maintains control of his horse through a gentle but firm control of the reigns, a good prosecutor maintains control of the witness during direct examination. The questioning

should generally be structured in a question and answer form, where discreet facts are elicited in small segments.

An open-ended question leading to a narrative answer:

Question: *What happened after the defendant arrived at your house?*
Answer: He walked in and pushed me. Then my wife screamed and ran out of the room. I told him that he had no right to touch me and he tried to hit me. The dog started barking. I was trying to call the police, but remembered that I had left my cell phone in the other room. So, instead, I grabbed him and we both fell to the floor....

Non-narrative alternative:

Question: *After you heard knocking on the door, what did you do?*
Answer: *I opened the door.*
Question: *And who was there?*
Answer: *The defendant.*
Question: *What did he do when you opened the door?*
Answer: *He walked straight into the apartment.*
Question: *What happened next?*
Answer: *He immediately pushed me.*
Question: *What did you do after he pushed you?*
Answer: *I grabbed his arm.*
Question: *Then what happened?*
Answer: *We both fell to the floor...*

In the latter example, the prosecutor maintains control over the pacing and timing of the testimony. The details are elicited in small chronological segments and are easy to follow.

On the other hand, narratives can be effective when a witness is at a dramatic point in the testimony and it would be disruptive to interrupt the story by asking for details. In such a situation, it may be appropriate to give the witness a little more space to elaborate, without interrupting with questions about small details. You can ask about details in the follow-up questions, by asking the witness to repeat the story, but in short segments. Allowing the witness to tell a story, will depend to a large extent on how well you know that he will stay on track.

Avoid personal opinions and "hearsay" testimony: The witness can only testify regarding matters on which he has personal knowledge, that is, the information he has obtained from what he has seen and heard himself, unless the other source of the information can be revealed and verified.[109] "Hearsay" facts are considered inadmissible, if the person [the information comes from] has not been also summoned as a witness, as they cannot be subjected to cross examination.

Witnesses are also not permitted to offer personal opinions or state their beliefs, but simply testify on the facts.[110] However, a witness may be permitted to draw conclusions based upon his observations on issues such as speed, distance, volume, time, weight, temperature and weather conditions. Similarly, witnesses may characterize the behavior of someone as "*angry,*" "*drunk,*" "*affectionate,*" or other traits that are commonly recognized by the average person.

3.4. Direct examination tools and techniques

Refreshing recollection: Although witnesses are expected to testify in their own words, based on their memory of an

109) Article 153 of CPC
110) Article 154 of the CPC

event, it is recognized that witnesses do not perfect recall. When a witness cannot recall a specific event or facts, it is permissible to "refresh" his recollection.[111] It is not clear whether the CPC permits the witness to have his memory refreshed only by documents that have been physically drafted by him or also documents drafted by others, for example a judicial police officer or prosecutor, which contain statements of the witness.[112] The drafters of this Guidebook believe that the spirit of the provision leads to the conclusion that both types of documents should be allowed to aid the witness' recollection. But since the rule on this particular legal practice is unclear, the prosecutor should place even more importance on witness preparation.

In order to refresh the witness' recollection with a document he has prepared, the prosecutor should first establish that the witness has recalled everything he can related to an issue or event. Then he asks the witness whether his recollection might be refreshed by a particular document. Next, the witness is shown the document, asked to review it, and then asked if his recollection has now been refreshed. Upon an affirmative answer, the prosecutor repeats the original question.

Question:	*What time did you leave the office that day?*
Answer:	*I do not remember exactly, I think it was in the afternoon.*
Question:	Would it help you refresh your memory if you saw the statement you gave to the police about a week after the incident.
Answer:	Yes.
Question:	Honorable judge, may I approach the witness? Please allow me to show you your statement dated January 6, 2007. Let me direct you to page 2, para-

111) Article 361/4 of the CPC
112) The minutes of obtaining the witness statement.

graph 4. Read that and let me know when you are done.

Answer: *OK.*

Question: *Does that refresh your memory?*

Answer: *Yes, it does.*

Question: *What time was it that you left the office that day?*

Answer: *About 4:30 pm.*

The prosecutor should consider that the document that is being used to refresh the recollection is not an exhibit and is not admitted as such. The only evidence is the answer given by the witness.

Recorded recollection: In some instances a prior statement of a testifying witness can be presented to the judicial panel as a prior recorded recollection. For this to occur, the following must exist:

- at trial, the witness must have no current recollection of an event;
- the witness has furnished a statement regarding the event at a time he had a clear memory;
- the witness admits that the statement was made when his recollection was clear;
- his memory is not refreshed even after he has reviewed his prior statement.

When these elements are established, the witness or the prosecutor may be permitted to read prior statements, which are then recorded in the minutes of the court proceeding. The actual document is not introduced and admitted as evidence.

Question: *What time did you leave the office that day?*

Answer: *I do not remember exactly, I think it was in the afternoon.*

Question: Do you recall giving a statement to the police on or around January 6?

Answer: Yes.

Question: Would it help you refresh your memory if you saw the statement you gave to the police after the incident?

Answer: I'm not sure, perhaps.

Question: Honorable judge, may I approach the witness? Please allow me to show you your statement dated January 6, 2007. Let me direct you to page 2, paragraph 4. Read that to yourself and let me know when you are done.

Answer: OK.

Question: Does that refresh your memory as to what time you left the office that day?

Answer: To be honest, no.

Question: Do you recall giving this statement to the police?

Answer: Yes, I do.

Question: How many days had passed since the incident when you gave this statement?

Answer: It was the day after.

Question: And at the time you gave the statement, how well were you able to remember what had occurred the day before?

Answer; Well, I remembered it quite well.

Question: Was the statement you gave on January 6, truthful and accurate to the best of your knowledge at that time?

Answer: Yes, it was.

Question: Let me then direct you again to your statement. On January 6, 2007, did you state the following, on page 2, paragraph 4: "I left the office at about 4:30 pm that day."[113]

Answer: Yes, I did.

113) Note that some of the questions are leading, but given that they direct the witness to a particular event or document, such questions are generally permitted.

Use of charts, diagrams, photographs, and reenactments: The use of charts, diagrams, photographs, or reenactments during the direct examination is a good technique to clarify the testimony of the witness. Charts and diagrams are particularly useful when the witness is describing locations, such as a crime scene, or physical things or concepts, such as how a phone system works or how a business is structured. The additional advantage is that once the witness has verified the accuracy of a diagram or chart during his testimony, the prosecutor can refer to the exhibit during his closing argument to remind the judicial panel of important details.

The chart or diagram is also a useful tool to repeat certain testimonies. As discussed in previous sections, repetition greatly enhances the ability of people to remember.

Assume that the witness just described how she was attacked by the defendant on the street. The witness could be asked a series of questions that repeat key facts:

Question:	*Alright, Mrs. Kurti, you testified that you first saw the defendant as he approached you near the corner by the Relax bar. Let me show you a diagram. Can you step over to the diagram and point out precisely where you were standing when you first saw him?*
Answer:	*(witness points to diagram) I was right over here.*
Question:	*And where was the defendant at that point?*
Answer:	*(pointing) He was right over there.*
Question:	*And where did you go from there?*
Answer:	*I walked to the corner - here (pointing).*
Question:	*And what did the defendant do?*
Answer:	*He crossed the street - here. (pointing …)*

The diagram or photographs provide the judicial panel with a clear visual picture of the events as they unfolded and tend to make the testimony more interesting. Also by referring to small details of the diagram or exhibit, the prosecutor appears to be asking different questions, but in actual fact, he is eliciting information that the witness spoke about before the diagram was produced. Repetition is a key ingredient to memory retention.

Alternatively or in combination with charts, diagrams or photographs, the prosecutor may ask the witness to demonstrate the position of the participants to an incident or to reconstruct elements of what happened.

Question:	OK, you said that after the defendant came up behind you, he grabbed you around the neck.
Answer:	Yes.
Question:	[to the judicial panel] May the witness demonstrate how she was grabbed?
Chair:	OK.
Question:	Can you step over here and show me how the defendant grabbed you? You play the role of the defendant and I will be you.
Answer:	*(witness putting her arm around the prosecutor's neck) "Here, he grabbed me like this."*

3.5. Planning direct examination and witness preparation

A direct examination goes well when the prosecutor and witness are "*on the same page*." It is like a dance, where the prosecutor takes the lead and the witness follows. Because this is not a natural form of conversation, it requires careful preparation by the prosecutor. Just as in dancing, if the person who is supposed to be following the steps of the other tries to lead, or heads in his

own direction, this creates disharmony and confusion (not to mention, sore feet!).

So how is this avoided? For starters, the prosecutor needs to know exactly where he is going, that is what information he seeks to elicit from the witness. To get to the destination, the prosecutor should prepare a *"road map"* or an outline of the topics and information he expects to elicit from the witness. The prosecutor (especially those with less experience) should also consider writing out questions in advance of the hearing. By writing out the questions and anticipating the likely answers, the prosecutor can develop a chronological and logical order of the questions. The written questions help the prosecutor assure that his questions are simple and direct, not compound or confusing, and are relevant to what he is attempting to establish. Of course, the prosecutor cannot prepare this list of questions unless a statement is obtained from the witness during the investigation and the information has been recorded in the minutes of the statements.

After developing his questions, it is recommended that the prosecutor conduct one or more meetings to prepare and rehearse with the witness.[114] The last meeting should occur as close to the witness' trial testimony as possible. Practice allows the prosecutor to identify unclear questions and help the witness understand what information the prosecutor is attempting to elicit by certain questions or phrasing. Further, the rehearsing sessions

114) This practice is now being implemented by some prosecutors. However, there are prosecutors who believe they should not meet with witnesses before trial in order to avoid claims by the defense that the prosecutor is biased and has instructed the witness about what to say. These opinions are not based in the law. First, the prosecutor must abide by the obligation of non-bias and respecting procedural provisions. Second, each party calls witnesses to bring information favorable to each case and has a legitimate interest in knowing what the witness will say. Third, the prosecutor and the defense should comply with the same requirements in any meetings with the witnesses.

may identify areas where the witness' recollection has started to fade, and allow him the opportunity to review prior statements, documents, or other records that refresh his recollection. After the interviewing sessions, the prosecutor may review his question list in order to alter the order of questions or to make them clearer.

The prosecutor should not share his notes or the pages on which he has written the questions to the witness. First, this is a guiding document for the prosecutor, and secondly it should not create the appearance that the witness has been furnished with a script.

Having prepared a road map, the prosecutor will have a guide for his direct examination at trial. However, the prosecutor should never READ his questions verbatim. Nor should the prosecutor worry if the actual testimony comes out in a different order. As stated, the road map is only a guide. The goal is to make the questions and answers appear as normal or natural conversation. Very often, the answer the witness gives in court differs from previous preparation and may lead to a different series of questions or clarifications that were not planned.

As part of the preparation of the witness for trial, the prosecutor should also anticipate likely questions on cross examination and review those with the witness. This should not be viewed as something improper, but rather as something that helps the witnesses lower the level of nervousness that accompanies being summoned to court. The nervousness may lead to forgetting important facts, thus, all the necessary steps should be undertaken to lower anxiety. The more prepared the witness is to deal with the questioning, the less stressful the situation will be for him.

The witnesses may be provided with some guidelines or strategies to answer the questions. Some of these may include:

- Always be truthful (this may seem obvious, but many people try to give the answers they think are expected of them, even if not completely true or accurate).
- Do not try to answer a question that you do not know the answer to. If you do not know the answer, simply say so.
- If you do not understand the question, ask the person who is asking the question to repeat or rephrase it.
- Do not interrupt the person who is questioning you. Listen to the entire question before starting to answer. Better yet, wait a few seconds after the question is asked to give yourself time to think.
- Answer the question being asked. Do not volunteer information.
- Do not argue with the person who is asking the questions. This simply makes you look bad.

After all this planning and preparation, the prosecutor may not need to refer to his "roadmap" at all during the questioning of the witness. However, he can always use his notes to quickly confirm that he covered all major points with the witness, before he submits the witness for cross examination.

3.6. Dealing with weaknesses and credibility issues

The credibility of the witness is always an issue. For this reason, it is helpful to "humanize" the witness with questions that demonstrate he is a normal and law-abiding person. Some witnesses, however, simply do not fall into that category, even if they try hard. The witness may be a drug addict or a convicted thief. He may have given prior statements that contradict his present testimony. He may be hoping for a break in his own criminal case. How should the prosecutor deal with that?

Probably the best way to address credibility concerns is to deal with or "front" the negative information during direct examination (just as this may have been "fronted" in the opening statement). By addressing the issue head on, the prosecutor evades the negative effect of opposing counsel exposing the information during cross examination. It also shows that the prosecutor is not "sugar coating" his case and is not afraid to deal with its negative aspects. On the other hand, this does not mean that the prosecutor should start off his direct examination of the witness with the negative aspects of his life. If the witness makes a decent appearance, the prosecutor may want to delay bringing out the "bad stuff" until the end of the witness' direct examination, when he has established some rapport with the tribunal. After all, the prosecutor does not want to impeach or destroy the credibility of his own witness before he even gets started.

Likewise, assume the witness gave a contradictory statement prior to the testimony. This needs to be addressed during direct examination, so it can be explained on the prosecutor's terms, not the defense attorney's.

Question:	*Now Mr. Kurti, you said that you saw three people in the car.*
Answer:	*Yes.*
Question:	*Was there a time that you thought differently?*
Answer:	*Yes, originally I said there were two passengers.*
Question:	*When did you say this?*
Answer:	*I said this to the police officer when he took my statement.*
Question:	*What has caused you to change your testimony?*
Answer:	*I have thought about it a long time, and I realized I made a mistake. There were three of them in the car.*
Question:	*Did you tell anyone that you made a mistake, prior to your coming here today?*

Answer: *Yes. I told you and the police officer, when I met you to discuss the case.*

Having brought out the inconsistency himself, the prosecutor has taken the sting out of any cross examination on this issue.

4. Cross examination

Cross examination is the advocate's opportunity to question his opponent's witnesses, after they have testified during direct examination. For prosecutors, it is the chance to directly challenge the truthfulness of what the defense witness is saying. If you are not prepared for cross examination, it can be difficult or disastrous. On the other hand, cross examination can be dramatic and even exciting. In many ways it defines the adversarial system of justice, as it is the ultimate challenge for the prosecutor/attorney in a trial. If direct examination is the best chance for the prosecutor to win the case, poor cross examination is the best chance to lose it.

Television and movies often portray trials in which a skillful prosecutor or lawyer cross examines a witness and *"exposes"* his lies or even extracts a confession. This rarely happens in real life. What happens more commonly is that the skillful cross examiner can "score points" for his side or his case by casting doubts on certain aspects of the testimony, or even by getting the witness to modify or withdraw some previous answers. On the other hand, the cross examiner may use the witness to his own advantage, having the witness highlight or confirm facts that are favorable to his theory.
Thus, the first consideration is to decide whether to conduct a cross examination at all. This will depend upon your judgment whether cross examination may add to your case or detract from the opposition's case.

4.1. Should you cross-examine?

The decision whether to cross-examine cannot be made intelligently unless you are clear about what you plan to achieve during cross examination. The key, as always, is thorough preparation before trial. You should know what your opponent's theory of the case is likely to be and also have an idea what each witness will testify about. Therefore, you should decide on your purpose for cross examination, then plan and organize it in advance. No one is required to cross-examine every witness of the opposing party who testifies at trial. Ask the following questions every time the defense finishes a direct examination before deciding to cross examine the witness:

- Has the witness hurt your theory of the case?
- Is the witness important?
- Was the witness' testimony credible?
- Did the witness give less than expected on direct examination?
- What are your realistic expectations during cross examination?
- What risks do you need to take?
- Does the witness have information that can support your version of the facts?

Very frequently, a defense witness says very little that would hurt the prosecution. In such a case, it may be unnecessary, and unnecessarily risky, to ask any questions at all on cross examination. In other words, you should conduct a very quick "risk/benefit analysis" to decide if it is worthwhile to conduct a cross examination. If your case is solid and you can reasonably expect to win, keep your risks at a minimum. If your facts are bad and you expect to lose, then you could consider conducting a risky cross examination.

A very different analysis applies when the defendant testifies at trial. Unless the defendant has said little which hurts the prosecution's case, the answer to the question, "*should you cross examine?*" is almost always "*yes.*"[115] After all, when the defendant agrees to testify, his testimony is generally the key to the entire defense. He generally asserts a denial of guilt and offers facts in support of his alleged innocence. In other words, if the judicial panel believes the defendant, he wins. Therefore you must destroy his credibility. You can achieve this through cross examination or other techniques outlined below.

4.2. Cross examination techniques

Ask leading questions: In conducting cross examination, your object is to focus attention away from the witness' direct testimony and onto matters that make his testimony less believable or other topics that you believe are helpful. This is the opposite of direct examination. You should be telling the story rather than the witness. In order to do this, you must always be in control of the testimony and the witness. Generally, this is accomplished by asking leading questions.

Leading questions allow you to control the witness and confront him with statements you allege to be accurate. The example below of cross examination contains a series of leading questions. Of course the questions must be asked in good faith and based upon facts known or believed to be true. For example, if you have no basis to believe that the defendant has been drinking with the witness, asking leading questions that imply this was the case would be misleading and improper. (If you really want to learn whether the defendant had been drinking with the wit-

115) Because the defendant has certain rights and obligations under the law, he is not treated as an ordinary witness. However, the same questioning techniques used on other witnesses can be used when the defendant testifies.

ness, you could ask the questions in a non-leading way, but this is not recommended if you do not know the answer.)

The CPC prohibits questions which negatively influence the impartiality of the witness or intend to suggest the answers.[116] Some prosecutors and judges may interpret this rule to prohibit asking any leading questions because they suggest the desired answer. However, some prosecutors interpret this rule more narrowly and argue that suggestive [leading] questions are only those not based on facts or the truth. Thus, when the prosecutor has a factual basis to ask the questions, they should be permitted.

Let us assume that the defendant's wife, who is an alibi witness for the defendant, has just testified that the defendant was home with her at 8:00 pm on the evening the crime occurred. The prosecutor has evidence from a neighbor of the defendant that no one was home in the defendant's apartment that night until well after 10:00 pm.

Question:	*Mrs. Bardhi, you just testified that your husband was with you at home at 8:00 pm.*
Answer:	*That's correct.*
Question:	*Isn't it the case that you were not home at 8:00 pm?*
Answer:	*No.*
Question:	*Isn't it the case that you did not come home that night until after 10:00 pm?*
Answer:	*No.*

The above questions are leading, but are they also suggestive? One could argue they are not, because they do not suggest any answer the prosecutor wants to receive, but an answer that he believes is the right answer based on other evidence. Furthermore, the witness denied all the statements of the prosecutor,

116) Article 361/3 of the CPC

thus, did not feel obliged because of his suggestions. The questions are somewhat argumentative, perhaps not terribly fruitful, but they are not suggestive.

However, even a prosecutor who is concerned about violating the rule against suggestive questions can score points in a cross examination with the use of open-ended questions

Question: *Mrs. Bardhi, first you just testified that your husband was with you at home at 8:00 pm.*
Answer: *That's correct.*
Question: *What time did you get home that night?*
Answer: *I don't remember exactly.*
Question: *Were you home at 8:00 pm?*
Answer: *Yes, I was.*
Question: *Were you home at 8:30 pm?*
Answer: *Of course.*
Question: *Were you home at 9:00 pm?*
Answer: *Yes, I already told you that.*
Question: *Mrs. Bardhi, is it possible that you actually got home after 10:00 pm?*

Whether by direct leading questions or by this indirect method, the goal is to highlight to the court that the prosecutor has evidence which refutes the testimony. Additionally, an effective cross examination often succeeds through the use of implication and innuendo rather than direct accusation. It is not necessary, and often harmful, to ask a witness the ultimate question. Closing argument is your opportunity to point out the relationship between facts, make characterizations, and draw conclusions based upon the accumulation of details. Do not expect an opposing witness to do this for you.

Ask Short questions: Questions during cross examination must be short in both execution and concept. If a question is more than three words long, it is not short in execution. Try to shorten it. If a question contains more than a single fact or it is not short in concept, divide it. The larger the scope of the question, the more likely you are to give the witness room to disagree. It is therefore preferable to divide areas of questioning into smaller component parts.

Assert statements of fact: If permitted, the best cross examination questions are not questions at all. Rather, they are propositions of facts that you put forward to the witness in an interrogative form. You already know the answer, but you simply want it to come from of the witness' lips. In this style of questioning, you should phrase your cross examination question in such a way that it falls into one of these three categories: a) you already know the answer; b) you can otherwise document or prove the answer; and c) any answer will be helpful. An example of the last sort of question is when the witness is forced to admit having previously given a statement that is inconsistent with his current testimony: *"Were you lying then, or are you lying now?"*

Avoid reading your questions: Usually it is a mistake to read from a prepared list of questions. Reading deprives your examination of the appearance of spontaneity and does not allow you to control the witness through eye contact. If you read, the witness will be less likely to follow your lead, and you will be less able to observe the witness' reaction to your question and the tone of his answer. It may also distract you as you may not hear the answers given and may not be able to deviate from the script. However, it is useful to have an outline to remind yourself of the points you intend to make on cross examination and to ensure that you are not omitting anything important.

Listen to the witness and insist on an answer: Controlling the witness of the opposing party means first asking the right questions and second getting the correct answers. This requires you to listen to the witness. You can often correct an answer by rephrasing your question. For example:

Question: *Isn't it true that all of the other traffic stopped for the ambulance?*
Answer: *How would they know to stop? There was no siren.*
Question: *You did not answer my question. All the other cars stopped?*
Answer: *Yes.*

Do not go "fishing": Fishing questions are asked in the hope that you might catch something. It has been said before and it is worth repeating here. Do not ask questions to which you do not know the answers. Similarly, do not ask the witness to explain the reason for his actions unless you are certain that he has a reasonable explanation. Instead you can offer the reason during your closing argument.

Avoid characterizations and conclusions: Another way to lose control during cross examination is to request that a witness agree with your characterization or conclusion.

Question: *It was too dark to see, wasn't it?*
Answer: *I could see just fine.*

Instead, you should have asked the witness about the facts that led you to the characterization that it was too dark to see: the sun had gone down; there was no moon that night; there were no street lights; and there were no house lights. The characterization could have been saved for the closing argument.

Avoid intimidating behavior: You are entitled to elicit information during cross examination and insist upon answers. But, you are not allowed to loom over the witness, to shout, to make threatening gestures, or otherwise to intimidate, bully, or badger the witness.

Avoid unfair characterizations: The right to lead the witness does not include the right to mislead the witness. You should not attempt to mischaracterize the testimony or to ask "trick" questions. If a witness has testified that it was dark outside, the following question would be a mischaracterization of the testimony: "So you admit that it was too dark to see anything?"

Assuming facts: The prosecutor should be allowed to inquire about facts that are not yet in evidence. If the other party objects, the judicial panel should sustain the objection only when the question uses the unproven fact as a premise rather than as a separate subject of inquiry, thus, denying the witness the opportunity to deny its validity. For example, imagine a witness to a robbery was walking on the sidewalk. During direct examination he stated that the robber wore a cap, but did not mention the fact that he had been drinking that morning. As a result, when it is time for cross examination, no evidence has been offered to show that the witness had been drinking before witnessing the crime. The prosecutor is entitled to ask questions such as, "*Had you been drinking that morning?*" even without knowing that this is a true fact. But, he cannot use this assumption as the predicate for other questions: "*Since you had been drinking that morning, you were somewhat dizzy/tipsy?*"

Compound questions: Compound questions contain more than a single inquiry: "Isn't it true that the truck slowed down at the intersection, but you didn't look up until after you heard

the crash?" It is not advisable to ask such questions, as every answer will be ambiguous.

4.3. Organization of cross examination

Do not worry about starting strong: It would be desirable to be able to begin every cross examination with a strong, memorable point that absolutely drives home your theory and theme. Unfortunately, this will not always be possible. Unless you are able to start off with such a question, you may proceed slowly to establish predicate facts.

Use topical organization: Your goal on cross examination is not to retell the witness' story given on direct examination, but rather to establish a small number of additional or discrediting points for the testimony. Vary the order of your questions by moving from one topic to another. Successful cross examination is usually based on indirection, that is, the ability to establish facts without the witness perceiving your purpose or becoming aware of the fact until it has been established. Varying the order of your topics will make it less likely that the witness will realize the purpose of a given line of questions. This technique should be carefully used, as constantly jumping from point to point is ineffective and often creates confusion.

Do not repeat the direct examination! This may be the most commonly violated maxim of cross examinations. Repeating the direct examination may have merit only in situations where the witness' testimony appears memorized, or when certain parts of the direct examination support your theory of the case.

End strongly: Save a particular question or series of questions which you know will make a good point for the end. It is always good to look like you have no more questions because you are

completely satisfied with the information elicited. On the other hand, if the witness has delivered an unexpected blow, think of something else to ask, even if it is not a "knock out" punch. You do not want to stop examination at a low moment.

Example of a cross examination:
The defendant is charged with sexual assault on a woman. During direct examination, he denied the charge, but defended himself that all was consensual. The cross examination will show that he was conscious he committed a crime based on his actions after the incident.

Question: *Mr. Kurti, on December 16, 2008, you were working for Trans Albania, weren't you?*
Answer: *Yes.*
Question: *That date was a Tuesday, wasn't it?*
Answer: *Yes.*
Question: *You were living on Rruga Papa Gjon Pali, No 142, Ap. 101, weren't you?*
Answer: *Yes.*
Question: *You were with Anila during the evening of December 16, 2008, until about 11:00 pm, weren't you?*
Answer: *Yes.*
Question: *You then left?*
Answer: *Yes.*
Question: *You did not go back to your apartment that night, did you?*
Answer: *No.*
Question: *You did not go to work the next day, did you?*
Answer: *No.*
Question: *You weren't sick though, were you?*
Answer: *No.*
Question: *You did not go home either, did you?*
Answer: *No.*

Question: *You did not tell anyone at work where you were, did you?*
Answer: *No.*
Question: *You did not tell any friends or family where you were, did you?*
Answer: *No.*
Question: *In fact, you were staying at a friend's house, weren't you?*
Answer: *Yes.*
Question: *That is where you stayed for the next three days, isn't it?*
Answer: *Yes.*
Question: *During those three days, you never went to work, did you?*
Answer: *No.*
Question: *You never returned home, did you?*
Answer: *No.*
Question: *And the only person who saw you at your friend's house was your friend, isn't that so?*
Answer: *Yes.*

4.4. Impeachment of the witness

Impeachment is a cross examination technique that discredits the witness or his testimony. In other words, it is an attack on his credibility. The purpose is to show that he cannot be trusted. There are a number of ways to do this, and the major reasons for impeaching the witness are: a) bias, interest or motive to lie; b) contradictory or implausible facts; and c) character.

Bias, Interest or Motive: When a defense witness testifies (falsely you believe), there is generally some motive for the witness to do so. Thus, if you have information that is damaging, your cross examination should highlight this motive. For exam-

ple, the defendant, owner of a trucking company who is charged with an assault, has called as a witness one of his employees, who was present during the incident. One line of cross examination of this witness might go as follows:

Question: *Now Mr. Kurti, when asked by counsel you testified that it was the victim who attacked the defendant first?*
Answer: *That's right.*
Question: *Now, you are employed by the defendant, is that right?*
Answer: *Yes.*
Question: *And you have been working for him for 17 years?*
Answer: *Yes.*
Question: *And you have developed a close relationship with him?*
Answer: *Yes.*
Question: *You and your family have been invited to his house on many occasions for social events.*
Answer: *A few times. Not many.*
Question: *But you do consider yourself close to the defendant?*
Answer: *Yes.*
Question: *And you have been satisfied working for him?*
Answer: *Yes.*
Question: *And he has treated you well, has he not?*
Answer: *Yes.*
Question: *And you hope to continue working for him after this case is concluded?*
Answer: *Yes.*

You can stop here, since the point is made. You do not need to ask the ultimate question: "*Isn't it true that you are lying now because of your friendship and loyalty to your boss and because you want to keep your job?*"

Contradictory or Implausible Facts: The cross examination may show that certain facts testified to by the witness are different from what are claimed to be. For example, you may be able to prove that certain parts of the witness' testimony are false or inaccurate by suggesting that other contradictory evidence exists. Of course, in order to ask these questions, you should have full faith in your knowledge.

Question: *Mr. Kurti, had you consumed any alcohol that night?*
Answer: *Maybe one beer.*
Question: *Isn't it true you had five or six beers?*
Answer: *No.*

Depending on whether the issue of how many beers Mr. Kurti drank that night is essential to the case, the court may permit you to introduce other testimony showing that what Kurti claimed is not true. Or you could continue the line of questioning to demonstrate that the testimony is implausible.

Question: *Mr. Kurti, you were at the bar for about 4 hours?*
Answer: *Approximately.*
Question: *And you only drank one beer?*
Answer: *Correct.*
Question: *And you had no other alcoholic beverages?*
Answer: *No.*
Question: *At the end of the evening, you were a little unsteady walking weren't you?*
Answer: *I don't think so.*
Question: *Didn't you ask your friend to walk you back to your apartment?*
Answer: *I did, so what?*
Question: *Didn't you ask him to walk you back, because you didn't feel steady on your feet.*
Answer: *I don't recall that.*

Character: The credibility of the witness can be harmed by showing that the witness has prior felony convictions or has committed actions that are related to the truthfulness of his character.

Question:	*Mr. Kurti, have you been previously convicted of a crime?*
Answer:	*Yes.*
Question:	*You were convicted of active corruption in 2004?*
Answer:	*Yes.*
Question:	*Mr. Kurti, you were previously in the army?*
Answer:	*Yes.*
Question:	*You were discharged from the army in 2000 for theft of some equipment?*
Answer:	*Yes.*

4.5. Rebutting the testimony

Impeachment, confronting a witness with a prior statement different from the in-court testimony, is the most complete form of discrediting the witness. The CPC permits parties to rebut, in whole or in part, the content of testimony through prior statements of a witness to the prosecutor or judicial police, but only after the witness has testified about the facts and circumstances to be rebutted.[117] The prosecutor is always aware of the prior statements, since they are in the investigation file.

Also due to court practice, there are different opinions among prosecutors on the previous legal provision. Some prosecutors believe that the prosecutor is allowed to confront the witness with his prior statement while the witness is still in the courtroom, while others believe that the prosecutor may bring the prior statement to the court's attention only after the witness

117) Article 362/1 of the CPC

has left the court room. Frankly, the law does not expressively prohibit confrontation while the witness is still in the room. Also, it simply makes more sense to allow direct confrontation because it is possible that the witness has an explanation for his inconsistency. If the witness has already left the courtroom, he will be deprived of the opportunity to explain the reason why his testimony is inconsistent with his prior statement.

If the judicial panel permits the rebutting of testimony, the standard technique is to: 1) confirm, 2) credit/give value, and 3) confront.

Confirm: To highlight the difference in testimonies, the first step is to confirm what the witness is currently claiming. For example, in the assault case the witness has testified that it was the victim who started the fight by throwing the first punch. So the first step is to simply confirm this testimony (note that this runs contrary to the general rule, according to which the testimony is not repeated during cross examination):

Question:	*Mr. Kurti, you said a few moments ago that it was the victim, Agim, who threw the first punch?*
Answer:	*Yes.*
Question:	*Are you sure of that?*
Answer:	*Yes.*
Question:	*Did you actually see him throw this punch?*
Answer:	*Yes.*

Credit/give value: The next step is to credit, that is, give value to the statement made during the investigation. This should be done through a series of questions, designed to express your faith that the prior statement was truthful and accurate.

Question: *Mr. Kurti, do you recall that the day after the incident, you went to the police station and met with police officer Bardhi?*

Answer: *Yes.*

Question: *And he asked you to give a formal statement as to what happened?*

Answer: *Yes.*

Question: *And you knew that it was important to the investigation that your statement be truthful and accurate?*

Answer: *Yes.*

Question: *In fact you were placed under oath?*

Answer: *Yes.*

Question: *So you knew that if you made a false statement you could be prosecuted for perjury?*

Answer: *Yes.*

Question: *And your memory of the event was fresh in your mind, wasn't it?*

Answer: *Yes.*

Question: *And you did answer the questions truthfully, didn't you?*

Answer: *I believe so.*

Confront: Next the witness is confronted with the applicable portion of his prior statement:

Question: *Mr. Kurti, do you recall that during your formal interview with officer Bardhi he asked you: "Did you see who threw the first punch?"*

Answer: *And you answered: "No, I was not nearby. I was standing over in the corner talking to my co-worker, so I didn't see how the fight started." Do you recall that question and your answer?*

Answer: *Not really.*

Question: *Would you like to read over your statement?*
Answer: *No, if that's what I said, that's what I said.*

If you are not permitted to confront the witness directly with his prior inconsistent statement, you can achieve the same result by fully developing his testimony in court, thus allowing you the opportunity to highlight the inconsistencies for the court later on.

Question: *Mr. Kurti, you said a few moments ago that it was the victim, Agim, who threw the first punch.*
Answer: *Yes.*
Question: *And you are quite sure of that?*
Answer: *Yes.*
Question: *And did you actually see him throw this punch?*
Answer: *Yes.*
Question: *Mr. Kurti, isn't it true that you did not actually see who threw the first punch?*
Answer: *No.*
Question: *Weren't you standing over in the corner talking to one of your colleagues when the fight started?*
Answer: *I was standing near the corner, but I could see everything.*
Question: *Isn't it true you didn't see how the fight started because you were talking to a co-worker?*
Answer: *No.*

After these questions, you would subsequently present the court with the inconsistent statement.

4.6. Cross examination as an "offensive weapon"

Cross examination can be an opportunity to bolster the theory of your case by looking for favorable testimony. Almost every witness of the opponent is a potential source of such favorable information. However, you do this only when you already know that the witness has such information, generally from prior statements given, or when it is low risk to ask these questions. Generally, cross examination should not be used to gather new information. Only very rarely should you ask a defense witness a question simply because you want to find out the answer. Rather, cross examination should be used to establish or enhance the facts that you have already discovered.

Example:
You are prosecuting a case involving the robbery of a woman on the street. The victim identified the defendant and claimed that he smelled of alcohol when he robbed her. The defendant claims an alibi and has called in his friend, who claims he was with the defendant that entire evening.

Question:	*Mr. Bardhi, you told the court that you were with the defendant that evening.*
Answer:	*Yes.*
Question:	*You and the defendant spend time at a bar, didn't you?*
Answer:	*Yes.*
Question:	*And both of you had some drinks together?*
Answer:	*Yes.*
Question:	*You both drank several beers, right?*
Answer:	*Yes, beer.*
Question:	*And the defendant had two or three beers, correct?*
Answer:	*I don't remember.*
Question:	*But he had more than one?*
Answer:	*I believe so.*

Even though you might not be given the chance to change his testimony that he was with the defendant that night, you have established, or corroborated other evidence, that the defendant had been drinking that night.

4.7. Cross examination of the defendant

The prosecutor should have a clear idea of the defense before the trial begins and in any case before the defendant decides to testify. Therefore, there is no excuse for not preparing an effective cross examination. Just as with other witnesses, cross examination of the defendant can be used to strengthen the prosecutor's case, by getting him to confirm as many facts as possible, or by impeaching his testimony, or both.[118] However, before setting off to destroy the defendant's credibility, make sure you have asked questions about issues you want him to confirm.

Among the traditional methods of impeachment (e.g. bias, contradictory facts, character), most useful would be to demonstrate that the defendant's testimony is absurd and unlikely. In order to do this, you should analyze what the defendant has said (or anticipate what he would say) and, using basic rules of logic, ask yourself "If what the defendant says is true, what else would have to be true, according to his logic?" Find those threads which take you to the absurd results or results that are untrue.

Example:
A doctor is accused of passive corruption, and the prosecutor's office has gathered evidence showing that he accumulated over

118) Article 362 of the CPC, when interpreted literally and in combination with Artcles 36, 166, 167 and 167/a of the CPC, appears not to permit impeaching the testimony of the defendant because he does not have the status of a witness. However, the spirit of these provisions and of the CPC in general leads to a wider interpretation, which would allow prior inconsistent declarations/statements of the defendant to be used for impeachment.

800,000 Euros in cash and property over an 8-year period (2001-2008). During that time, his salary was approximately 30,000 Euros annually. The doctor testifies at trial that he accumulated a substantial portion of this money from remittances sent to him from his 2 adult children, who currently reside in the United States. He claims that each child sent him about $100,000.

Question: *Doctor, your oldest son, Agim, emigrated to the United States in 2004, correct?*
Answer: *Yes.*
Question: *And that was for the purpose of attending school?*
Answer: *Yes.*
Question: *And he attended the University of Maryland from 2004 to 2006, correct?*
Answer: *Yes.*
Question: *And he graduated in May 2006 with an undergraduate degree in Engineering?*
Answer: *Yes.*
Question: *And you paid his tuition and living expenses while he was in school, didn't you?*
Answer: *Yes.*
Question: *And the cost of his schooling over those two years exceeded $75,000 US dollars, didn't it?*
Answer: *I believe so.*
Question: *Did you take out any loans for his schooling?*
Answer: *No.*
Question: *Now, he wasn't working while he was in school, was he?*
Answer: *No.*
Question: *And he only started working after graduation.*
Answer: *Yes.*
Question: *When did he start working?*
Answer: *Summer, 2006.*

Question: *And he got a job with Techom Company, in Boston, correct.*

Answer: *I believe so.*

Question: *And his salary in 2006 and 2007 was approximately $45,000 a year, wasn't it?*

Answer: *I don't really know.*

Question: *Do you know how much his expenses were while he lived in Boston?*

Answer: *I don't.*

Question: *And you testified earlier when asked by the defense that your son has sent you approximately $100,000 since 2004?*

Answer: *Yes.*

The absurdity of the answers is apparent, or it will be made apparent when you present other evidence. You can present evidence to show the son's income and that he would have had to basically be sending his father all of his earnings for the two years that he worked, without keeping any money for his personal living expenses: rent, food, etc. So the son would have to be starving back in Boston in order to send money to his wealthy parents. You may continue to point out the absurdity of this claim through questions about how the money was transferred, the lack of documentation for the wire transfer, lack of customs declarations for the money, etc., and then move on to similar questions regarding the daughter.

If the cross examination is effective, not only do win your case, but you also have a lot of fun.

5. Closing argument

The closing argument is the culminating point of the trial, chronologically and psychologically. It is the last opportunity to

communicate with the judicial panel regarding the facts of the case and to persuade the judges of the defendant's guilt. Therefore, it is important to logically and persuasively present your theory of the case, the facts that support it, and the law which compels a finding of guilt.

As with all other parts of the trial, the arguments must be organized and planned in advance. They should be constructed to support the opening statement and the case you have presented. If you have been successful, the opening statement painted a picture of what the judicial panel would see and hear during the trial. The witnesses, documents, and exhibits fit neatly into that picture, reinforcing the image created. In the closing argument, you then nail down the image by pointing out the crucial details, weaving them together with the witnesses' accounts and explaining the significant connections. All three aspects of the trial, opening statement, witness examinations, and closing argument, should be combined to evoke a single conception of the events. In summary, the closing argument must tell the whole story of the case.

Use your theme and theory of the case: The theory of the case is absolutely essential. This means that you must tell the court why a guilty verdict should be delivered. A simple recitation of the facts is not sufficient. Rather, the argument should bring together information from various witnesses and exhibits in a way that creates only one result. To be successful, the theory presented in the closing argument must be logical, believable, and legally sufficient.

a) The theory of the case, and consequently the closing argument, must be logical in the sense that the component facts should lead to the desired conclusion. It is often helpful, therefore, to reason backward, starting with the end result

and then providing supporting facts. Logic, however, is only the starting point for the closing argument.

b) Even the most logical theory in the world will not win a case if the court does not believe it. For a theory to be sound, it must be based on facts that are likely to be accepted. There is no way to guarantee that the judges will accept your closing argument; actually the purpose of the trial is for the judges to decide which theory is more believable. The most credible evidence commonly takes the form of admissions from the opposing party, followed by undisputed evidence that you have produced. With disputed evidence, it is generally best to rely on the common sense value of the evidence and of course on the credibility of witnesses.

- Admissions: The most credible information to use in closing argument is often what is produced by the other side. The opposing party obviously would not offer self-damaging testimony, unless it was unavoidably true. Consequently, it is particularly effective to argue against a party using the opponent's own words and documents. These admissions need not be concessions, nor should they necessarily be testimony from the actual party. Anything can be used as an admission so long as it was offered by your opponent. A strong closing argument can use the testimony of the opposing party's witnesses, exhibits, charts or graphs, tangible objects, or even comments by opposing counsel during the opening statement.

- Undisputed facts: Undisputed facts consist of the testimony, exhibits, and other evidence that you have offered and which the other party has not disputed. The opposition's decision not to produce contrary evidence greatly enhances the value of such undisputed facts.

- Common sense and experience: Admissions and undisputed facts are valuable precisely because it is impossible for the other side to take issue with them. Every trial, however, involves a core set of facts and issues that are in dispute. When key events or occurrences are in dispute, an effective closing argument will first make use of common sense. As is the case with any two stories or accounts, a judge is likely to choose the one that most closely agrees with his own experience. Thus, in structuring the argument, it is essential to bear in mind the relationship between your theory of the case and the judge's sense of what will or will not ring true.

- Credibility: The final method of establishing believability is to rely upon the credibility of the witnesses. The credibility of the witness is important, but it is probably the weakest method of proving your version of disputed facts. There are two problems with credibility arguments. First, they rely almost entirely on subjective impressions. While the prosecutor may regard one witness as enormously more credible than another, there is no way to be sure that the judges perceived the testimony in the same way. Second, credibility arguments ask the judges to think ill of a person, to conclude that he has omitted something, exaggerated, or even lied. This is not to say that the prosecutor should avoid credibility arguments, but only that they should be supported through the use of admissions, undisputed evidence, or invocations of common sense.

c) Legal sufficiency: The final cornerstone of a solid theory is legal sufficiency. In your closing argument you must address both the law and the facts.

Argue your case: A good argument combines the themes, theories of the case, evidence, and the law and molds them into

a persuasive whole. A good argument is a combination of logic and emotion brought together. Although you should not argue in the opening statement, you can and must argue during the closing argument if you want to win the case. What distinguishes the closing argument from a mere presentation of the facts? Below are some of the most useful elements of "argument:"

a) Conclusions: During closing argument, the representatives of the parties are free to draw conclusions based upon the evidence and urge that they be accepted by the court. A conclusion is a result, consequence, or repercussion that follows from the evidence in the case. It is not sufficient for the closing argument to simply draw conclusions. In addition, you must explain why the desired conclusions are the correct ones.

b) Inferences: While a closing argument can and should include broad conclusions, it may also include the sort of narrow conclusions commonly known as inferences. An inference is a deduction drawn from the existence of a known fact. In other words, the inferred fact need not be proven so long as it is a common-sense consequence of an established fact. An inference will be accepted only if it is well-grounded in common understanding. For that reason, it is often necessary to explain the basis of all but the most obvious inferences. For example, everyone could infer a child's age from knowledge of her grade in school.

c) Details and circumstantial evidence: The closing argument is the prosecutor's only opportunity to explain the relevance and consequences of circumstantial evidence. Much of the art of direct and cross examination consists of the accumulation of details that lead to a certain conclusion or result. It is exactly in the closing argument that the prosecutor com-

bines these details so that they lead to the desired result. In a residence burglary prosecution, there may have been no eye witnesses to give direct evidence against the defendant. But, there may have been a number of other witnesses who provided detailed circumstantial evidence. Perhaps one witness saw the defendant running from the scene of the crime, while another found a single shoe in the doorway of the burglarized home. Yet a third witness might have heard the defendant complaining about her need for a new radio, while the crime victim testifies that an expensive radio was taken in the burglary. Finally, on cross examination, the defendant could be asked to try on the shoe to show that it fits. None of these statements constitute direct evidence of the defendant's guilt, particularly when they are adduced individually through the testimony of four or five different witnesses. They can, however, be organized into a powerful narrative leading to conviction. Moreover, the circumstantial evidence becomes even more persuasive when all of the connections are explained in the closing argument.

"...no one saw the defendant commit the burglary, but the surrounding details point in only one direction. She was seen running, not walking, from the crime scene just after the house was robbed. That alone does not make her guilty, but it does tell us that she had a reason to run away from that house. Now consider all the other evidence. She wanted a new radio so badly that she has complained about it to her friends, and the most valuable item taken in the burglary was a brand new radio. It seems as though the burglar left a shoe behind that was caught in the door. It is a woman's shoe that fits perfectly on the defendant's foot. Thus, it all falls together: the house was robbed, the defendant ran, she wanted a radio, a radio was stolen in the burglary, the burglar left a shoe behind, which fits the defendant. Perhaps

only one of these facts could be coincidence, but all together, they add up to guilt…"

The prosecutors understand that circumstantial evidence is probative and reliable. It is, therefore, desirable to explain the value and credibility of circumstantial evidence during closing argument.

d) Analogies and allusions: An analogy explains the conduct of the parties through reference to everyday human behavior. A witness' testimony can be strengthened or diminished by comparing it to some widely known experience or activity. However, while analogies can be powerful, there is always the danger that they can be inverted and exploited by the other side. Care must be taken to make sure that any analogies are "airtight." An allusion is a literary or similar reference that adds persuasive force to an argument. The allusions may be drawn from classical literary works (Shakespeare or the Bible) but also movies, popular songs, fairy tales, or advertisements.

e) Credibility and motive: The prosecutor may comment on and compare the motives and credibility of the witnesses. Many trials, perhaps most of them involve competing versions of events which the judges must resolve to reach a verdict. The closing argument is the only time when the prosecutor may confront directly the character of the witnesses and explain why some should be believed and others discounted. Perhaps a witness for the opposing party was impeached, or his testimony was rebutted as a result of a prior inconsistent statement. Even though inconsistencies between the statements speak for themselves, closing argument is the time to explain exactly how they undermine the witness' credibility. Finally, motive can be established on the basis of proven

facts or logical inferences. The prosecutor may tell the judicial panel why a witness would exaggerate, conceal information, quibble, or lie. The reasons need not be based on outright admissions given that they follow rationally from the testimony in the case.

f) Argue common sense: Perhaps the ultimate test of every closing argument is its plausibility. Even if the closing argument refers to known facts, gives reasons for every action, is supported by credible witnesses, and is replete with convincing details, it still may not be accepted if it does not make sense to the judge. You cannot win with an implausible argument. It is essential, therefore, to address the issue of common sense. Explain why your theory is realistic, using examples and analogies from everyday life. Common sense arguments can also be used to belittle or even ridicule the opposition's case.

g) Demeanor: Comments on a witness' demeanor are fair arguments. Usually, these comments are negative, as it is easier to characterize untrustworthy conduct. Negative comments can be effective as long as they are adequately based on observable facts. It is not uncommon, for instance, to comment on a witness' refusal to give a simple answer or to make a concession. Similarly, the prosecutor might mention that a witness averted his eyes or fidgeted on the stand as though he was hiding something. Comparable comments can be made about witnesses who sneer, lose their tempers, scowl, or show impatience. Be careful, however, because comments on the witness' demeanor are based strictly on perception, and there is no assurance that the judge has perceived the same thing as the prosecutor. These types of comments should be used when the witness' behavior has been blatant and unambiguous.

h) Refutation: Another distinguishing feature of the closing argument is refutation of opposing positions. Opening statements and witness examinations may recite and elicit facts that are contrary to the opposition's case, but in closing argument you can directly refute the opposition by pointing out errors, inconsistencies, implausibility, and contradictions.

i) Application of the law: Closing argument provides the prosecutor an occasion to argue how the law applies to the facts of the case. The legal discussions are extremely limited during opening statement and are not allowed during witness examinations, but they are essential in closing argument.

j) Moral appeal: Closing argument allows the parties to elaborate on the moral theme of the case.

5.1. Structure of closing argument

The structure of the closing argument must be developed for maximum persuasive weight. The central thrust of the closing argument must always be to provide logical, moral, legal, and emotional reasons for a verdict in your favor.

Topical organization: The importance of topical organization in the closing argument cannot be overemphasized. Other methods of organization (such as chronology and witness listing) seem more natural at first, but do not always present the evidence in its most persuasive form. Topical organization, on the other hand, allows the parties to determine the best way to address the issues in the case. Topical organization can use, or combine, any of the following strategies:

- Issues: One of the simplest and most effective forms of organization is to divide the case into a series of factual or legal issues.

- Elements: A second form of topical organization revolves around elements and claims. Every legal cause or defense is composed of various discrete elements. A prosecutor can deliver his closing argument by discussing the evidence that supports each element of the crime.

Chronological organization: While chronology certainly plays an important role in final argument, it may not be the best approach to overall structure. The difficulty with chronology is that events are unlikely to have occurred in the most persuasive sequence. There can be no doubt, of course, that chronology is an essential tool in the structure of a final argument. There will come a time, or several times, in every argument when key occurrences should be presented chronologically. Indeed, the precise sequence of events can often be the central issue in a case. Chronology often fails, however, when it is used as the primary organizational device, as though the entire story of the case can be presented in a single order.

Witness listing: Listing the witnesses and summarizing what each of them said is an ineffective and boring method of closing. In some instances, it may be important to remind the judicial panel of a particular testimony; however, this should be done in the context of weaving the testimony into the overall explanation of events.

Affirmative case first: Most closing arguments will consist of two distinct components: developing the affirmative case and debunking the opponent's claims or defenses. As a general rule, it is preferable to build your own version of your case and then proceed to debunk the opposition. Prosecutors should resist the temptation to begin by criticizing the defense case. No matter how weak or ridiculous the defense is, it is usually best to begin with the strong points of your own case. The prosecutor, after

all, bears the burden of proof and cannot win without establishing all the elements of the case. Thus, there is not much to gain by debunking the defense if you cannot prove your own case. Moreover, a prosecutor who launches immediately into an assault on the defendant's case may appear not to have much confidence in his own position. Although the judges may not jump immediately to that conclusion, the defense could argue precisely this point: *"If the prosecutor's case is so solid, why did the prosecutor begin by attacking the defense? He must be worried."*

Cluster circumstantial evidence and accumulate details: The closing argument is the proper time for summing up details. Although particular elements may have occurred at different times and have been testified to by several witnesses, they should be aggregated to make a single point in the closing argument.

Weave in witness credibility: As noted above, listing of witnesses is ineffective in closing argument. Witness credibility, however, is a topic which should be addressed. You should weave discussion of witness' testimony and credibility into the fabric of the story. In most cases, it is sufficient to mention witnesses only when they become important to the theory of the case.

5.2. Other considerations on closing argument

Start strong: The first few minutes of the closing argument should communicate three things: 1) your theme; 2) why the judicial panel should find the defendant guilty; and 3) your enthusiasm about the case. Just as with the opening statement, first impressions are lasting impressions. Moreover, if your initial arguments are compelling, the judicial panel will continue to listen.

Be efficient: Just as with the opening statement, the judicial panel will have a limited concentration span. You should focus on the theme, the key evidence, and the law without getting bogged down in small details. Unless the case is unusually complicated, you should try to prepare a closing argument that takes 30 minutes or less to deliver.

Argue the strengths of your case: Successful arguments have a positive approach and concentrate on evidence that affirmatively demonstrates why you should prevail. Spending most of your closing on the "defensive" sends a negative image to the judicial panel.

Address weaknesses: While closing argument should positively argue the strengths of your case, this does not mean that you should avoid its weaknesses. Confronting weaknesses reduces the effectiveness of your opponent's arguments when it is his turn for closing. This technique also demonstrates candor with the court. Additionally, you can often reframe the weaknesses into something neutral or positive, as shown by the example earlier where a witness made a misidentification.

Tie up cross examinations: Closing argument is the time to tie up issues intentionally left unaddressed during cross examination. Recall the questions that are forbidden to the prudent cross examiner. Never ask a witness to explain; never ask a witness to fill in a gap; and never ask a witness to agree with a characterization or conclusion. These questions and others like them, risk your losing control of the witness. There is a strong consensus that it is better to refrain from asking the ultimate question and to make the point instead during closing argument. So, if your cross examinations were artful and effective, you should be able to spend some time during closing argument drawing the previously unspoken conclusions.

Ask rhetorical questions: By asking questions that challenge the defense to explain the weaknesses in his case, you may put him on the defensive and cause him to alter his closing, or at the very least, cause him to focus on the negative aspects of his defense. However, you must be careful not to ask rhetorical questions that can be answered with a compelling or logical response.

Use exhibits and visual aids: As with the opening, successful courtroom techniques maximize the use of demonstrative visual aids. At the appropriate time, key exhibits should be presented, and charts or diagrams should be used that summarize testimony or documents. In addition to being a powerful tool for recollection and persuasion, the timely use of such aids recaptures the wandering minds of the judicial panel.

5.3. Content and organization

The specific content of closing argument is determined by the facts and issues in the case. It is possible, however, to enumerate some elements that should be considered for inclusion in a closing argument. The components of most closing arguments should include the following elements:

1. Introduction
2. Identification of issues
3. What really happened and proof
4. Refuting the defense
5. Legal basis for determining guilt
6. Conclusion

Introduction: An introduction could simply begin with a few words thanking the judicial panel for their time and attention, or it could quickly get down to business:

"*Honorable members of the judicial panel, this has been a lengthy trial and I want to thank you for the attention you have shown. As I stated at the beginning of this case, during my opening statement, this is a case of jealousy and rage, of a man who was unable to control his anger because he suspected that his wife was seeing another man…*"

Identification of issues: Somewhere early in your closing you should identify for the panel what the issues in the case are. Frequently, issues identified at the start of the trial may have disappeared or been conceded by the defense. Therefore, it is always helpful to focus the judicial panel on issues that still remain unresolved.

"*…I submit to you that based on evidence presented, and considering what the defendant stated in his testimony, there is really only one issue remaining for your consideration, and that is whether the defendant was provoked by the unreasonable actions of the victim…*"

What really happened and proof : This should not be a simple recitation of the facts or chronological reiteration of the testimonies of each witness. Rather, this is the opportunity to tell a persuasive story. A persuasive story tells what happened in a simple, easy to follow manner, includes human elements or drama, and accords with common sense. The prosecutor may also explain the reasons for the actions of the parties, as testified to by them, by other witnesses, or from what can be reasonably inferred from the evidence, common knowledge or experience. You may discuss credibility or lack thereof of certain witnesses and the probability or improbability that the events have occurred as described. In the end, you must convince the judicial panel that your version of the events is the true version.

Refuting the defense: After you have given a strong version of your interpretation of the facts, you could then briefly address the issues that you would expect the defense to raise.

Legal basis for determining guilt: In this stage, you would cover the elements of the law and findings that must be made to result in a verdict of guilt and explain how each element was established.

Conclusion: The closing should conclude the argument smoothly and efficiently. It should appeal to the court's sense of fairness and justice and be a plea to upholding the rule of law.

"*...Honorable members of the court, when the defendant attacked Mr. Kurti, he did not think of the consequences. He did not think about the harm that he could cause to the victim, and he certainly did not think about winding up in a courtroom, as he is today. I submit that justice requires a ruling that the defendant is guilty of the crime of grave intentional assault, and I would ask that you return a verdict of guilt...*"

5.4. Message delivery technique

The closing argument is generally regarded as the prosecutor's finest hour. It is the time when all of the skills, or rather the art, of persuasion should be displayed on behalf of the case. Even though a polished delivery will not rescue a lost cause, a forceful presentation can certainly reinforce the merits of the case.

Do Not Read or Memorize: It is a mistake to write and read your closing argument. Even a memorized argument is likely to be only slightly more effective, and it carries the extreme risk that you will forget your place or leave out a crucial part of the argument. The most effective argument is the one that is deliv-

ered from an outline. The use of an outline allows you to plan your closing argument, to deliver it with an air of spontaneity, and to adapt to the arguments of the opposition. Do not be hesitant to use notes during the closing argument. There is nothing wrong with speaking without notes if you are able to do so, but it is far better to refer to a page or two on your notepad than to omit a crucial argument. Even if you are capable of arguing without notes, you should still use the outline method of preparation, rather than writing out and memorizing a speech.

Movement: A certain amount of body and hand movement will enliven your closing argument and increase the attentiveness of the judicial panel. Gestures can be used to emphasize important points or to accent differences between your case and the opposition's case. Body movement can also be used for emphasis or transition. Pausing or taking a step or two will alert the panel of the fact that you are about to change the subject. However, you should avoid aimless pacing and ineffective gestures. Constant movements not only are distracting, but they also deprive you of the ability to use movements purposefully.

Verbal pacing: The speed, tone, inflection, and volume of your voice can be important persuasive tools. Changes in them can be used to signal transitions from one subject to the other and to maintain the judge's attention. It is important not to speak either too quickly or too loudly. The pacing of your speech can be used to convey perceptions of time, distance, and intensity. If you describe an event rapidly, it will seem to have taken place very quickly. If you describe it at a more leisurely pace, the time frame will expand. In a similar fashion, fast speech magnifies intensity and reduces distance. Slower speech reduces intensity and increases distance.

Emotion: There are different schools of thought regarding the use of emotion in the closing argument. Many lawyers believe that emotion has little place at any point during the trial, while others believe that emotion can communicate as effectively as logic or reason. There is a clear consensus, however, that false emotion will backfire. The best approach to emotion is to save it for the time when you are discussing the moral dimension of your case. There will be points that call for an outward display of feeling and a flat presentation may be regarded as an absence of conviction.

5.5. Ethics and impermissible arguments

Statements of personal beliefs: It is improper and unethical for a prosecutor to assert personal knowledge of facts being discussed or state a personal opinion as to the justness of the cause, the credibility of a witness, and the culpability of a defendant. The purpose of this rule is twofold. First, it prevents the prosecutor from putting his own credibility at issue. A case is decided on the basis of law and evidence, not on a judge's affinity for or faith in the prosecutor. Second, a statement of personal beliefs suggests that the prosecutor has access to off-the-record information and, therefore, invites the judge to decide the case on the basis of evidence which is not in the record.

Appeals to prejudice or bigotry: It is unethical to attempt to persuade a court through appeals to racial, religious, ethnic, gender, or other forms of prejudice.

Misstating the evidence: While it is permissible to draw inferences and conclusions, it is improper to misstate or mischaracterize evidence intentionally in the course of the closing argument. If you overstate or mischaracterize, opposing counsel will object, and the judge undoubtedly will sustain the objection.

Misstating the law: The prosecutor may use the closing argument to explain the relevant legal provisions and link them to the facts of the case. However, under no circumstance should you misstate the law or argue for legal interpretations that are contrary to the spirit of the law.

Misusing evidence: When evidence has been admitted only for restricted use, it is improper to attempt to use it for any other purpose.

Appeals to personal interest of the judge: The prosecutor should never use an argument that links the interests of any member of the judicial panel to the outcome of the case. If a member of the panel had a personal interest in the case, the prosecutor should have demanded his removal.

ANNEX 1

UN GUIDELINE ON THE ROLE OF PROSECUTOR

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

    (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
    (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
    (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
    (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offenses.

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

ANNEX 2

Standards of professional responsibility and statement of the essential duties and rights of prosecutors, as adopted by the International Association of Prosecutors

1. Professional Conduct

Prosecutors shall:

- At all times maintain the honor and dignity of their profession;
- Always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- At all times exercise the highest standards of integrity and care;
- Keep themselves well-informed and abreast of relevant legal developments;
- Strive to be, and to be seen to be, consistent, independent and impartial;
- Always protect an accused person's right to a fair trial, and in particular ensure that evidence favorable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- Always serve and protect the public interest;
- Respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

2.1. The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independent-

ly and be free from political interference.

2.2. If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- Transparent;
- Consistent with lawful authority;
- Subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3. Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. Impartiality

Prosecutors shall perform their duties without fear, favor or prejudice.
In particular they shall:

- Carry out their functions impartially;
- Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- Act with objectivity;
- Have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- In accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable inquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

- Always search for the truth and assist the court to arrive at the truth and to the dictate of fairness.

4. Role in criminal proceedings

4.1. Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2. Prosecutors shall perform an active role in criminal proceedings as follows:

a) Where authorized by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
b) When supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
c) When giving advice, they will take care to remain impartial and objective;
d) In the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
e) Throughout the course of the proceedings, the case will be firmly but fairly prosecuted, and not beyond what is indicated by the evidence;
f) When, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore;

- Preserve professional confidentiality;
- In accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;
- Similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- Safeguard the rights of the accused in cooperation with the court and other relevant agencies;
- Disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- Examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- Refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- Seek to ensure that appropriate action is taken against those responsible for using such methods;
- In accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Cooperation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

- Cooperate with the police, the courts, the legal profession, defense counsel, public defenders and other government agencies, whether nationally or internationally; and
- Render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual cooperation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- To perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- Together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- To reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension, and age of retirement subject to conditions of employment or election in particular cases;
- To recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integ-

rity, performance and experience, and decided upon in accordance with fair and impartial procedures;

- To expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- To objective evaluation and decisions in disciplinary hearings;
- To form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and
- To relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

ANNEX 3

CODE OF PROFESSIONAL ETHICS FOR PROSECUTORS

We, the prosecutors of the Republic of Albania:

Very highly appreciating the importance of the role of the prosecutor's office in the criminal justice system;

Aware of our legal and moral responsibilities to the society;

At the first meeting of the Prosecutors' General Assembly, approve the fundamental rules and principals of professional ethics which, by becoming part of our professional awareness, will guide and protect us while fulfilling our duties.

FIRST PART

Article 1
Fundamental principles

While performing their duties, prosecutors:

1. Shall respect the dignity of their profession by working with competence, honesty, fairness, and commitment;
2. Shall be objective, independent, and non-biased and avoid any kind of conflict with their profession;
3. Shall demonstrate mutual respect among colleagues and tolerance towards different opinions;
4. Shall demonstrate a spirit of understanding and cooperation with all state institutions and civil society organizations which contribute to society's interests;

5. Shall bear in mind that they are acting on behalf of society and the public interest;
6. Shall respect, protect, and embrace the universal concepts of human dignity and human rights by avoiding any kind of discrimination, especially on political, ethnic, social, cultural, religious and gender grounds.

Article 2
Competence

Prosecutors:

1. Shall develop their professional skills by staying updated about new information which concerns their scope of activity;
2. Shall exercise their authority on the basis of facts collected in a lawful manner, and shall respect the principle of due process of law in a criminal context;
3. In application of the principle of centralization (Article 148 (2) of the Constitution), shall respect and implement/enforce the orders and instructions assigned to them. In every instance, they will act with respect for the laws and their conscience;
4. Shall preserve professional secrets and any other data which might damage the investigation process, affect the dignity and private life of the person, the rights of juveniles, and the public morale;
5. Shall take care - within the margins of their authority - that subjects to the proceedings are properly informed of their rights and role in the process;
6. Shall take into consideration the opinions, legal interests, privacy, as well as other concerns of individuals with whom prosecutors establish contact;
7. Shall not allow personal, family, or friendship interests to

have any influence on them as they perform their duties. They shall submit their resignation for cases which are related to their personal, family, or social interests, or on grounds of bias provided for by law.

Article 3
Impartiality and Independence

While exercising their duties, prosecutors:

1. Shall respect the dignity of any person, in honesty, avoiding unlawful influences or any type of prejudice based on racial, religious, gender, ethnic, political, or economic grounds, or prejudices of any other nature;
2. Shall overcome any cultural prejudices which may affect them in their understanding and appreciation of facts, as well as affect their interpretation or enforcement of the law;
3. May not ask for or accept for themselves or their family members any gifts or other benefits from persons who are under investigation or criminal prosecution, or from other people who are suspected to likely affect the prosecutors' professional independence or impartiality;
4. Shall not allow that their name or reputation to be used by other persons for unjust profit purposes;
5. Shall not conduct any economic activity or become members of social organizations which raise doubts about the prosecutor's reputation or which are in conflict with the role of the prosecutor;
6. May not perform actions which fall under the scope of activity of an attorney, except when defending their personal or family members' private rights of a legal and civil nature.
7. Shall guarantee the functioning without any delay of the criminal justice system in accordance with the interest of justice.

Article 4

Honesty and Justice

Prosecutors:

1. Shall be aware of their ethical and professional obligations;
2. Shall not use their profession for procuring unfair advantages and privileges;
3. Shall not dishonestly influence decisions for their promotion, appointment, or transfer and shall not allow similar violations;
4. Shall be available and tolerant with the public;
5. Shall demonstrate respect for the role of other structures/ bodies of the judiciary;
6. Shall demonstrate ethical culture (by acknowledging their mistakes, by apologizing for their unethical actions, by not abusing their authority with disinformation or mistakes made by their colleagues);
7. Shall manage in good faith the information which they possess by respecting the legislation in force. For no reason shall they use such information for personal benefits or in the interest of other persons;
8. Outside the scope of their profession, they shall demonstrate appropriate behavior which does not call into question their professional honesty.

SECOND PART

Article 5
Institutional Relations

In relation with other institutions, prosecutors:

1. Shall cooperate with objectiveness and competence;
2. Shall avoid conduct which generates delay of the proceedings, maladministration of justice, violation of judicial dignity, or conduct which runs counter to the guarantees for objectivity, impartiality and independence of the judiciary;
3. Shall seek respect for their independence while performing the functions required of them by the Constitution and the laws;
4. Shall coordinate with international authorities, while respecting human rights, ratified international documents and local legislation.

Article 6
Relations with Colleagues

In relations with colleagues, prosecutors:

1. Shall demonstrate ethics, while not discriminating or insulting each other because of position, origin, social or economic status, race, gender, age, or other grounds;
2. Shall not talk, use gestures, or act in a manner which affects the dignity and personality of the other person.

Article 7

Relations with the Victims and Witnesses

In relations with victims and witnesses, prosecutors:

1. Shall preserve the confidentiality and shall not disclose any information which could put the safety of victims/witnesses at risk;
2. Shall take the necessary legal measures to secure witnesses and their families;
3. Shall take care that victims do not suffer any further harm and are treated with dignity;
4. Shall not ask witnesses to give any self-incriminating testimony and neither offer them any remuneration for their testimonies;
5. Shall provide witnesses with legal and social assistance in cases provided for by law.

Article 8

Relations with the Accused Persons

In relations with accused persons, prosecutors:

1. Shall respect the principle of presumption of innocence;
2. Shall take care that the rights of the accused person in the criminal process are respected;
3. Shall not hide from judicial authorities evidence which favors the person accused;
4. Shall not oblige the accused person to incriminate himself or to plead guilty and neither shall they allow the accused to be subjected to violence, pressure or torture.

Article 9
Relations with the Media

In relations with the media, prosecutors shall:

1. Give information related to their activities, to the extent allowed by law, only when it is deemed reasonable to clarify or declare the falsity of information. During their statements, interviews, or appearances in public, prosecutors shall take into consideration that their personal opinion is perceived by the public as the prosecutor's office opinion.
2. Shall respect the social interests by not becoming subject to media pressure;
3. Shall not disclose information which constitutes a professional secret or risks the success of the criminal proceedings.

THIRD PART

Article 10
Ethics Committee

1. Failure to respect the provisions of this Code shall constitute an ethical violation.
2. The Ethics Committee shall have the exclusive authority to proceed in cases of ethical violations.
3. By means of a decision, the Ethics Committee may make observations, issue fines against the members of the Association, ask for expulsion from the Association, as well as present the case to the relevant authority when it establishes that the violation is subject to disciplinary measures.

Article 11

Final provisions

1. Decisions of the Ethics Committee may be appealed to the General Assembly of the Association. This does not constitute an obstacle for the General Prosecutor to initiate disciplinary proceedings for cases set forth by the Ethics Committee.
2. In addition to prosecutors in office, candidates for prosecutor shall be subject to this Code.

ANNEX 4

Minutes of "Obtaining statements from persons who are familiar with the circumstances of the criminal offense"

REPUBLIC OF ALBANIA
PROSECUTOR'S OFFICE OF TIRANA DISTRICT

Minutes

In _____, on__/____/__, at _____hr, I_____, in the capacity of the judicial police officer, based on Articles 297, 155 - 160 and the following articles of the CPC, keep these minutes in order to obtain information which shows the circumstances of the criminal offense, from citizen, _____, son of_____, born on _____, in _____, nationality, _____, citizenship, _____, education _____, profession _____, civil status, _____, legal status _____, address: district,_____,town/commune, _____, neighborhood, _____, street, _____, no._____ tel. _____, mob. _____, holder of identifying document_____.

After the content of Articles 155 to 160 of the CPC dealing with the rules of testimony is explained to the person who is being questioned, and he was asked to tell everything he knows regarding the circumstances of the crime and the person to whom the crime is attributed, and after he

was warned about the criminal liability he might have if he makes any false statement to the judicial police officer, by giving answers which he knows to be entirely or partially false, or conceals facts or evidence, under Article 305/b of the Criminal Code, he may be sentenced to imprisonment of up to or 6 (six) months;

At his free will, he declared: _____
_____

(The circumstances of the facts are stated, what he has seen and heard, sources from which he became aware of the criminal offense, personal data and address of the person to whom the criminal offense is attributed, of the injured person [victim] and of those who are able to clarify the circumstances of the facts.)

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____.

The minutes of the statement are read and signed without any observation.

After being read, the minutes were signed without any observation.

STATEMENT GIVER	JUDICIAL POLICE OFFICER
_____	_____

ANNEX 5

List of NGOs which provide assistance services for victims of crime

Tirana

"Reflections" Association (counseling and shelter)
Address: "Elbasani" Str.,
Bld. "Fratari", Tërshana 2, 1st floor,
Entrance 2, Tirana
P.O. Box 2412/1
Tel. /Fax: (04) 23 40433/4
E-mail: reflekesione@icc-al.org

Center for Women and Girls Counseling (social counseling)
Address: Str. "Sami Frashëri,"
Bld. 9, Entrance 5,
P.O. Box 2416/1, Tirana
Tel: (04) 2233408
E-mail: qkgv@albnet.net

Center for Legal Civic Initiatives (legal counseling)
Address: "Vaso Pasha" Str., Bld. 12,
Entrance 1, Apartment 1, Tirana
Tel. /Fax: (04) 2241914
avokatore@albmail.com; aurboz@yahoo.com

Gender Alliance for Development Center
Mob: 0682059301

Albanian Human Rights Center
E-mail: kozara@albmail.com

Albanian Children's
Human Rights Center
E-mail: crca@adanet.com.al

Albanian Helsinki Committee
E-mail: v.mecaj@ahc.org.al

Albanian Human Rights Group
E-mail: Info@ahrg.org

Shelter for Women and Girls
(sheltering)
Tel: (04) 226 1885

Linza (state run) shelter

Elbasan

Women's Forum
Address: "5 Maji" Quarter, "Fetah Ekmciu" Str., Bld. 450/1, Elbasan
Tel/fax (054) 255509/240051

Another Vision Shelter
Tel. /Fax: (054) 259657
E-mail: forumigruasebasan@yahoo.com

Durrës

Social Center for Women and Girls (social and legal)
Address: 2nd Quarter,
Bld. behind the Court,
Tel. /Fax: (052) 234600
E-mail: shoqataegrave@yahoo.com

Shkodër

Woman to Woman
(social counseling)
Address: "Marin Barleti" Str.,
in front of "Millenium" Cinema
Tel: 069 20 79 112, (022) 241154
E-mail: gtg@adanet.com.al

"The door" (social counseling)
Address: "Naim Gjylbegu" Quarter
Tel: (022) 243729
E-mail: thedoor@infothedoor.com

Women Center "Easy steps"
Address: "Branko Kadia" Str.,
"Tre Heronjtë" Quarter,
No. 57, Shkodër
Tel: (022) 244022
E-mail: qendragruashk@yahoo.com

Kukës

Center for Counseling and Social Services
(social and legal counseling)
Address: 2nd Quarter,
behind "Gjallica" Hotel, Kukës
Tel: (024) 223621;
Mob: 0692244911
E-mail: cckukes@yahoo.com

Berat

Women Center "Kristal"
Address: Culture Palace
"Margarita Tutulani", 1st floor
Tel: (032) 231004
E-mail: qkgv@yahoo.com

Kuçovë

Social Assistance to Women in Family
(social and legal counseling)
Address: "Llukan Prifti" Quarter
Mob: 0692296445
E-mail: tekfansgk@yahoo.com

Korçë

Korca Woman
Address: "Rebublika" Avenue,
Bld.3, Apartment 1
Tel: (082) 24 3563
E-mail: korcawoman@yahoo.com

Pogradec

"I, the Woman" Association
"Reshit Çollaku" Str.
Tel: (083) 222140
Fax: (083) 225104
E-mail: unegruaja@yahoo.com

Vlorë

"Vatra" Center (shelter)
Tel. /Fax: (033) 224078; (033) 235533
qvatra@icc-al.org

Gjirokastër

Community Center (shelter)
Tel: (084) 268866; Mob: 0692059427
idrizi_bardha@yahoo.com

ANNEX 6

Agreement of Collaboration with IC

Approved "Top secret"

_____
(*Grade, name, last name, signature*)

_____, on _____

In_____, on _____, I _____ in the capacity of the crime investigation specialist, at the _____ Sector/Section of _____, at the Directorate/Police Station _____, asses that it is in the interest of the rule of law and public safety the engaging of the informant in a secret, reliable, and sustainable collaboration with the crime investigation structures, for having him supply information on unlawful criminal activities, and enter with him into the following:

Collaboration agreement:

The obligations of the crime investigation specialist:

1. The crime investigation specialist should direct the informant to supply information only on unlawful activities for public order and security needs.
2. During the collaboration, the crime investigation specialist should establish security and trust in the informant on the preservation of the data/information that will be provided by the latter.
3. The crime investigation specialist should not promise to the

informant favors which are counter to the law and the criteria for his compensation.
4. The crime investigation specialist should not force the informant to infiltrate into criminal groups which are impossible for him.

The obligations of the informant:

1. The informant should supply information only on unlawful activities and for public order and security needs.
2. While collaborating with criminal investigation structures, the informant should maintain confidentiality.
3. The informant should inform the crime investigation specialist as soon as possible about the investigation of crimes that other persons might commit.
4. The informant shall not trigger the commission of crimes by other people.
5. The informant should not commit crimes as he is equally subject to the law.

Crime Investigation Specialist	Informant
_____	_____
(Grade, name, last name signature)	(Code and signature)

ANNEX 7

List of criminal offenses of economic nature which allow the inclusion of witnesses in the protection program

1. Article 143/a, paragraph 2: "Fraudulent and pyramid schemes with serious consequences"
2. Article 143/b, paragraph 2: "Computer fraud in conspiracy, more than once, with serious consequences"
3. Article 183, paragraph 2: "Money counterfeiting in conspiracy, more than once, with serious consequences"
4. Article 230/c: "Giving information from persons who perform public functions or persons on duty or exercising a profession"
5. Article 230/ç: "Performance of services and actions with identified persons"
6. Article 230/d: "Collection of funds for terrorism financing"
7. Article 260: "Passive corruption of high state officials or locally elected officials"
8. Article 287, paragraph 2: "Laundering of crime proceeds in conspiracy, more than once, with serious consequence"
9. Article 293/a, paragraph 2: "Unlawful interception of computer data from or within the military, national security, public order, civil protection computer systems or any other computer system of public importance"
10. Article 293/c, paragraph 3: "Interference in the military, national security, public order, civil protection computer systems or any other computer system of public importance"

ANNEX 8

List of economic crimes for which electronic interception in private places and recording or incoming and outgoing calls is permitted

1.	Article 135	"Theft through abuse of office"
2.	Article 143/a	"Fraudulent and Ponzi schemes"
3.	Article 143/b	"Computer fraud in cooperation"
4.	Article 146	"Credit fraud"
5.	Article 171	"Smuggling of unauthorized goods"
6.	Article 172	"Smuggling of goods to avoid excise duties"
7.	Article 175	"Smuggling by customs officials"
8.	Article 176	"Smuggling of goods with cultural value"
9.	Article 181/a	"Failure to perform duties by tax authorities"
10.	Article 183	"Money counterfeiting"
11.	Article 184 (2)	"Forging securities"
12.	Article 185	"Production of forgery instruments"
13.	Article 186 (3)	"Forging of documents by the official in charge of issuing them"
14.	Article 186/a (2)	"Computer forgery"
15.	Article 192/b (2)	"Unauthorized computer access"
16.	Article 195	"Concealment of assets after bankruptcy"
17.	Article 230/c	"Disclosing information by persons who perform public functions or professional duties"
18.	Article 230/ç	"Performance of services and actions with identified persons"
19.	Article 230/d	"Raising funds for terrorism financing"
20.	Article 248	"Abuse of office"
21.	Article 259	"Passive corruption by public officials"

22. Article 260 "Passive corruption by high state officials or locally elected officials"
23. Article 287 "Laundering of crime proceeds"
24. Article 293/a "Unlawful wiring of computer data"
25. Article 293/b (2) "Interference with computer data"
26. Article 293/c "Interference in computer systems"
27. Article 319/a "Passive corruption of judges/prosecutors and other judicial officials"

ANNEX 9

List of economic crime for which photographic or video surveillance and the use of tracking devices is permitted [1]

1.	Article 143/b (1):	"Computer fraud"
2.	Article 173:	"Smuggling of licensed goods"
3.	Article 174:	"Smuggling of other goods"
4.	Article 177:	"Smuggling of goods holding intermediary status"
5.	Article 179/a:	"Non declaration of money or valuable assets at the border"
6.	Article 180:	"Concealment of income"
7.	Article 181:	"Failure to pay tax and duty"
8.	Article 182:	"Modification of measuring devises"
9.	Article 184 (1):	"Forging securities"
10.	Article 185 (1):	"Production of forging instruments"
11.	Article 186/a (1):	"Computer forgery"
12.	Article 192/b (1):	"Unauthorized computer access"
13.	Article 193:	"Provoked bankruptcy"
14.	Article 194:	"Concealment of bankruptcy status"
15.	Article 196:	"Failure to comply with obligations"
16.	Article 197/a (1):	"Predetermining results in sports"
17.	Article 197/b:	"Distortion of competition in sports"
18.	Article 244:	"Active corruption of public officials"
19.	Article 245:	"Active corruption of high state officials or locally elected officials"
20.	Article 245/1:	"Unlawful influence on public officials"
21.	Article 256:	"Misuse of state contributions"
22.	Article 257:	"Illegal benefiting from interests"

1) In addition to crimes listed in Annex 7

23. Article 257/a (2): "Refusal to declare, failure to declare, concealment, or false declaration of assets of elected persons and public officials"
24. Article 258: "Breaching equity in public bids or auctions"
25. Article 293/b (1): "Interference in computer data"
26. Article 293/ç: "Misuse of equipment"
27. Article 312: "Active corruption of the witness, expert or translator
28. Article 319: "Active corruption of the judge, prosecutor, and of other justice officials"

ANNEX 10

Summary of jurisprudence of ECHR regarding the special investigative techniques[2]

Special investigative technique	Leading cases	Convention interpretation
Interception of telephone and mail	*Klass v. Germany* (1979-80) 2 EHRR 213 *Malone v. United Kingdom* (1985) 7 EHRR 14 *Halford v. United Kingdom* (1997) 24 EHRR 523 *Huvig v. France* (1990) 12 EHRR 528 *Kruslin v. France* (1990) 12 EHRR 547 *Valenzuela Contreras v. Spain* (1999) 28 EHRR 483	To comply with Article 8, the state must establish: * The surveillance is strictly proportionate to the pursuit of a legitimate aim; * The rules using the force of law must regulate the circumstances in which the surveillance is permitted; * The rules must contain adequate and effective safeguards against abuse; * The rules must be accessible and precise so that the citizens have an indication of the circumstances in which surveillance techniques will be utilized, the categories of people liable to be subject to surveillance, the offenses , the investigation of which permits surveillance, the permitted duration, the circumstances in which any recordings will be kept on file by the state and the scope and manner in which, in practice, surveillance is to be carried out; * The rules should not leave the decision as to whether surveillance will take place in the hands or to the unfettered discretion of someone; * If the discretion is left to the executive, the rules must clearly indicate its scope/coverage; * The rules must be in a form that is legally binding and publicly open/available; * There are proper methods of independent accountability regarding the authorization and use of surveillance and its review and supervision.

2) "Special Investigative Means and Human Rights in the Jurisprudence of the European Court of Human Rights," Bostjan M. Zupanicic

Metering of telephone calls	*PG v. United Kingdom* (2002) EHRLR 262	As above
Interception of a pager	*Taylor – Sabory v. United Kingdom* (2001) EHRLR 94	As above
Use of covert listening devices	*Khan v. United Kingdom* (2001) 31 EHRR 45 *PG v. United Kingdom* (2002) EHRLR 262	As above
Video surveillance	*Govell v. United Kingdom* (1999) EHRLR 121	As above
Undercover officer listening to conversation	*A decision against. Germany*, 15 October 1987, app No. 12127/86	A trial will not be unfair, pursuant to Article 6, when evidence overheard by an undercover officer is relied upon by the court if: * The evidence in question is confirmed by other evidence; * The person making the self -incriminating statements was in no way compelled to do so.
Police participation in the commission of crime (entrapment/ provocation)	*Ludi v. Switzerland* (1993) 15 EHRR 173 *Teixeira de Castro v. Portugal* (1999) 28 EHRR 101 *Radermarcher and Pferrer v. Germany*, 13t May 1991, app. No. 12811/87 *Shahzad v. United Kingdom* (1998) EHRLR 210	A trial will be unfair, pursuant to Article 6, when an individual is charged with an offense committed with the participation of undercover officers if: * The operation was not ordered and supervised by a judge (the court has not made it clear if this requirement is always necessary); * There is no evidence that the defendant was predisposed to commit the crime; * The police "incited" rather than "detected" the crime; * The crime would have not occurred without police involvement.

ANNEX 11

Law No. 9917, dated 05/19/2008 "On the prevention of money laundering and terrorism financing"

In May 2008, the Assembly passed Law No. 9917, "On the prevention of money laundering and terrorism financing." This law, which resulted from the revision of the 2000 law "Against money laundering," is intended to strengthen the mechanism of transparency in the financial transactions. This goal will be achieved through stringent reporting requirements on certain individuals and industries, who are obligated to report specific transactions to the General Directorate of the Prevention of Money Laundering (GDPML). The GDPML, an agency under the Ministry of Finance, also serves as the Financial Intelligence Unit (FIU). Below is a brief synopsis of some of the most pertinent provisions of this law.

Article 3: Entities which are subject to the law:

- commercial banks;
- non-banking financial institutions;
- foreign exchange offices;
- postal services;
- savings-credit unions;
- every other natural or legal person who issues or manages means of payment or money, or performs any transfer of value (debit and credit cards, checks, traveler's checks, payment orders, bank money orders, electronic money);
- stock markets and securities industry;
- casinos;
- lawyers, notaries, and other legal representatives, when they perform functions related to the transfer of ownership of real estate or administration of bank accounts;

- real estate agents;
- others who deal in construction, precious metals and stones, art work purchases, money exchange, motor vehicles trading, travel agencies, and others.

Article 4: Subjects must identify the clients and verify the identity of the persons who perform a transaction in an amount no less than:

- 200,000 lekë in a casino;
- 1,500,000 lekë in a single transaction or related transactions;
- when there are suspicions about the truthfulness of the identity of the client or suspicions of money laundering or terrorism financing

Article 5: Documentation required for the identification of the client

Subjects must register and maintain data on client, including, for natural persons, names and last names, date of birth, residence address, employment, type and ID document number; and for natural persons and businesses which engage in for-profit activity, the date of registration in the National Registration Center, the tax ID number, and other data.

Article 6 imposes the requirement that the subject should continually monitor the business relationship with the client in order to know the clients' activities.

Articles 7-9 impose extended diligence requirement to clients who are "politically-exposed persons" defined in Article 28 as persons identified as such by the High Inspectorate for the Declaration of Assets, that is, certain elected and public officials.
Article 11 imposes on subjects the duty to undertake preven-

tive measures, that is, internal rules and controls and employee training which lower the risk of money laundering and terrorism financing.

Article 12 imposes on subjects the obligation to report to the "responsible authority" (GDPML) any suspicious transactions; subjects must report a request to engage in a suspicious transaction immediately, to give the responsible authority an opportunity (48 hours) to issue instructions on whether to allow the transaction to go through. The subjects are further obligated to report:

- all transactions in physical money equal to or greater than 1,500,000 lekë or the equivalent in foreign money (currently approx. 15,200 USD);
- all transactions not in physical money, in a sum equal to or greater than 6,000,000 lekë, performed as a single transaction or as related transactions.

Article 13 allows certain exemptions from reporting, such as interbank transactions (not in the name of clients), between the subjects of this law and the Bank of Albania, public institutions and entities.

Article 14 absolves the subject of legal liability for the disclosure of bank or professional secrets.

Article 15 prohibits employees of the subject from disclosing to the client or others that the transaction has been reported.

Article 16 imposes the obligation to maintain records for at least 5 years on the subject.

Article 17 requires every person entering or leaving the territory of Albania to declare amounts of cash, negotiable instruments, metals, precious stones, and other objects having a value of 1,000,000 lekë or their foreign equivalent, as well as the purpose of carrying them, on which he should also present justifying documents. Customs officials are obligated to send to the responsible authority copies of the declaration documents. Customs officials must also report, within 72 hours, every suspicion or information related to money laundering or terrorism financing.

Article 18 imposes the obligation on tax authorities to report immediately any suspicious transactions related to money laundering and terrorism financing.

Article 19 imposes the obligation on the Central Office of the Registration of Immovable Properties to report within 72 hours the registration of a contract for the change of ownership of a property of a value of 6,000,000 lekë or more or its foreign equivalent. The Central Office is also obligated to report any suspicious transactions or data.

Article 21 establishes that the GDPML exercises the function of the supervisory authority under the Minister of Finance.

Article 22 establishes that the GDPML serves as a national centre for the collection, analysis, and dissemination to the agencies of information related to money laundering and terrorism financing. As an FIU, the GDPML has access to databases and information administered by state institutions and to every public register; it supervises reporting requirements of subjects, conducts inspections, cooperates with foreign counterparts, and exchanges information with the Ministry of Interior and other competent authorities. It also has the authority

to block or freeze financial transactions temporarily, up to 72 hours. Further, the GDPML notifies the respective supervising authorities (of the subjects)[3] concerning non-compliance with the law.

Article 23 establishes the Committee for Coordination of the Fight Against Money Laundering, which establishes state policy. The committee is chaired by the Prime Minister, and consists of the Ministers of Finance, Foreign Affairs, Defense, Interior, the General Prosecutor, Governor of Bank of Albania, National Intelligence Service and the Inspector General for HIDAA.

Article 26 gives supervising authorities the power to revoke or request revocation of the licenses of those subjects that it finds engaged in money laundering or that repeatedly engage in administrative infractions.

Article 27 establishes that the violations of the law, when not a criminal offense, result in fines based on the type of infraction. Fines range from 100,000 lekë to 50% of the value of the transaction.

3) Many of the subjects to the law are regulated by the supervising authorities. For example the Bank of Albania regulates and supervises the banking industry in Albania. Other professions, including accounting, law, construction, etc. are overseen by the respective regulatory entities.

ANNEX 12

Legislation on criminal forfeiture

Article 36 of the CC provides the legal frame for the criminal forfeiture of assets.

Article 36

Forfeiture of Criminal Means and Crime Proceeds

1. Forfeiture is authorized by the court and refers to reception and transfer in favor of the state of the following:

   a) objects that have served or are specified as means for committing the criminal offense;
   b) crime proceeds, including any kind of asset, as well as legal documents or instruments certifying other titles or interests in the asset, deriving or acquired directly or indirectly from the commission of the criminal offense;
   c) the promised or given remuneration for committing the criminal offense;
   ç) any other asset whose value corresponds to the crime proceeds;
   d) objects whose production, use, holding, or alienation constitutes a criminal offense, even if a sentencing decision is not given;

2. If the crime proceeds are transformed or partly or fully converted into other assets, the latter are subject to forfeiture;

3. If crime proceeds are merged with legally acquired assets, the latter are forfeited up to the value of the criminal offense proceeds;
4. Also subject to forfeiture are other incomes or profits of the criminal offense, from assets that are transformed or altered into criminal act proceeds, or from assets with which these proceeds are commingled, in the same amount and manner as the crime proceeds.

Article 274 of the CPC relates also to criminal forfeiture. It permits pretrial seizure of proceeds of the criminal offense, if the prosecutor can show that there is a danger that the proceeds will be dissipated.

In the context of a criminal proceeding (under Article 274), forfeiture of crime proceeds begins with their seizure. At the end of the court proceeding, the assets (movable or immovable properties) that are linked to the commission of the criminal offense are forfeited through the final court verdict. The notification of charges should specify the concrete property or contain a notice to the defendant that the prosecution is seeking forfeiture of property as part of the sentence. In other words, the forfeiture of assets is not a goal in itself in the classical criminal proceeding. It may be decided on a case by case basis, at any stage of the judicial proceeding, whenever a reasonable doubt (based on evidence) exists that the assets are related to the criminal offense. The court makes an interim decision on seizure. The court's decision on seizure may be appealed by the defendant, as well as other persons who may claim ownership of the seized assets. Third parties may also appeal the final forfeiture decision on the grounds that the forfeited assets do not belong to the defendant or are not derived from the crime.

ANNEX 13

Legislation on civil forfeiture

Legislation on civil forfeiture has been accepted by governments worldwide as an effective tool against organized crime and terrorism. Additionally, world bodies such as the European Court of Human Rights have established that these laws are in accordance with human rights, as they are recognized as actions against property and not the individual. Accordingly, in December 2009, the Assembly of the Republic of Albania passed Law No. 10 192, "On preventing and striking of organized crime and trafficking through preventive measures against assets." This law, commonly known as the Anti-Mafia law, became effective on January 24, 2010. Although the main focus of the law relates to the forfeiture of assets from organized crime, trafficking, and terrorism, it should be of particular interest to prosecutors that the reach of the law includes the forfeiture of assets derived from money laundering under Article 287 of the Criminal Code (Article 3/d). So, if an investigator is handling a financial crime or corruption case and finds evidence of money laundering, this law could be used to take away the defendant's property through a civil proceeding.

Provisions of the Anti Mafia Law which are of particular importance include the following:

Article 3.1: This provision is applicable to assets of persons for whom "reasonable suspicion based on indicia" exists for participation in certain criminal organizations or structures or terrorist organizations or otherwise engaged in certain criminal offenses, including money laundering.

Article 3.2 (a): This provision explains that the law is also applicable to assets of "close/related persons" of the subject (to include immediate family members as well as aunts, uncles, nieces, nephews, and in-laws).

Article 3.2 (b): This provision explains that the law is also applicable to assets of other natural persons or legal entities on whom there is "sufficient data" that indicates that their property is directly or indirectly owned by persons identified in paragraph 1 of Article 3, or have been used to facilitate their criminal activities.

Article 3.4: Specifies that the law is applicable to assets accumulated by persons before the law went into effect, meaning that the state can currently bring an action against wealth accumulated in the past as a result of money laundering.

Article 5.1: The proceedings under this law are independent from the criminal proceedings that may be held against persons who are subjects of this law.

Article 7: The court of competency at the first level is the First Instance Court for Serious Crimes. The requests for seizure are handled by a single judge, while the requests for forfeiture are handled by a panel of three judges.

Article 8: Authorizes prosecutors and judicial police to carry out investigative actions based upon information furnished by third parties or upon their own initiative. This includes a full financial investigation, to include the person's financial means and activities, his sources of income and his assets.

Article 10: Authorizes the court to take "special actions" at the request of the parties or on its own initiative, to include actions

that are not expressly regulated by law. Further, international agreements that the state has entered into may be called upon, if the need for international assistance arises.

Article 11: Permits the prosecutor to seek the seizure of assets when:

There is a "reasonable suspicion based on indicia" that shows that the person may be involved in criminal activity; and

The person, subject to this law, has assets or income that do not correspond to the level of income profits or declared lawful activities, and

a) a real danger exists of loss, removal or alienation of the funds, assets or other rights on which forfeiture actions are provided under this law; or

b) there are reasonable suspicions showing that the possession of the assets and the exercise of the particular economic, commercial and professional activities are in a state of danger or influence by a criminal organisation or that may facilitate criminal activities.

Article 21: Once the prosecutor requests the forfeiture of assets under this law, the burden of proof to show that the assets were acquired in a lawful manner shifts to the person whose assets the prosecutor is seeking to forfeit.

Article 22: The provisions of the Code of Civil Procedure are implemented to the best extent possible during the review of the request. When the whereabouts of the person, the forfeiture of whose assets is sought, are unknown, the court may designate a lawyer to represent him and proceed further. If third

parties are found to own the property, they will be summoned to be part of the proceedings.

Article 24: The court will accept the request for forfeiture when all of the following are met: a) there are "reasonable suspicions based on indicia" on the participation of the person in criminal activity (pursuant to Article 3); b) it is not proven that the assets have a lawful source or the person fails to justify the possession of the assets based upon lawful income or activities; and c) when the assets are directly or indirectly in the full or partial possession of the person. Further, the court may reach this decision even when criminal proceedings against the defendant are dismissed by the proceeding authorities due to insufficiency of evidence, the death of the person or other legal reasons why the criminal proceeding could not continue, and even if the person was declared criminally innocent.

It should be emphasized that because the Court of First Instance is the Serious Crimes Court, civil forfeiture matters are to be handled by the prosecutors of the Serious Crimes Court. Therefore, prosecutors of the Joint Investigative Unit must work closely with Serious Crimes prosecutors in determining whether and when to pursue a civil forfeiture action. Additionally, Serious Crimes prosecutors will often rely on the investigative efforts carried out by the prosecutor and judicial police of the JIU.

ANNEX 14

International Partners in the fight against money laundering

The fight against money laundering involves an international cooperative effort. Currently, Albania is a signatory to or member of the following conventions or organizations:

Warsaw Convention (signatory since 16 May 2005 and ratified by Albania through Law No. 9 641, dated 20 November 2006): Under this Convention, signatories agree to make it possible to search, collect, identify, freeze, seize and forfeit property of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or proceeds of this criminal offense, and to provide cooperation to this end to the widest possible extent...

MONEYVAL Committee*:* Albania is a member of the Committee of Experts for the Measures for the Prevention of Money Laundering and Financing of Terrorism in the Council of Europe. The committee plays an important role in implementing accepted international standards in the fight against money laundering and financing of terrorism. Mutual evaluations of member states, based on FATF and EU standards, are undertaken periodically and important legal, financial and law enforcement recommendations are made that should be implemented by relevant state institutions.

EGMONT GROUP: This is an important network of Financial Intelligence Units throughout the world comprised of 26 member countries as well as countries with observer status, such as the United States and Canada. The Egmont Group is

an important forum for the exchange of information and best practices among member states, as well as the enhancement of the level of implementation of international standards for the prevention of money laundering and financing of terrorism. Egmont's International Secure Web System permits members of the Egmont Group to communicate with one another via secure e-mail, giving and accessing information regarding trends, analytical tools, and technological developments. In other words, this system provides the ability to facilitate rapid exchanges of information that could enhance the efforts of local, state, and federal law enforcement in fighting money laundering.

FATF: The Financial Action Task Force (FATF) is an intergovernmental policymaking body whose purpose is to establish international standards, and develop and promote policies, both at the national and international levels, to combat money laundering and terrorism financing. It was established in July 1989 by a Group of Seven (G-7) Summit in Paris, to examine and develop measures to combat money laundering. FATF has 35 member jurisdictions, including MONEYVAL. The priority of FATF is to ensure global action to combat money laundering and terrorism financing, and concrete implementation of its 40+9 Recommendations throughout the world. Starting with its own members, FATF monitors countries' progress in implementing AML/CFT measures, reviews money laundering and terrorism financing techniques and counter-measures, and promotes the adoption and implementation of the 40+9 Recommendations globally.

SECI Center: The Southeast European Cooperative Initiative for the fight against international crime is a group of police and customs authorities from thirteen Southeast European countries aiming to dismantle organized crime networks. The SECI Center operational activities are conducted within the frame of

seven Task Forces addressing issues of drugs and human trafficking, stolen vehicles, smuggling and customs fraud, financial and computer crime, terrorism and container security.

INTERPOL: The International Organization of National Police Agencies, Interpol has 187 member states. Founded in 1923 and with headquarters in Lyon, France, Interpol's mission is to facilitate police cooperation at the international level as well as support all the organizations, authorities and agencies that strive to prevent and fight crime internationally. Albania has been a member of Interpol since 1991.

EUROPOL: It is the European Union's Criminal Intelligence Agency. It became fully operational in July 1999. The agency is active in all European countries and coordinates the activities from its headquarters in The Hague. EUROPOL's mission is to contribute in a significant way towards the fight against organized crime in the European Union. Albanian State Police cooperates closely with EUROPOL.

FinCEN: The Financial Crimes Enforcement Network (FinCEN) was established by the United States Department of the Treasury in April 1990 to provide a government-wide multisource intelligence and analytical network to support the detection, investigation, and prosecution of domestic and international money laundering by federal, state, local, and foreign law enforcement agencies. To fulfill this mission, FinCEN maintains a database of declarations/reports of large currency amounts or otherwise suspicious transactions. In addition to these reports, banks and other financial institutions are required to file Suspicious Activity Reports (SARs) to alert regulators and law enforcement personnel of possible criminal activity affecting or conducted through the institutions. SARs help identify credit card and loan fraud, embezzlement, and check kiting. The Inter-

national Programs Division responds to requests from Egmont Financial Intelligence Units (FIUs), as well as acts as a conduit for requests from domestic law enforcement to foreign FIUs.

ANNEX 15

List of information requested from the bank

ATTACHMENT TO SUMMONS/SUBPOENA ISSUED TO:
(Financial Institution Name)

ALL OPEN AND CLOSED ACCOUNTS

For the years: 20xx - 20xx

All records pertaining to the following individuals and business entities, whether held jointly or severally, as trustee or fiduciary as well as custodian, executor or guardian as well as any other entity in which these individuals or entities may have a financial interest:

To include all accounts in which these individuals had signatory authority and/or the right of withdrawal.

These records should include, but not be limited to, the following items:

SAVINGS ACCOUNT RECORDS: Including signature cards, ledger cards or records reflecting dates and amounts of deposits, withdrawals, interest, income, profit sharing, debit and credit memos, deposit slips, deposited checks, withdrawal slips, checks issued for withdrawal, and official forms reporting income.

CHECKING ACCOUNT RECORDS: Including signature cards, bank statements, deposit slips, deposited checks, checks drawn

on the account, records pertaining to all debit and credit memos, and official forms reporting income.

LOAN RECORDS: Including applications, financial statements, loan collateral, credit investigations, loan agreements, home mortgages, contracts, checks issued for loans, repayment records, including records revealing the date, amount and method of repayment (cash or check), checks used to repay loans and a record disclosing the total amount of discount, interest, or profit share paid annually, records of any liens, loan correspondence files, and internal bank memoranda.

SAFE DEPOSIT BOX RECORDS: Including contracts, access records, and records of rental fees paid disclosing the date, amount, and method of payment (cash or check).

CERTIFICATES OF DEPOSIT AND MONEY MARKET CERTIFICATES: Including applications, actual instruments(s), records of purchases and redemptions, checks issued on redemption, checks used to purchase certificates, any correspondence and any official forms reporting income, records revealing the annual interest or profit sharing paid or accumulated, the dates of payment or interest or the dates the profit sharing is earned, checks issued for interest or profit sharing payments.

CREDIT CARD RECORDS: Including customer's application, signature card, credit or background investigations conducted, correspondence, monthly billing statements, individual charge invoices, repayment records disclosing the dates, amounts and method (cash or check) of repayment, checks used to make repayments (front and back).

PURCHASES OF BANK CHECKS: Purchases of bank, cashier, teller checks, traveler check records, or money order records

including the check register, file copies of the checks or money orders, records revealing the date and source of payment for said checks or money orders.

OTHER RECORDS: Records of certified checks, wire transfers, letters of credit, bonds and securities purchased through your bank, savings bond transactions and investment accounts. Such records should include the date and amount of the transaction, method (cash or check) and source of payment, instruments and statements of transactions. Copies of Suspicious Activity Reports (SARs) and Currency Transaction Reports (CTRs) should also to be provided.

All correspondence with the above persons/entities and/or with third parties regarding the above persons/entities.

All memoranda, files, or records relating to meetings or conversations concerning the above persons/entities.

ANNEX 16

Methods of business organization

Financial crimes are often carried out with the assistance of or under the guise of legitimate businesses. Therefore, while a financial crime investigator does not need to be an accountant or hold a degree in business administration, it is useful for him to have a basic understanding of how businesses operate generally and how to define their criminal responsibility.

Most aspects of businesses operations in Albania are specifically regulated by the law "On entrepreneurs and companies"[4] and the law "On the National Registration Center."[5]

One important element relates to the applicability of the Albanian law to businesses operating in a cross border context. Interestingly enough, the Albanian law "On commercial companies" implicitly leaves it to business owners to decide whether to subject their business to Albanian law, the defining element of which is the location of the company's main office in Albanian territory. This location is left to the choice of the company's owners, even if the company is incorporated or conducts its main business in Albania.

There are several diverse forms of business in Albania, but the main two categories are entrepreneurships and commercial companies. The main differences between them are found in their legal personality.

4) Law "On entrepreneurs and companies," No. 9901, dated 04/14/2008
5) Law "On the National Registration Center," No.9723, date 05/03/2007

Additionally, while entrepreneurship is always a business owned by a single individual, companies may be owned by one or more persons or even other legal entities.

1. Entrepreneurs

Entrepreneurs *(sole proprietorships)* are the simplest form of business arrangement. In an entrepreneurship, there is no distinction between the entrepreneur and the business entity in terms of legal personality. The entrepreneur holds all the rights and bears all the obligations deriving from the business towards third parties with all his current and future assets.

According to Albanian law, an entrepreneur is one "who conducts an economic activity which requires an ordinary business organization." The so-called "freelance professions," such as dentists, lawyers, accountants etc., are excluded by law from being considered entrepreneurs. The Minister of Finance defines the volume of economic activity which marks the threshold for objectively determining when an entrepreneur must register as an ordinary business organization.

Those with sufficient economic activities to qualify as entrepreneurs must then register with the National Registration Center (NRC) for taxation and other purposes. Upon registration, a legal name is given to the business, and several accounting duties are required including: account record keeping; drafting and publishing financial data to the NRC; business progress reporting; and other reporting duties pursuant to the law on accounting. The NRC has been designed and functions as a one-stop-shop or as a closed cycle structure. Upon registration with the NRC, the business will simultaneously be registered in the Commercial Register, the Tax Department as a taxable entity, with the social and health insurance agencies, and la-

bor inspection authorities. This holds also true for commercial companies.

The application for registration shall be submitted to the NRC by the person who is being registered as an entrepreneur or his authorized representative. In addition to the Application Form, he must submit a copy of his identity document.

The requirements for registration in the Application Form include:

- The personal identity data of the owner of the business;
- The location where the business will operate;
- The scope of activity, if it has been defined;
- Specification of signature of the natural person (Article 30 of the NRC Law).

This information may be easily obtained by a law enforcement officer by accessing the NRC's electronic database without the need for a judicial warrant.

For tax purposes, the law recognizes the income of the business as income to the sole proprietor. In other words, any "net" income that the business earns (after expenses) is considered personal income to the owner. The owner pays taxes on this income annually, through the filing of an annual personal income tax return.

2. Commercial companies

A company acquires status as a legal person upon registration with the Commercial Register administered by the NRC. After registration, its legal personality is retroactive to the moment of incorporation. In contrast to the entrepreneurship, the com-

pany is recognized by law as an independent legal entity, separate and apart from its partners/shareholders.[6] In other words, a company is able to independently hold rights and liabilities in relation to third parties, including to its own owners. It is important to highlight that owning the shares[7] in a company does not mean owning the assets of that company. Holding a share in a company entitles the holder to various rights and obligations towards the company, such as the right to receive annual profits (dividends), to participate in the general assembly (which has important general decision-making powers) and various obligations from fiduciary duties to prohibition of capital distribution etc. So the company becomes a player in the economic environment and is able to enter into contracts and hold rights, or be a party in court or administrative proceedings. It can also own shares in another company which creates the so-called "group of companies" where the company holding the shares is called "the parent company" while the other the "subsidiary one."

While branches are part of the same company and share the same legal personality with the main company, affiliates (subsidiary companies) have a different legal personality from the parent company. The new law "On commercial companies" recognizes two different types of group companies or equity groups: 1) the parent company holds a certain amount of shares or decision-making powers in the subsidiary and control groups; and 2) the parent company actually has *de facto* control on the subsidiary company's management. In most cases, the structure of group companies is important for determining legal responsibilities of the parent company towards the subsidiary as well as obliga-

6) Law "On entrepreneurs and companies" refers to the owners of the company with the term "partner" in the case of the Limited Liability Corporations (LLCs) and with the term "shareholder" in the case of Joint Stock Companies (JSCs).
7) Law "On commercial companies" refers to the parts of the company with the term "parts" in the case of the LLCs and with the term "shares" in the case of JSCs.

tions of the latter to comply with the instructions or decisions of the parent company.

To establish a company, all partners of a general partnership, all the general partners of a limited partnership, all administrators of an LLC, all members of the Board of Administration of a JSC, or any person authorized by them, shall submit an application to the NRC providing the following information:

- The statute of the commercial company;
- The act of incorporation (if they have been drafted as separate documents);
- Representative organs' appointment decisions, etc.;
- The application form.

The requirements of the Application Form include:

- Name of company;
- Type of company;
- Date of incorporation/foundation;
- Identity data of the founders;
- Company seat;
- Company scope of activity, if determined;
- Duration of activity, if determined;
- Identity data of the persons responsible for the company management and representation to the third parties, their representative authorities, and the duration of their office;
- Specifications of the signatures of the persons who represent the company to third parties (Article 32 of the NRC Law).

This information may be easily obtained by a law enforcement officer by accessing the NRC's electronic database without the need of a judicial warrant.

2.1 Entrepreneurships: general partnerships and limited partnerships

Albanian law, unlike English law, but similar to French law, confers the status of the legal person to partnerships as well. In addition, similarly to French law, Albanian law makes a distinction between "partnership companies" (*Persons' Companies-Societes de Personnes),* and *commercial* companies, which are also called "capital companies" (*Societes de Capitaux).* Partnerships may not be established by one person, whereas commercial companies may. Partnerships are divided into general partnerships and limited partnerships.

A general partnership is owned only by general partners who are personally liable for all partnership commitments towards third parties. General partners make equal contributions. They also share a company's profits equally among themselves and pay the same amount for compensation of any company losses. Another specific feature of the general partnership is that shares are not easily transferable because approval by all partners is always required. Furthermore, in a general partnership all members are managers of the company and may represent the company alone, unless the statute provides otherwise.

The same specifications would go *mutatis mutandis* for limited partnerships. The only difference in a limited partnership is the existence of at least one limited partner in addition to the general partners. The limited partner does not have any management or representation authority by default. He is not personally liable for the company's debts/losses, but only up to the value of his contribution to the partnership capital. This means that if the company goes bankrupt or suffers an annual loss and the limited partner has already paid his assigned contribution, he is not liable toward third parties or the company at all. He

will eventually lose only his part of the company's capital. If the company goes bankrupt and undergoes liquidation,[8] it uses the money made from the liquidation of assets to pay off its debts to the creditors and might potentially have zero capital at the end of the liquidation process. In cases of loss, the company's equity capital, where the contribution of the limited partner has gone, will be reduced to cover the loss.[9] If he has not partially or entirely paid his signed contribution, and is still a debtor to the company, the limited liability partner will be personally liable to the third parties in case of bankruptcy, or to the company in case of losses, up to the extent of his unpaid contribution.

So a great advantage of doing business in a partnership is having a large control of the business management, while a big disadvantage is the personal liability for partnership commitments. Still, in contrast to the entrepreneur, the general partner's personal liability does not extend to his future assets, only to his current assets.

2.2 Capital Companies – Limited Liability Companies (LLCs) and Joint Stock Companies (JSCs)

The advantage to incorporating a business as a commercial company, especially as a capital company, as opposed to running it as a sole proprietorship, is the limited liability of the owners. The most a shareholder can lose is the amount of his investment. Other advantages include: a) the perception that the business is more professionally run; b) the status of corporation establishes certain minimum reporting requirements to government agencies; c) the transfer of ownership of the business is easier; and d) the business can continue even if the original

8) Bankruptcy status is reached when the company "liquidity-debt ratio" is negative.
9) While Total Assets = Equity Capital + Borrowed Capital, Equity Capital = Partners' Contributions + Reserves + Profit/Loss.

owners or directors die or are replaced. Disadvantages include the fact that the commercial company, as a separate legal entity, must file and pay income taxes which are assessed at a higher rate than for individuals.

In contrast to partnerships in other types of companies (LLCs and JSCs), the partners/shareholders are not personally liable for the commitments of the company, but only the value of the company itself. Capital companies (both LLCs and JSCs) also have the advantage of easy transferability of the parts/shares to third parties. In LLCs, shares may be transferred free from the other shareholders' consent, although there must be a written contract. In a JSC, however, there is no requirement for shareholders' consent for transferring shares and no obligation for a written contract.

Another special feature of LLCs and JSCs is the separation between the ownership and management. This separation, especially in the case of companies with a large number of partners/shareholders, enables a centralized management which is also professional and specialized. An investor may not necessarily be an expert in the field, but this does not impede him from investing his money in good and successful businesses.

In an LLC, the owners are called members and profits are not necessarily equally distributed among them. The primary characteristic an LLC shares with a partnership is the availability of pass-through income tax. An LLC is often more flexible than a JSC, and it is well-suited for companies with a single owner.

The minimum capital required to establish an LLC is only 100 lëke. As a rule, in an LLC the representation is done by the administrators, which can be only natural persons. Albanian law has several restrictions on who may be appointed as an admin-

istrator in a company and prohibits the appointment of anyone convicted of a criminal offense in Articles 163 to 170 of the CC for up to 5 years after conviction or serving the sentence.

The managing organs in an LLC are:

- The General Assembly, which takes decisions on specifically important issues such as amendment of the statute, capital increase/decrease, commercial policy decision, etc.

- The Administrators, who are appointed by the General Assembly and are mainly responsible for the company's ordinary management, representation to third parties, and taking care of accounting/financial duties of the company.

A JSC, on the other hand, is a company whose capital is divided into shares subscribed by its founders. A JSC may be a company with a public or private offering in compliance with the law "On securities" (Law No. 9723, Article 106).

The owners of a JSC are known as shareholders, and their share or percentage of ownership is reflected in stock certificates issued by the JSC and registered in the NRC for the Registration of Shares. When the JSC is first incorporated, the Articles of Incorporation will specify how many shares are issued initially. An artificial value will be placed on each share or stock.[10] The number of shares issued and the distribution to the initial stockholders often depends on the capital contributions of the shareholders. The actual value of the shares will depend on many factors, including the perceived value of the business and whether the shares can be traded or sold. Theoretically, even if

10) Unlike the LLC partners, the JSC shareholders hold different amounts of shares of an equal value, otherwise referred to as "quotas." On the other hand, each partner in an LLC holds only one share, which differs from the other shares in value. They are otherwise called "parts."

a company is about to dissolve, the owner of each share would receive a proportional share of the net proceeds or equity in the business after all debts have been paid. Consequently, when a corporation becomes bankrupt, the shares generally become worthless.

In terms of representation, the same goes for the JSC where the representation lies with the administrators. The specific feature of a JSC in comparison to an LLC is that it can list the shares in the joint stock market (if a public JSC). Furthermore, the minimum capital required for establishing a JSC is 2,000,000 lëke. The management of a JSC is more complex as it refers to a larger business with a larger number of shareholders. The relationship between shareholders is not based on the freedom of contract principle, but rather on mandatory legal provisions. Rightfully enough, the new law does not call them "anonymous companies" but "shareholder companies," as the names of the shareholders are not secret but published with the NRC.

The organs of a JSC are:

1. The General Assembly, which decides on important matters such as amendments to the statute, appointment of administrators, commercial policies, etc.;
2. The Board of Administrators, which performs general company management duties, representation to third parties, and also takes care of financial accounting duties; and
3. The Supervisory Board - in the case of a two-tier system JSC (see Table 1, below).

Table 1. Organs of all types of companies

Type of company	Representative organ	Internal management organ	Supervisory organ
General Partnership	All partners	All partners	All partners
Limited Partnership	All general partners	All partners	All partners
Limited Liability Company	Administrators (appointed by the General Assembly)	General Assembly (all shareholders)	General Assembly (all shareholders)
Joint Stock Company: one-tier system	Administration Council, (appointed by the General Assembly)	General Assembly (all shareholders)	Board of Administrators
Joint Stick Company: two-tier system (German model)	Administration Council (appointed by the Supervisory Board)	All shareholders	Appointed by the General Assembly
Joint Stock Company: two-tier system (Italian model)	Appointed by the General Assembly	All shareholders	Appointed by the General Assembly

3. Business Financial Records

Law No. 9723 specifies only the duty of the companies to maintain annual reports, consolidated accounts, and accounting books of the company. Law No. 9828, dated 04/29/2004, "On accounting and financial data" (as amended), provides for the duty of companies to maintain all the above-mentioned information.

The business records of the partnership belong to the business, not to the individual partners. Therefore, the production of those records can be compelled by way of a subpoena. This is also true for the sole proprietorship.

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