

HANDBOOK FOR CRIMINAL JUSTICE ACT LAWYERS
DISTRICT OF NEBRASKA

The following is a guide to representing federal criminal defendants in the United States District Court for the District of Nebraska. It was written by the Federal Public Defender and owes its origin and inspiration to Alex Bunin, the Federal Public Defender in the Northern District of New York. It is not legal advice, nor is it intended to be anything other than a helpful guide.

The purpose of this Handbook is to give lawyers a simple guide to the rules, cases, and procedures that are specific to practicing in the District of Nebraska. The federal criminal justice system is not uniform. Although the Federal Rules of Criminal Procedure, and precedents of the United States Supreme Court, apply in all districts, each federal district has its own practices and procedures. Some are in local rules, judicial opinions, and standing orders. Others, are a matter of custom and practice.

Please consider the Federal Public Defender's Office a resource to help you in representing a client under the Criminal Justice Act. Our attorneys and staff can assist you in answering common procedural and practice questions.

Dated: May 20, 2010

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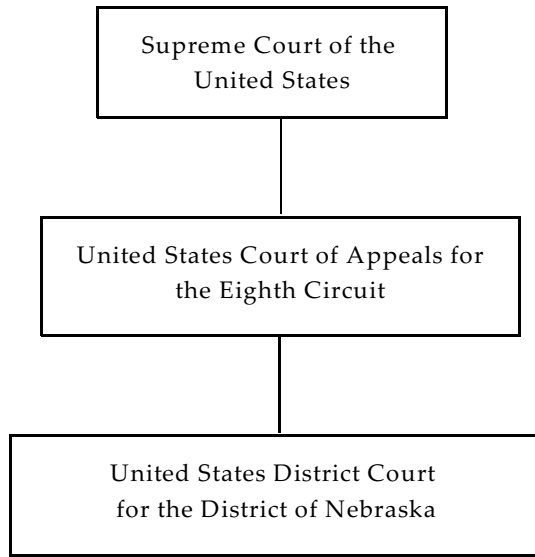
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Criminal Justice System in the District of Nebraska

Hierarchy of federal courts.

I. Courts and Agencies

A. Judges

- 1. U.S. Magistrate Judges** are appointed by the Judges of the U.S. District Court for an eight year term. In criminal cases, magistrate judges have the authority to determine release or detention of defendants; to arraign felonies; to adjudicate misdemeanors by pleas or trials; to impose misdemeanor sentences; to issue discovery orders; to rule on motions when delegated by district judges, and to conduct change of plea hearings. *See* NECrimR 59.1. Magistrate judges' decisions may be appealed to district judges who will review the issues *de novo*.

There are three U.S. Magistrate Judges in the District of Nebraska. Their names and chambers' location are as follows:

Hon. Cheryl R. Zwart
Robert F. Denney Federal Building & U.S. Courthouse
100 Centennial Mall N., #566
Lincoln, NE 68508-3251
(402) 437-1670 •

Hon. Thomas D. Thalken
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, #2271
Omaha, NE 68102-1322
(402) 661-7343 • Fax: (402) 661-7345

Hon. F. A. Gossett III
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, #2210
Omaha, NE 68102-1322
(402) 661-7340 • Fax: (402) 661-7338

2. **U.S. District Judges** are nominated for life terms by the President of the United States and confirmed by the Senate. District judges have authority to preside over all aspects of federal criminal cases, including motions, trials, pleas, and sentences. U.S. District Judges are sometimes referred to as “Article III” judges as their existence stems from Article III of the Constitution of the United States. (U.S. Magistrates by contrast are Article I judges.) Some states have multiple federal districts and others do not. The state of Nebraska is one federal district and has court locations in Omaha, Lincoln and North Platte.

There are three active U.S. District Judges and two Senior U.S. District Judges in Nebraska. Their names and chambers’ locations are:

Hon. Joseph F. Bataillon
Chief Judge
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, #3259
Omaha, NE 68102-1322
(402) 661-7302 • Fax: (402) 661-7306

Hon. Richard G. Kopf
Judge
Robert F. Denney Federal Building and U.S. Courthouse
100 Centennial Mall N., #586
Lincoln, NE 68508
(402) 437-1640 •

Hon. Laurie Smith Camp
Judge
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, #3210
Omaha, NE 68102-1322
(402) 661-7323 • Fax: (402) 661-7326

Hon. Lyle E. Strom
Senior Judge
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, #3190
Omaha, NE 68102-1322
(402) 661-7320 • Fax: (402) 661-7318

Hon. Warren K. Urbom
Senior Judge
Robert F. Denney Federal Building and U.S. Courthouse
100 Centennial Mall N., #507
Lincoln, NE 68508-3876
(402) 437-5231 • Fax: (402) 437-5690

3. **The United States Court of Appeals for the Eighth Circuit** holds court in St. Paul, Minnesota, St. Louis, Missouri, Omaha, Nebraska, Kansas City, Missouri, and Little Rock, Arkansas. The Eighth Circuit is composed of judges from Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Missouri and Arkansas. They are nominated by the President for life terms and confirmed by the Senate. There are eleven other federal courts of appeal. The courts of appeal review cases from the district courts to determine whether there have been errors of law or fact, and whether such errors require a reversal of a defendant's conviction or sentence. There are also instances in which the

government may appeal a district court's ruling regarding orders or sentences. Jury acquittals of defendants may not be appealed.

4. **The United States Supreme Court** is the only judicial authority above federal courts of appeal. The nine Justices are also nominated by the President and confirmed by the Senate for life terms. The Supreme Court reviews federal criminal convictions and sentences at its discretion through a writ of certiorari. Review may be allowed when there is a significant question of either constitutional law or statutory interpretation that is unresolved by the Supreme Court or is in dispute among lower courts. An attorney appointed to represent a defendant in a different district court may be required to pursue appeals to the court of appeals and the Supreme Court if directed to do so by the client.

B. Agencies

1. **The United States Attorney (USA)** is the prosecutor responsible for federal criminal cases in each federal district. The USA is appointed by the President and confirmed by the Senate. The USA assigns Assistant United States Attorneys (AUSAs) to handle cases. Cases may be investigated by federal agents, e.g., Federal Bureau of Investigation (FBI), Bureau of Alcohol, Tobacco, and Firearms (ATF), Internal Revenue Service (IRS), Bureau of Immigration and Customs Enforcement (ICE); state agencies, e.g., Nebraska State Troopers or Omaha or Lincoln Police Departments; or task forces of state and federal agents. Prosecutions may begin as the result of arrests or as part of ongoing investigations.

Deborah Gilg is the U.S. Attorney for the District of Nebraska. The U.S. Attorney has offices in Omaha and Lincoln. The contact information for the offices is:

Deborah Gilg
1620 Dodge Street, #1400
Omaha, NE 68102-1506
(402) 661-3700 • Fax: (402) 661-3082

U.S. Attorney's Office – Lincoln
Robert F. Denney Federal Building & U.S. Courthouse
100 Centennial Mall N., #487
Lincoln, NE 68508
(402) 437-5241 • Fax: (402) 437-5390

2. **The Federal Public Defender (FPD)** is appointed by the Eighth Circuit Court of Appeals for a renewable four-year term. The FPD employs Assistant Federal Public Defenders (AFPDs), investigators, and other support staff. The FPD is assigned by the District Court to represent indigent criminal defendants. Funding and salaries of FPD employees are appropriated through the Administrative Office of the U.S. Courts, Office of Defender Services.

The Federal Public Defender for the District of Nebraska is David R. Stickman. The FPD has offices in Omaha and Lincoln. The contact information is as follows:

Federal Public Defender's Office
222 South 15th Street
Suite 300N
Omaha, NE 68102
(402) 221-7896 • Fax: (402) 221-7884
<http://ne.fd.org>

Federal Public Defender's Office
100 Centennial Mall North
Suite 112
Lincoln, NE 68508
(402) 437-5871 • Fax: (402) 437-5874

3. **The Criminal Justice Act (CJA) Panel** is composed of private attorneys who are assigned to represent indigent criminal defendants when the FPD has a conflict. These attorneys must apply to the Criminal Justice Act Panel Selection Committee of the District Court for admission to the panel. They are paid an hourly rate and reimbursed for designated expenses. The FPD manages the CJA Panel by finding attorneys willing to accept cases the FPD is unable to take.

Karen Burks is the CJA Panel Administrator and is available to assist CJA panel attorneys with all aspects of CJA voucher processing. Ms. Burks can be reached at (402) 221-7778.

4. **The United States Probation Office** is an agency under the authority of the Administrative Office of the U.S. Courts. In the District of Nebraska it has two main functions: (1) presentence investigations and reports; and (2) supervision of defendants on probation or supervised release. The Chief U.S. Probation Officer is appointed by the Nebraska U.S. District Judges. The U.S. Probation office has offices in Omaha, Lincoln, and North Platte. Their contact information is:

U.S. Probation Office
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, Suite C79
Omaha, NE 68102
(402) 661-7555 • Fax: (402) 661-7550

U.S. Probation Office
530 Robert V. Denney U.S. Courthouse
100 Centennial Mall North
Lincoln, NE 68508
(402) 437-5223 • Fax: (402) 437-5654

U.S. Probation Office
322 United States Courthouse
300 East Third
North Platte, NE 69101
(308) 532-1918 • Fax: (308) 532-4212

5. **The United States Pretrial Services Office** is an agency whose function is pre-trial evaluation and supervision of defendants. The Chief U.S. Pretrial Services Officer is appointed by the Nebraska U.S. District Judges. The U.S. Pretrial Services Office has offices in Omaha and Lincoln. The contact information is:

U.S. Pretrial Services Office
Roman L. Hruska U.S. Courthouse
111 South 18th Plaza, Suite 1175
Omaha, NE 68102
(402) 661-7560 • Fax: (402) 661-7566

U.S. Pretrial Services Office
5th Floor
100 Centennial Mall North
Lincoln, NE 68508
(402) 437-5795 • Fax: (402) 437-5609

6. **The United States Marshal** takes custody of federal criminal defendants and is responsible for transporting them to and from court. The Marshal's Service is part of the Department of Justice. The Marshal has authority to contract with state and local authorities to house pretrial detainees. There is no federal detention facility in Nebraska. Thus, detained defendants are typically housed in the following locations: for Omaha cases – Douglas County Correctional Center (Omaha, Nebraska), Saunders County Jail (Wahoo, Nebraska), Cass County Jail (Plattsmouth, Nebraska), and Pottawattamie County Jail (Council Bluffs, Iowa); for Lincoln cases – Saline County Jail (Wilber, Nebraska) and Dawson County Jail (Lexington, Nebraska). Defendants are also sometimes held at the Community Corrections of America (CCA) facility in Leavenworth, Kansas. The U.S. Marshal's Service also searches for fugitives and serves subpoenas.
7. **The United States District Clerk** administers all court procedures and court records. Documents are primarily filed electronically and are available via the Internet. *See* N.E.L.R. Crim. 49.1, <http://ecf.neduscourts.gov>.

II. Pretrial Procedure

A. Arrests

When crimes occur outside an officer's presence, a warrant is necessary for arrest. U.S. CONST. AMEND. IV. Warrants are obtained by sworn testimony establishing probable

cause that a crime has occurred. F.R.C.P. 4 and 9. Police can also arrest persons for crimes committed in their presence without the necessity of warrants. United States v. Watson, 423 U.S. 411 (1976). Judges may allow accused persons to appear in court without arrest by a summons issued and served on the defendants. FED. R. CRIM. P. 4.

Regardless of the jurisdiction in which persons will ultimately be charged, federal law requires arresting officers to bring defendants before a magistrate as soon as possible (See FED. R. CRIM. P. 5), and the time from arrest is not to exceed 48 hours absent extraordinary circumstances. Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). In federal court, this proceeding is called an initial appearance before a magistrate judge.

If officers bring defendants before a state magistrate this does not preclude filing federal charges later. In many cases, state authorities will defer prosecutions in lieu of federal charges. In other cases, state and federal charges are pursued simultaneously. It is not considered to be a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution for identical conduct to be prosecuted in state and federal courts. See Abbate v. United States, 359 U.S. 187 (1959).

B. Pretrial Services Reports

Before initial appearances in court, defendants will be given the option of being interviewed by pretrial services officers (PTSOs). PTSOs will also help defendants complete a financial affidavit so the Magistrate Judge can consider whether to appoint counsel. Defendants' answers are used to complete pretrial services reports to a magistrate judge in order to help determine release or detention. 18 U.S.C. § 3154(1).

1. Interview

PTSOs will warn defendants about the potential effect of their answers and their right to counsel. *Pretrial Services Form 1*. Although PTSOs are not allowed to ask defendants about the charged offenses, sometimes their questions overlap – e.g., questions about immigration status in illegal entry cases, or questions about criminal history in recidivist offenses. See 18 U.S.C. § 3153(c)(1). Those answers may not be used in the government's case-in-chief, but they could be used for impeachment or sentencing. PTSOs may record incriminating statements whenever they are volunteered by defendants. *Office of Probation and Pretrial Services Monograph 112* ("The Pretrial Services Investigation and Report") (rev. March 2005), at II-3. Those statements may end up in a later presentence report. *Pretrial Services Form 1*.

The PTSO will use the defendant's answers, information gathered from records, and other interviews, to create a report for the Court. A recommendation of release or detention can be based on a nine-point scale called a "Risk Prediction Index." *Office of Probation and Pretrial Services Monograph 112* ("The Pretrial Services Investigation and Report") (rev. March 2005), at IV-7-8. If release is appropriate, the report must recommend the least restrictive conditions of release that assure the defendant's appearance and safety to the community. *Id.*, at I-3. The PTSO should not consider the weight of the evidence, or whether a rebuttable presumption applies, nor should the officer address potential penalties, as these are solely for the Court to assess. *Id.*, at I-4-5.

2. Legal Advice

PTSOs may not give legal advice. *Office of Probation and Pretrial Services Monograph 112* ("The Pretrial Services Investigation and Report") (rev. March 2005), at II-4. However, defense counsel is authorized to attend the interview. *Id.*, at II-1. Therefore, whenever possible, counsel should attend the interviews.

If a defense attorney can meet with his or her client before the first court appearance, the first meeting should focus primarily on the issue of release. Lawyers may also need to ask about recent events (e.g., arrests and searches) in order to preserve memories that quickly fade. These are opportunities to establish rapport with defendants, listen to what information they can provide, and explain how the federal system of release and detention works. Asking questions about their backgrounds will show concern for them and may elicit information about relatives, employers, and assets, that could persuasively support release. Even if chances for release are poor, defendants are unlikely to accept those opinions from a person who has not bothered to build a good relationship first. Additionally, lawyers should not damage those alliances by trying to give an opinion about the ultimate resolution of a defendant's case. At that stage, such opinions are only guesses, and may later be exposed as unfounded.

C. Initial Appearances

At an initial appearance, magistrate judges (1) advise defendants of their rights, (2) inform defendants of the charges, (3) determine whether counsel should be appointed, and (4) consider release or detention. FED. R. CRIM. P. 5. The rules below, for charging and prosecuting federal crimes, apply in all cases in which there is a potential sentence of imprisonment. In petty offenses and some misdemeanors, FED. R. CRIM. P. 58 covers most court procedures. *See also* 18 U.S.C. § 3401.

1. Charges

The charges will be in the form of either a complaint, indictment, or information. The arresting officers must provide magistrate judges with a showing of probable cause. Gerstein v. Pugh, 420 U.S. 103, 114 (1975). Absent an indictment, probable cause is alleged in a sworn written instrument called a complaint. FED. R. CRIM. P. 3. An indictment is issued by a grand jury and requires defendants to enter pleas. FED. R. CRIM. P. 7(a)(1). An indictment establishes probable cause to believe the defendant has committed a crime. An information is drafted by prosecutors when defendants are charged with misdemeanors, or when there have been waivers of indictment in felonies. FED. R. CRIM. P. 7(a)(2), (b).

a. Complaint

When defendants are charged by a complaint, no answer or plea is necessary. Therefore, any detailed discussions of the charges between lawyers and defendants can take place after release or where defendants are ultimately detained. Defendants charged by a complaint with felonies must then be indicted by a grand jury within 30 days. 18 U.S.C. § 3161(b). This deadline is subject to certain exceptions. *See* 18 U.S.C. § 3161(h).

A preliminary hearing is held if a defendant is charged with a felony by means of a complaint. FED. R. CRIM. P. 5.1. This is an adversary proceeding in which the government must establish probable cause to bind the cases over until indictments are returned. It must occur within 10 days from the initial appearance if the defendant is detained, and within 20 days if released. FED. R. CRIM. P. 5.1(c); 18 U.S.C. § 3060. Preliminary hearings are rare for two reasons. First, prosecutors often obtain indictments before the date of the hearing, rendering the issues moot. Second, defendants may waive the hearing in exchange for the government's acquiescence to conditions of release or other matters.

b. Indictment

An Indictment is a written charge signed by a grand jury foreman on behalf of at least 12 members of a grand jury. FED. R. CRIM. P. 6(f). In Nebraska, grand jurors are selected among registered voters and licensed drivers. Defendants should read the charges or have the charges read to them.

The court appearance for pleading to an indictment is called an arraignment. FED. R. CRIM. P. 10(a). When indicted defendants have been arrested, arraignments can occur

simultaneously with initial appearances. Magistrate judges may receive felony guilty pleas on behalf of some district judges. Assistant United States Attorneys will either read the indictments in their entirety, summarize the allegations, or defense lawyers can waive the reading with the defendants' permission. Lawyers may then enter pleas of "not guilty" for defendants. If defendants are indicted after an initial appearance occurs, and it is inconvenient to return to court, arraignments may be waived in writing by defendants. FED. R. CRIM. P. 10(b). Arraignments, or any other uncontested proceedings, may also proceed by video-conferences. FED. R. CRIM. P. 10(c); however video conferencing in Nebraska is rare.

c. Information

An Information is only filed at an initial appearance if the case is a misdemeanor, or if it was agreed that the defendant would waive indictment FED. R. CRIM. P. 7(a)(2), (b). No answer is necessary unless a defendant intends to plead guilty to a misdemeanor. In misdemeanors, when guilt is clearly established, an expedited plea and sentencing may be in a defendant's interest. However, each case must be evaluated by its own circumstances.

2. Appointment of Counsel

a. Eligibility

If a defendant cannot afford counsel, an attorney will be appointed pursuant to the Criminal Justice Act. 18 U.S.C. § 3006A. A magistrate judge determines if a defendant qualifies for appointed counsel based upon a financial affidavit, CJA23. This form is available on the FPD's website <http://ne.fd.org>, from the FPD's office or from the Clerk of the U.S. District Court. The U.S. Pretrial Services Office also has these forms. If there is a question about whether the defendant's assets come from a legitimate source, the court may hold a hearing. United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1985). In potential capital cases, the Court must consult the FPD about appointment of counsel. 18 U.S.C. § 3005.

The determination is based upon defendants' assets, not family or friends. Even persons who are employed or own homes may qualify for appointment of counsel if it is unlikely they will be able to obtain adequate representation with their own resources.

b. Appointment

The FPD is typically called by a magistrate judge's chambers whenever a new arrest appears to require the appointment of counsel. Pursuant to the Criminal Justice Act Plan for the District of Nebraska, the FPD represents up to 75% of the criminal defendants in the district. If the FPD determines that conflicts of interest prevent the office from representing defendants, the court will assign members of the CJA Panel.

The appointment of counsel could occur at several points in the process. In many cases, this is soon enough for AFPDs to attend PTSO interviews and to meet the clients privately. Sometimes CJA panel attorneys will be contacted in time to arrive for the interviews. They may also be appointed after the initial appearance or whenever it appears the FPD has conflicts. Once appointed, counsel must file a notice of appearance. N.E.L.R. 44.2. Occasionally, counsel is appointed to represent an indigent person pre-indictment.

c. Compensation

CJA counsel is compensated upon completion and review of a voucher provided by the FPD's Office. The voucher documents hourly work and other expenses. Worksheets and instructions about how to complete them are available on the FPD's website. The FPD has a CJA Panel Administrator, Karen Burks, who can assist counsel with questions regarding CJA paperwork. There are maximum amounts that can be paid in each case, and requests to exceed that amount are reviewed by the Chief Judge of the Eighth Circuit.

3. Release and Detention

Defendants have no absolute right to bail. United States v. Salerno, 481 U.S. 739, 749 (1987). The only constitutional restriction on bail is that it not be excessive. U.S. CONST. AMEND. VIII. The court must hold hearings and make findings in support of its decisions. By statute, magistrate judges have four choices regarding release or detention: (1) personal recognizance or unsecured appearance bonds, (2) release subject to conditions, (3) temporary detention of up to 10 days, or (4) detention pending resolution of the case. *See* 18 U.S.C. §§ 3141-3156 (Bail Reform Act of 1984). In Nebraska, cash bonds are rare.

a. **Options**

(1) **Release Without Conditions**

A personal recognizance is a defendant's promise to return for all court appearances. An unsecured appearance bond is a defendant's promise to return subject to specified penalties if the defendant fails to honor their pledge. 18 U.S.C. § 3142(b).

(2) **Release With Conditions**

Defendants may be released subject to conditions. Conditions may include reporting to PTSOs, abstaining from illegal drugs, committing no new crimes, substance abuse treatment, posting money or property, use of third party custodians, electronic monitoring, curfews, travel restrictions, maintaining or seeking employment, medical or psychiatric treatment, or any other least restrictive conditions that will assure the defendant's appearance and community safety. 18 U.S.C. § 3142(c). These special conditions may reflect the nature of the charges, such as prohibiting contact with minors in a child exploitation allegation, or a requirement that a defendant be subject to electronic monitoring.

(3) **Temporary Detention**

Temporary detention is used when there is some uncertainty about a defendant's status. For instance, if it is unclear whether defendants are subject to deportation or to charges in other jurisdictions, this option will allow judges to get definitive answers before proceeding further. It is only detention for up to 10 days. 18 U.S.C. § 3142(d).

(4) **Detention by Findings**

Detention pending trial may only be imposed after a hearing or unless a defendant waives the hearing. The government may move for detention hearings if the defendants are charged with crimes of violence, crimes with potential life or death sentences, serious drug crimes, or if they have two or more prior convictions for specified offenses. The court or the government may move for detention if defendants are serious risks for obstruction of justice, for witness tampering, or for flight. Certain specified crimes raise rebuttable presumptions in favor of detention. 18 U.S.C. § 3142(e), (f).

(5) Detention by Waiver

In some cases, defendants may wish to waive detention hearings when their release on the federal charges will only cause them to be turned over to state custody or to the Department of Homeland Security. *See, e.g. Alabama v. Bozeman*, 531 U.S. 1051 (2001). These are case-by-case decisions that are fact-specific. For instance, in some cases, release into state custody could adversely affect the amount of time ultimately credited by the Federal Bureau of Prisons toward federal sentences, or the likelihood of receiving a consecutive federal sentence. *See VI (C)*. For some defendants, quick deportations to repressive countries may be worse than spending more time in U.S. custody.

b. Detention Hearings

(1) Time of Hearing

A detention hearing will be held at the initial appearance unless either the defendant or prosecutor seeks a continuance. Excluding holidays and weekends, defendants may have five-day continuances and the government may have three days. 18 U.S.C. § 3142(f)(2)(B). If a lawyer has not had an opportunity to interview a client about the possibility of release before the initial appearance, a continuance is usually appropriate, unless the government and PTSO will agree to release. CJA counsel are sometimes contacted after the initial appearance occurs. Unless those defendants were released, the court will continue those hearings.

(2) Rules

Detention hearings are not subject to the rules of evidence and information may be proffered. 18 U.S.C. § 3142(f). Proffering evidence simply means that lawyers represent to the court what information supports their requests. Defense counsel should never call their client to testify at a detention hearing. Risk of flight may be proven by a preponderance of evidence, and dangerousness by clear and convincing evidence. *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985). Although defense counsel have the right to cross-examine government witnesses, prosecutors typically call case agents who summarize the government's evidence.

Unless proof of the charged crime is particularly weak, defendants are best served by focusing on their strong ties to the community and lack of dangerousness. This can be supported by a history of employment, good family relations, lack of substance abuse, and

the absence of a criminal history. Although these attributes may be substantiated in pretrial reports, that is no excuse to ignore the potential for live witnesses or documentary evidence, which may strengthen the case for release, especially when the charged crimes raise a rebuttable presumption in favor of detention.

c. Removal Hearings

A removal hearing is held if a person has been arrested for charges pending in another jurisdiction. FED. R. CRIM. P. 5(c)(3). The main issue at those hearings is identity – whether the person is actually the charged defendant. If the arrested person denies they are the charged defendant, fingerprint matches are generally sufficient to resolve the issue. If the demanding district is a federal court, the charged individual is also told of a procedure to plead guilty in the district they were found. FED. R. CRIM. P. 20. This can only occur if the USAs in both districts agree. The only other issue is release. Detention hearings may proceed in either the removing or receiving districts, but defendants are usually better off making their cases for release in the jurisdictions where they have stronger ties, assets, and potential witnesses.

d. Results of Release or Detention

If released, defendants will be given written copies of the conditions of release. If all conditions are met, the defendants may be released immediately. In some cases, release may be delayed to obtain surety signatures, post property, or complete booking procedures. Even if a federal court enters a release order, that will not affect detainers from other jurisdictions. Defendants will remain detained in state custody if they appeared in federal court pursuant to a writ of habeas corpus ad prosequendum (writ to bring a person confined in another jurisdiction).

If detained in federal custody, defendants will be the responsibility of the U.S. Marshal's Service. Defendants housed in state facilities, pursuant to contracts with local authorities, will be subject to their internal rules. Defendants indicted in Omaha are typically housed in the Douglas County Correctional Center in Omaha, the Cass County Jail in Plattsmouth, Nebraska, the Saunders County Correctional Center in Wahoo, Nebraska or the Pottawatomie County Jail in Council Bluffs, Iowa. Defendants indicted in Lincoln are usually held in the Saline County Jail in Wilber, Nebraska. Also, defendants will sometimes be held in the Dawson County Correctional Center in Lexington, Nebraska or at Community Corrections of America (CC) in Leavenworth, Kansas. If facilities fail to provide adequate medical care, or attorney access, that should be reported to the Marshal.

D. Criminal Pretrial Orders

In the District of Nebraska, at a felony arraignment, magistrate judges will enter the District's Standard Progression Order. The progression order describes all discovery and motion obligations of the government and defendant. The order forbids the filing of boilerplate discovery requests. Each party has a duty to contact the other and attempt to resolve discovery disputes. If either party is still unsatisfied with the state of discovery, they must seek a motion to compel, a motion for a protective order, or a motion to modify the standard order. Those motions must be accompanied by a certificate of conference describing informal attempts to resolve the matters.

1. Government's Discovery

Usually, within fourteen days of an arraignment, the government must comply with the discovery obligations of FED. R. CRIM. P. 16(a) and 12(b)(4), exactly as if the defendants had made formal requests. NECrimR 16.1(a). If a defendant does not request discovery, a notice must be filed within two days after the arraignment. *Id.* Rules 16 and 12 list certain documents, objects, and information that are subject to discovery. The government must also provide exculpatory evidence, as defined by Brady v. Maryland, 373 U.S. 83 (1963). Failure to turn over exculpatory evidence may be reversible error. Kyles v. Whitley, 514 U.S. 419 (1995); Banks v. Dretke, 540 U.S. 668 (2004).

Upon request of the defense counsel, the government must disclose promises made to its witnesses, as defined by United States v. Giglio, 405 U.S. 150 (1972), as well as the witnesses' prior convictions.

2. Defendant's Discovery

If a defendant requests discovery from the government, it must be provided to the government within 30 days of arraignment. NECrimR 16.1(b)(1).

E. Pretrial Filing Procedures

1. Method

Except for sealed and pro se filings, all written motions in criminal cases must be filed electronically. *See* NELR Crim. 49. Faxing pleadings to the Court is not allowed. All written notices and filings in a case will also be received by each party's attorney

electronically. The information about how to register for “Case Management/Electronic Case Files” (CM/ECF) is located on the District’s website <https://ecf.ned.uscourts.gov>. The website answers questions about what equipment and software is necessary, how to create documents that may be filed, and how to access previously filed documents. Attorneys who are unfamiliar with electronic filing may also call the FPD for assistance.

2. Dates

The progression order will state the filing deadline for pretrial motions.

When computing time periods, exclude the day of the event beginning the period, but include the last day unless it falls on a weekend or federal holiday. FED. R. CRIM. P. 45(a).

F. Pretrial Motions

Except when made during a trial or hearing, a motion must be in writing, state the grounds on which it is based, and state the relief or order sought. FED. R. CRIM. P. 47. A brief must accompany the motion. Although motions may be supported by an affidavit, sworn affidavits are not required in the District of Nebraska. A certificate of service is required for all non-sealed motions. FED. R. CRIM. P. 49.

Pretrial motions will be reviewed by a magistrate judge. Indicted cases are assigned to district judges and magistrate judges on a rotating basis.

1. Discovery

In state court practice, attorneys often file omnibus motions to assure they have requested all potential discovery, and have sought to suppress any illegally seized evidence. In the District of Nebraska, discovery motions may only compel, protect, or modify what is already required by FED. R. CRIM. P. 16. For example, it would be redundant to file a motion requesting the defendant’s statements when Rule 16 already requires the government to provide them. However, if the government has refused to provide them, a motion to compel (explaining the efforts made to obtain those statements), would then be appropriate. If defense counsel wanted discovery that was not specifically described in Rule 16, (and the government refused to turn it over), a motion would be the proper instrument to file to obtain the discovery.

2. Suppression

Motions to suppress evidence must also be specifically tailored to the facts of the case. Before filing motions to suppress evidence, defense counsel must make sure the government has complied with the standard criminal pretrial order by giving the defendant notice of the statements and tangible evidence that the government seeks to introduce at trial. It is only then that defense counsel will be able to specifically identify materials that are subject to suppression. If the government refuses to provide such notice, a motion to compel is necessary.

A complete explanation of search and seizure law is beyond the scope of this handbook. However, beyond case law, the admissibility of statements and items is also covered by statute. 18 U.S.C. § 3501.

3. Other

A motion for a bill of particulars may be filed when the indictment or information does not provide adequate notice to the defendants of all facts required for a prima facie case. FED. R. CRIM. P. 7(f). Such a pleading may be useful when the government has omitted dates, places, and persons whose identity is necessary to defend a charge. Motions to sever are necessary when defendants or offenses are improperly joined. FED. R. CRIM. P. 8.

Not every case requires pretrial motions. Because of the standing pretrial order, discovery motions are unnecessary unless there is a dispute that cannot be informally resolved. Unlike state courts, some federal cases precede without any pending pretrial motions.

4. Notices

At the time for filing pretrial motions, defendants must also provide written notice of certain affirmative defenses. Insanity defenses require such notice. FED. R. CRIM. P. 12.2(a). Notice is required if defendants wish to rely upon a mental health expert to establish any mental health defense. FED. R. CRIM. P. 12.2(b). Such notice allows the court to order testing by a government expert, subject to certain limitations. FED. R. CRIM. P. 12.2(c).

If requested by the government, alibi defenses require pretrial notice by defendants within 10 days. FED. R. CRIM. P. 12.1(a). The government must make a request in order to trigger a duty for a defendant to provide notice. Once the defendant provides notice, the government has 10 days to disclose its rebuttal witnesses. FED. R. CRIM. P. 12.1(b).

Public authority defenses are affirmative defenses alleging that a defendant was acting legally because they were authorized by a government agency. FED. R. CRIM. P. 12.3. The notice is due at the time of pretrial motions and must identify the agency that is the source of the authority to act.

G. Speedy Trial

The right to a speedy trial is guaranteed by the Sixth Amendment. Barker v. Wingo, 407 U.S. 514 (1972). Prejudice to defendants, and reasons for the delays, are considered as factors when defendants move to dismiss their indictments. *See* United States v. Lovasco, 431 U.S. 783 (1977). In some cases, delays of many years may be presumptively prejudicial. *See* Doggett v. United States, 505 U.S. 647 (1992). A pretrial denial of a claim is not an interlocutory appealable order. United States v. MacDonald, 456 U.S. 850 (1978).

1. Deadlines

In federal courts, there are also statutory requirements for speedy trials. 18 U.S.C. § 3161 et seq. The government has 30 days from the time a defendant is arrested to bring charges by information or indictment. § 3161(a). Those periods do not begin anew upon the filing of superceding indictments. United States v. Rojas-Contreras, 474 U.S. 231 (1985). Trials must commence within 70 days from the time the formal charges are filed or when a defendant first appears in court, or waives appearance, whichever is later. § 3161(c)(1). The remedies are dismissal, either with or without prejudice. United States v. Taylor, 487 U.S. 326 (1988). There are many exclusions that toll the 70-day calendar. § 3161(h). For instance, the time while pretrial motions are pending may be excluded. Henderson v. United States, 476 U.S. 321 (1986).

The Interstate Agreement on Detainers Act also has time limits. 18 U.S.C. App.2, § 2. Persons serving a sentence in state or federal custody have the right to a trial in other state or federal jurisdictions that have placed detainers on them within 180 days of their demand. Fex v. Michigan, 507 U.S. 43 (1993). Agreed trial dates beyond the time limits for detainers waive any complaints. New York v. Hill, 528 U.S. 110 (2000).

2. Delays

In Zedner v. United States, 126 S. Ct. 1976 (2006), the Supreme Court found that prospective waivers of the speedy trial limits have no value unless the court makes a finding of legitimate statutory exceptions prior to plea or trial. Therefore, unless the District Court makes findings that the delays serve the ends of justice, defendants will retain the ability to move to dismiss the charges, regardless of any prior waiver or agreement.

H. Mental Health Issues

1. Competence

Mental incompetence means that a defendant is presently suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. 18 U.S.C. § 4241(d); Dusky v. United States, 362 U.S. 402 (1960). Competence to stand trial is the same standard as competence to plead guilty or waive counsel. Godinez v. Moran, 509 U.S. 389 (1993). Competence is determined by a preponderance of evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996). Convicting defendants who are incompetent violates due process. Bishop v. United States, 350 U.S. 961 (1956). Defendants found incompetent will remain hospitalized until they become competent. 18 U.S.C. § 4241(e).

2. Sanity

Insanity is when a defendant, as the result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. 18 U.S.C. § 17(a). Defendants have the burden of proving insanity by clear and convincing evidence. § 17(b). Defendants must provide the government written notice of this defense. FED. R. CRIM. P. 12.2. When sanity is an issue, defendants have the right to the assistance of court-appointed psychiatrists. Ake v. Oklahoma, 470 U.S. 68 (1985). If defendants are hospitalized after a verdict of not guilty by reason of insanity, they may be discharged upon recovery, or if it is determined that they will not create a substantial risk of bodily injury to other persons or serious damage to property of others. 18 U.S.C. § 4243(f).

3. Experts

Whenever a defendant's mental health appears to be at issue, counsel should seek the assistance of an independent expert for an evaluation. Even when clients appear to meet the standards for competence and sanity, mental illness or retardation may still affect their culpability. Diminished capacity may be a defense to some crimes and it is always relevant to determining appropriate sentences. The FPD is a good source of information about when to seek experts, where to find suitable experts, and how to make a proper request to hire experts.

4. Sex Offenses

The Adam Walsh Act authorizes the Bureau of Prisons to certify inmates as "sexually dangerous persons." This certification can occur prior to sentencing or at any time after the commencement of probation or supervised release and prior to the completion of a sentence. 18 U.S.C. § 4248. A determination that a person is a sexually dangerous person requires the civil commitment of the defendant to the custody of the Attorney General until either 1) a state will assume custody of the defendant, or 2) the defendant is no longer sexually dangerous. See United States v. Comstock, __U.S.__, No.08-1224 (May 17, 2010). Thus, counsel needs to be especially cautious in advising and representing clients who may face a Bureau of Prisons' designation as a sexually dangerous person.

III. Pretrial Practice

A. Client Contact

1. Meetings

Whether defendants are released or detained, one of the most important duties lawyers can perform is keeping defendants informed about their cases. Not only is it ethically required, but it establishes positive relationships between clients and lawyers. Only when a client trusts his or her lawyer will the defendant rely upon the lawyer's advice. Imagine meeting someone briefly once or twice, and then being pressured to make life-changing decisions based on what you were told. You would, at the very least, be hesitant to agree. If the person insisted that you had little choice, it is unlikely you would be passive and compliant.

Panel lawyers and defenders usually have many cases and must use their time wisely. It may be difficult to regularly visit detained clients. Although face-to-face contacts are best, often defendants are in jails and prisons hours away. Lawyers should accept prisoner phone calls whenever possible. Collect calls from jails and prisons are reimbursable. It is very discouraging for prisoners to constantly have calls refused or be told their lawyers are unavailable.

2. Correspondence

Aside from meetings and phone calls, another way to communicate is writing letters. Although lawyers should avoid sending sensitive case materials to jails or prisons (unless they can be kept secure), there is a great deal of basic information that can be put in letters or enclosed as attachments. Lawyers should begin with the assumption that clients know nothing about the federal criminal justice process. Summaries of the charges, outlines of federal procedures, and discussions of potential sentences, can go a long way to convince clients their lawyers care about their cases, understand their cases, and will continue to work on their cases.

3. Discovery

In complex cases, with massive discovery, special procedures may be needed. When defendants can assist their lawyers by reviewing documents or recordings, it may be necessary to get permission to have electronic equipment or computers brought into jails. Counsel should check with the FPD about what has been done in the past and what resources are available.

Clients should also be told what information must not be freely disseminated. Defendants do not always use their best judgement about discussing their cases. Lawyers should explain to clients that others, who may appear to be their friends, could become adverse witnesses simply by repeating what defendants told them or by finding incriminating materials among a defendant's belongings. There is an attorney-client privilege that can be waived by talking to others. See Swidler & Berlin v. United States, 524 U.S. 399 (1998); Mitchell v. United States, 526 U.S. 314 (1999). Defendants should not discuss their cases with anyone without first consulting their lawyer.

Clients in jail must frequently be reminded not to talk about their cases on the telephone. These conversations are always reviewed by the government and incriminating calls are played back during trial.

B. Assessing a Case

Lawyers often assess cases too quickly. There are two problems with this approach. First, clients sense when lawyers have made up their minds without first considering the defendants' perspectives. That causes them to distrust their lawyers. Once a lack of trust sets in, all other discussions are difficult.

Second, lawyers may be wrong in their initial assessments. Even in cases where guilt appears to be overwhelming, the charges should be carefully examined to see if all elements can be proven. There may also be technical issues that will defeat those cases in whole or in part. Procedural victories, such as the suppression of evidence, can cause prosecutors to reevaluate cases. Failure to assess all the potential issues may ultimately be ineffective assistance of counsel. *See, e.g., Glover v. United States*, 531 U.S. 198 (2000).

1. The Charges

If an indictment contains a defect of form, a motion to dismiss must be filed prior to trial. FED. R. CRIM. P. 12(b)(3)(B). For instance, indictments have defects in form if multiple crimes are charged when only a single crime occurred. Objections that an indictment entirely failed to state an offense, or that it did not invoke jurisdiction, are never waived. FED. R. CRIM. P. 12(b)(3)(B).

Multiple convictions or punishments may violate the Double Jeopardy Clause of the Fifth Amendment. *See Rutledge v. United States*, 517 U.S. 292 (1996). Alternatively, crimes that are distinct, and separated by time, may be grounds for severance of the charges.

Charges must be filed within the statute of limitations for that crime. 18 U.S.C. § 3282. They must also be filed in the district for which venue is proper. *United States v. Cabrales*, 524 U.S. 1 (1998). Since not all crimes have federal jurisdiction, some crimes (e.g., robbery and arson), may require additional pleading and proof that the crime affected interstate commerce. *See Jones v. United States*, 529 U.S. 848 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

2. Discovery

a. Necessity

Defense lawyers cannot accurately evaluate defendants' cases without adequate discovery. Prosecutors bring charges because there was evidence that they believed would convince grand juries to indict and petit juries to convict. That evidence is typically in the control of prosecutors and law enforcement. Unless defense lawyers get access to that evidence there is generally little to base decisions upon.

It is rare that lawyers can learn enough about cases from client interviews alone to make proper assessments. For many reasons, clients can be poor sources of information. Few anticipate that they will be charged with crimes, and therefore, many key events are forgotten. Even after dramatic events, defendants are unlikely to know all the potential witnesses, what forensic evidence was formed, or if there were other suspects.

In addition, defendants may have poor communication skills, low intelligence, or mental illnesses. Some defendants refuse to trust their lawyers enough to tell them everything, under the mistaken assumption that they will get better representation if their lawyer inaccurately believes there are grounds for acquittal. However, none of these are sufficient reasons not to interview defendants in detail, or to automatically discount their versions of events.

b. Methods

The District's Standard Criminal Progression Order is described in a preceding section. The purpose is to avoid the need for judges to review boilerplate discovery demands. The order does not relieve lawyers of their obligations to obtain necessary discovery. The only way to do this is to contact the AUSA handling the case. In most instances, prosecutors are confident enough about securing convictions that they do not fear losing any advantage by freely discussing the case with defense counsel. This should be a time to listen and learn. If a prosecutor is someone that the defense lawyer already knows, a phone call may be sufficient. Otherwise, counsel should make an appointment to meet with the prosecutor.

Informality is the best way to start the discovery process, but it is not always enough. The items that defense counsel will need are specific to each case. Calling and leaving a message requesting "discovery" is not sufficient. Either face-to-face meetings, phone discussions, or letters – detailing exactly what is being requested – must be attempted before pursuing remedies through the District Court. Depositions are not allowed in federal court in criminal cases in exceptional cases to preserve testimony. *See* FED. R. CRIM. P. 15.

If any items or statements of defendants are in the government's possession then counsel should be sure to pursue FED. R. CRIM. P. 12(b)(4). That provision (incorporated into the Standard Progression Order), requires the government to give notice of what evidence it intends to introduce in its case-in-chief, that is discoverable under FED. R. CRIM. P. 16, and that could be the subject of a defendant's motion to suppress. Without knowing what the government will offer at trial, motions to suppress cannot adequately describe the relief requested.

3. Investigation

a. Investigators

Most defense counsel are solo practitioners or members of small firms. They do not employ full-time investigators. Although not every case requires investigators or experts, the need for such assistance should at least be considered. In private practice, the ability to use such resources will depend upon what clients can afford. In appointed cases, counsel can incur up to \$500 for such expenses without prior approval. 18 U.S.C. § 3006A(e). Whenever possible, provide a detailed justification for an investigator and get pre-approval utilizing CJA form 21 from the court. Those requests may be *ex parte* and *in camera*.

When attorneys interview potential witnesses (particularly adverse witnesses), there is a possibility that a lawyer's recollection will become material and relevant at trial. This can be a conflict of interest. If that likelihood is strong, requesting an investigator should be studied.

b. Subpoenas

Attorneys may subpoena persons and documents to be brought to court at trial. FED. R. CRIM. P. 17. Subpoenas to bring documents prior to trial pursuant to FED. R. CRIM. P. 17(c) require a court order. NECrimR 17.2. Counsel must review NECrimR 17.2 and follow its provisions if subpoenaing documents before trial.

c. Other

There are many other resources. Anyone with an Internet connection has access to a wealth of information. Some services cost money, but may also have lower rates for CJA

counsel. The FPD is a good place to start and ask about where to look for information on investigative and expert resources.

4. Resolution

Decisions to resolve cases by trials or guilty pleas are never simple. The answer may change many times over the course of a single prosecution based upon new information or changed circumstances. Decisions to take cases to trial are generally based upon perceived weaknesses in the government's evidence or lack of feasible alternatives. With the advent of mandatory minimum sentences, sentencing guidelines, and inflexible Department of Justice policies, the latter is frequently a reason for going to trial.

Like all decisions, choices between trials or pleas are best made with the most information available. Reviewing discovery, independent investigation, and discussions of the issues with other lawyers, are valuable resources. Ethical rules require that decisions to try or plead cases ultimately belong to each defendant. Similarly, when cases are tried, the decision over whether a defendant testifies belongs to the defendant. However, lawyers who allow clients to make these decisions poorly – without adequate information and guidance – are equally at fault.

IV. Guilty Pleas

A. Requirements

A defendant may plead guilty or (with court consent) nolo contendere. FED. R. CRIM. P. 11(a)(1). Either may be conditional upon reserving in writing the right to appeal an adverse pretrial ruling, if both the government and court consent. FED. R. CRIM. P. 11(a)(2). Jeopardy attaches at unconditional acceptance of a guilty plea. Until the court unconditionally accepts the plea, it may be withdrawn for any reason (unless this right is waived in the plea agreement). FED. R. CRIM. P. 11(c)(5). Conditional pleas are allowed with the consent of the parties and the Court, usually for the purpose of appealing dispositive pretrial rulings. FED. R. CRIM. P. 11(a)(2).

B. Plea Colloquy

In all cases, judges must admonish defendants of the constitutional rights they will give up by waiving a trial. The judge must also inform the defendant of the nature of the

charges and the potential penalties. The judge reviews the terms of any plea agreements and must conclude that the pleas are voluntary, and that there are adequate facts supporting them. FED. R. CRIM. P. 11(b). This means there must be a sufficient factual basis to support each guilty plea. Defense counsel and the defendant are required to complete a Petition to Enter a Plea of Guilty if the defendant intends to enter a guilty plea. These forms are available on the court's website.

Judges must make sure that defendants understand there is a factual basis for each plea. Defendants must be admonished of all consequences of their pleas, including the imposition of restitution. Omissions in a plea colloquy may be grounds for reversal on appeal.

Lawyers should make sure that their clients are prepared for plea colloquies. This means the clients should be ready to answer any of the judges' questions including: "Did you fully discuss the charges with your attorney?" "Are you fully satisfied with the advice from your attorney?" "Are you pleading guilty because you are in fact guilty?" "Have you discussed the affect of the sentencing guidelines on your case with your attorney?" Unless the answer to all of these questions is "yes", the proceedings may come to a premature end.

Preparations for plea colloquies should not begin in a holding cell moments before the hearings. Many defendants will think that their lawyers are trying to trick them into pleading guilty, in order to resolve their case more quickly.

C. Plea Agreements

There is no requirement that a guilty plea be accompanied by a plea agreement. However, if parties do enter into contracts with the government they should be written and signed by the defendant, the defense attorney, and the prosecutor. Federal judges take no part in negotiating plea agreements. FED. R. CRIM. P. 11(c)(1).

1. Types

There are three forms of plea agreements. FED. R. CRIM. P. 11(c)(1). The first type limits the quality or quantity of charges. FED. R. CRIM. P. 11(c)(1)(A). The second type recommends, or acquiesces to, sentences or sentencing ranges. FED. R. CRIM. P. (c)(1)(B). The third type contracts for specific sentences or sentencing ranges. FED. R. CRIM. P. 11(c)(1)(C). Only the third type, 11 (c)(1)(C), will bind a judge. In order for a judge to be bound by a plea agreement, a judge must accept the plea agreement prior to sentencing.

Otherwise, the plea agreement will be treated as deferred until the judge reviews the presentence report. FED. R. CRIM. P. 11(c)(3).

If the court rejects any plea agreement (binding or not) the parties must be advised in advance of imposing the sentence. FED. R. CRIM. P. 11(c)(5).

Defendants should only enter into plea agreements with appeal waivers if they will receive some promised benefit in return. Otherwise, defendants may as well plead guilty without a plea agreement.

2. Effect

Even when judges are not bound by plea agreements, the parties are. If the government has agreed to recommend specific ranges, it must do so. The government must not seek enhanced sentences when it promised not to. The government cannot argue for different sentences than previously promised.

A common basis for plea agreements is a defendant's agreement to cooperate in the prosecution of others, in exchange for the government's promise to make a motion to the court requesting a departure below a mandatory minimum punishment. A district judge may depart below a mandatory minimum only upon the government's request. 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. Typically, this form of plea agreement occurs in drug distribution cases. However, even when the government controls whether a sentence reduction is allowed, a bad faith failure to move for such a departure may require the court to enforce the plea agreement

D. Post-Plea Proceedings

After a plea hearing is completed, a sentencing date is issued. It takes approximately three months for presentence reports to be completed and reviewed by the parties; any additions or deletions to be made; and any unresolved issues to be addressed by the parties in sentencing memoranda. Often the same United States Probation Officer (USPO) will investigate and write the report in that case. Defense lawyers should find out who the assigned USPO for their cases is and make an appointment to be present with their clients if they are interviewed for the presentence reports. Defendants have a right to have counsel present whenever they are interviewed. FED. R. CRIM. P. 32(c)(2).

Release pending sentencing or appeal is covered by 18 U.S.C. § 3143. Unless the defendant is not facing imprisonment, the judge must find clear and convincing evidence the defendant is not likely to flee or pose a danger to the safety of another or the community, in order to be released pending sentence. 18 U.S.C. § 3143(a). However, the determining factor may be whether or not the government objects to release. On appeal, the same standard applies, with the additional showing of a substantial questions of fact or law likely to result in relief on appeal. 18 U.S.C. § 3143(b).

V. Trials

A. Pretrial Conference

Prior to jury selection, the District Judge presiding over the trial will hold a pretrial conference. This is a time for the attorneys to meet with the judge to discuss outstanding issues such as scheduling, witnesses, motions in limine, voir dire, opening statements, and preliminary jury instructions.

Before the trial date, counsel must file electronically voir dire requests, proposed jury charges, any stipulations of fact, and an exhibit list.

1. Witnesses

The United States Constitution provides defendants the right of compulsory process to bring witnesses to court. U.S. CONST. AMEND. VI. However, it is still up to the lawyers to follow the procedures necessary to get witnesses to court is by subpoena. FED. R. CRIM. P. 17(a).

A subpoena for a witness to appear in court may be obtained by *ex parte* application. NECrimR 17.1. If the defendant is indigent, the court will order the government to pay the witness' costs and fees. FED. R. CRIM. P. 17(b).

Although any nonparty at least 18 years old may serve a subpoena, CJA counsel will usually rely upon the U.S. Marshal for service of subpoenas. CJA counsel cannot be reimbursed for using commercial process servers. The Marshal will need a certified order from the court listing the names and addresses of the witnesses to be served, and stating that the costs will be paid by the government; as well as an original and two copies of the completed subpoenas; and 14 working days notice.

Although it is then the Marshal's responsibility to provide travel and lodging for those witnesses, counsel must be sure to communicate with witnesses to avoid problems regarding reimbursement. Reimbursable travel to court is by the least expensive manner, not the most convenient. Witnesses may prefer to drive their own vehicles, but if bus tickets are cheaper, the Marshal will pay for the bus. Bus and airline tickets are made available at the terminal, so the travelers will need valid identification to pick them up. Unless special arrangements are made, lodging funds are not advanced, so a credit card is necessary. The travelers or attorneys should make those reservations and check that government rates are obtained. There is a per diem reimbursement that includes meals. Travelers should obtain and keep all receipts, except for meals.

There are special rules for travel advances, federal employee witnesses, foreign witnesses, prisoner witnesses, and non-custody travel for defendants. A good discussion of these, and other related issues, is in *U.S. Marshals Public Defender Handbook*, created by the Marshal's Service.

2. Motions in Limine

Motions in limine request the court to make rulings on the admissibility of evidence that will be offered during the trial. They may be filed by the proponent or opponent of the anticipated exhibit or testimony. By getting early rulings, the parties can tailor their cases to answer or ignore the disputed items without having to wait for them to be offered during the trial. For example, if it were contested that a statement was inadmissible hearsay, a ruling on a motion in limine would allow the parties to know whether the statement could be referred to in their opening statements.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. F.R.E. 103(a)(2). Therefore, motions in limine can be very effective devices to narrow the issues before the inevitable distractions of trial begin.

3. Voir Dire

The pretrial conference is a good opportunity to discuss what procedures will be allowed during voir dire. Juror questionnaires are typically completed by the prospective jurors, and copied for the parties by the Clerk's Office. These questionnaires are available to be reviewed by defense counsel before the day jury selection begins.

In all cases, counsel should consider case-specific questions suitable for voir dire. The judges will allow the lawyers to ask questions directly to the panel, although Judge Kopf and Judge Smith Camp typically limit voir dire to ten minutes per side.

B. Jury Selection

The composition of panels of potential jurors and grand jurors is covered by the Modified Plan for Random Jury Selection. If there is to be a challenge to the array, it must occur before voir dire begins or within 7 days of when grounds were discovered. 28 U.S.C. § 1867(a) and (b). Counsel can obtain a list of the potential jurors by calling the judge's courtroom deputy a day before the jury trial is to commence.

1. Strikes

Jurors are not so much selected, as excluded. They are excluded by challenges for cause and peremptory strikes. Challenges for cause deal with whether the person is capable of rendering a fair and impartial verdict. Challenges may not be based upon the race or gender of the potential juror. Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1986).

There is no limit to how many challenges for cause that can be made. Peremptory strikes are divided among the parties, six for the government and 10 for the defense in noncapital cases. FED. R. CRIM. P. 24(b)(2). There are additional challenges allowed to alternates. FED. R. CRIM. P. 24(c)(4). The court has discretion to give more total strikes to the defense, especially when there are multiple defendants. FED. R. CRIM. P. 24(b).

2. Procedures

There are two main forms of jury selection that are used. Both types are subject to variations. Attorneys should speak directly to the courtroom deputy clerk to determine exactly what to expect. Many lawyers like to have a seating chart to make notes about each prospective juror. In order to prepare that chart in advance, lawyers need to find out how those persons will be numbered and seated.

C. The Trial

Criminal trials are open to the public. U.S. CONST. AMEND. VI. Courts may not remove spectators without sufficient findings explaining the necessity. Victims have

special rights to appear. 18 U.S.C. § 3510. In rare cases, defendants may seek to close proceedings for their own safety. Absent permission from the Court, the proceedings may not be photographed or recorded. Defense counsel should move to sequester all witnesses.

After the jury is selected, the trial begins with the government's opening statement. The defense may then make an opening statement, reserve it until the beginning of the defense proof, or waive the opportunity completely. The latter two choices are rarely appropriate, because the jury will not get to hear the defense until after the government's case-in-chief. However, defense counsel should be careful not to make any statement that could be treated as an admission of a party-opponent, and used to the defendant's disadvantage.

The government calls its first witness and puts on its case-in-chief. The government must prove each element of the charged offenses beyond a reasonable doubt or the case is subject to a judgment of acquittal. FED. R. CRIM. P. 29(a). Any fact, that if proven, raises the potential maximum punishment, is an element of the offense. Apprendi v. New Jersey, 530 U.S. 466 (2000). Defense counsel should make a motion for judgment of acquittal at the close of the government's case, and renew it at the close of all evidence, or else risk facing a higher standard of review if later appealing the sufficiency of the evidence. The motion may be renewed within seven days of discharging the jury. FED. R. CRIM. P. 29(c).

One procedure that is particular to federal prosecutions is the Jencks Act. 18 U.S.C. § 3500. The government need not provide the defendant statements of any of its witnesses until after they have testified on direct examination. However, because providing statements after a witness has testified will almost always delay a trial or hearing, the district court will typically direct prosecutors to provide early disclosure whenever possible. Defense lawyers can usually expect to get all such statements the week before testimony begins. Either side may request the prior statements of a witness after they have testified. FED. R. CRIM. P. 26.2.

Once the government rests, defendants may rest or put on a defense. If a defendant rests, the proof in the case is over. If a defendant puts on a defense, the government may be able to introduce additional evidence in rebuttal. Some affirmative defenses – such as alibi, insanity, or acting upon public authority – require defendants to give the government pretrial notice. FED. R. CRIM. P. 12.1, 12.2, 12.3.

Unless the parties have not already done so, jury instructions must be provided in writing by the close of evidence. FED. R. CRIM. P. 30. Closing arguments begin with the

government, then the defendant(s), followed by a government rebuttal. FED. R. CRIM. P. 29.1. Jury verdicts are returned in open court and they must be unanimous. FED. R. CRIM. P. 31. Either side may ask that the jury be polled about their votes in open court.

A motion for new trial must be filed within fourteen days of verdict or finding of guilt. FED. R. CRIM. P. 33(b)(2). The only exception is regarding newly discovered evidence, which must be raised within three years. FED. R. CRIM. P. 33(b)(1).

VI. Sentencing

The sentencing hearing is to occur approximately 90 days from the plea or verdict, but often is scheduled weeks later. The presentence report is to be available to the parties 45 days before the hearing. Objections to the report are due 14 days after disclosure.

A. Guidelines

Prior to the implementation of the United States Sentencing Guidelines in 1987, and except for a few mandatory sentencing statutes, federal judges had very broad discretion to fix sentences. The guidelines created a system for weighing offense characteristics along with defendants' criminal histories. By adding and subtracting points assigned to various factors, and by following the intersection of those points along a grid, sentencing ranges were created. The ranges were mandatory unless there were facts that allowed judges to depart from the ranges. Departures were allowed for limited reasons, the most common being for defendants' cooperation with the government in the prosecution of others.

In United States v. Booker, 543 U.S. 220 (2005), the United States Supreme Court found that a mandatory application of the federal sentencing guidelines violates defendants' Sixth Amendment right to a jury trial. The guidelines are now weighed as one of the statutory sentencing factors under 18 U.S.C. § 3553. Counsel must be familiar with the decisions in Gall v. United States, 128 S.Ct. 586 (2007) and Kimbrough v. United States, 128 S.Ct. 558 (2007) which explain sentencing in federal court after Booker.

There is no area of mitigation that defense lawyers should treat as prohibited. In other words, lawyers should argue for a fair result regardless of whether the guidelines seem to discourage or prohibit particular factors. On the other hand, acquitted conduct may also be considered. United States v. Watts, 519 U.S. 148 (1997).

The best way for lawyers to make sure judges have the inclination and authority to impose requested sentences is help judges give compelling statements of reasons, by filing sentencing memoranda. The reasons should state what mitigating factors are specific to each defendant's case. Factors that apply to all defendants (e.g., the indignity of a criminal conviction), or vaguely stated explanations, may not survive an appeal by the government.

The application of the guidelines is complicated. It is not unusual for the parties to agree to what they believe the offense levels and criminal history categories will be. However, even with the best of intentions, these predictions can be undermined by newly discovered facts, the interpretation of those facts and law by the USPO, or the findings by the Court. A more detailed, yet basic, explanation of the sentencing process can be found in a separate handbook available from the FPD office. This handbook is "An Introduction to Federal Sentencing," Ninth Edition, by Lucien B. Campbell and Henry J. Bemporad.

B. Mandatory Minimums

Mandatory minimum punishments are statutes that require judges to sentence defendants to minimum sentences of imprisonment. Unlike sentencing guidelines, judges may only deviate from these minimum punishments if the exceptions are also created by statute.

For example, 21 U.S.C. § 841 creates an escalating system of mandatory minimum (and increased maximum) punishments, based upon drug quantity. Pursuant to 18 U.S.C. § 3553(e), judges may depart below those mandatory minimums if the government files a motion stating that the defendants have provided substantial assistance in the prosecution of others. Another exception is when defendants meet certain criteria based upon their lack of criminal history, lack of violence or injury, lack of role increase, and truthfulness. 18 U.S.C. § 3553(f) (known informally as "the safety valve"). The former exception applies to all types of offenses. The latter applies only to controlled substances cases.

There are mandatory minimum punishments for sexual exploitation of children, 18 U.S.C. § 2251 et seq.; aggravated identity theft, 18 U.S.C. § 1028A; and the possession of firearms in relation to crimes of violence or drug trafficking crimes, 18 U.S.C. § 924(c). In some cases, prior convictions create mandatory minimum sentences, such as when persons charged with being a felon in possession of a firearm have three prior convictions for violent felonies or serious drug crimes, 18 U.S.C. § 924(e) (Armed Career Criminal Act); or when persons charged with a serious violent felony have two prior convictions for the

same or one conviction for a serious violent felony and one for a serious drug offense. 18 U.S.C. § 3559(c) (Three Strikes Law).

The Career Offender provisions of the sentencing guidelines are not statutory. U.S.S.G. § 4B1.1. However, it can dramatically affect the sentences recommended in presentence reports. Therefore, counsel should always be certain to check defendants' criminal histories to see if there are two or more crimes of violence or controlled substance offenses. The terms, "crime of violence," "violent felony," "serious violent felony," "controlled substance offense," "drug trafficking crime," and "serious drug offense," all have different meanings and should not be used interchangeably.

C. State and Federal Sentences

When one sentence of confinement is to follow another in point of time, the second is deemed to be consecutive. Concurrent sentences are when two or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified. BLACK'S LAW DICTIONARY, Sixth Ed. (1990), pp. 304, 291. This interplay is important when federal defendants are also facing, or serving, state sentences.

A judge cannot force another jurisdiction to take possession of a defendant. Ponzi v. Fessenden, 258 U.S. 254, 260-61 (1922). Neither can a judge force another jurisdiction to give a defendant credit for time spent in that judge's jurisdiction. United States v. Wilson, 503 U.S. 329, 333 (1992). Comity requires that when the writ is satisfied, the second sovereign return the prisoner to the first sovereign. Therefore, when a state prisoner comes to federal court on a writ, his custody does not change. It is as if he has been borrowed, subject to return. The only way to change custody is for the primary jurisdiction (generally the state), to release the defendant. Therefore, preventing a consecutive sentence has nothing to do with the order in which the sentences of different jurisdictions are imposed. What matters is which jurisdiction has primary custody.

1. Federal Statutes

When a defendant is already subject to an undischarged sentence, 18 U.S.C. § 3584 gives federal courts discretion to impose additional consecutive or concurrent sentences, as long as the courts comply with the sentencing objectives of 18 U.S.C. § 3553(a). Section 3553's objectives take into account the nature and seriousness of the offense, kinds of

available sentences, policy statements of the guidelines, potential disparity, and the need for restitution.

There are exceptions to the rule allowing discretion. Attempts, and offenses that were the sole objective of the attempts, may not be consecutive. 18 U.S.C. § 3584(a). Convictions for possession of a firearm in relation to drug trafficking or violent crime must be consecutive to any other sentence. 18 U.S.C. § 924(c).

There are two presumptions under § 3584. First, multiple terms of imprisonment imposed at the same time are presumed to be concurrent, unless courts say otherwise. Second, multiple terms of imprisonment imposed at different times are presumed consecutive, unless courts say otherwise. If a court wants a different result, the judge must clearly state so in the judgment.

2. Sentencing Guidelines

Although no longer mandatory, when defendants have at least one prior undischarged sentence, there are three types of sentences contemplated by the sentencing guidelines. There are: (1) purely consecutive sentences, U.S.S.G. § 5G1.3(a); (2) purely concurrent sentences, U.S.S.G. § 5G1.3(b) and (3) hybrid sentences, U.S.S.G. § 5G1.3(c). An undischarged sentence means one that is currently in effect, whether the defendant is in custody or not. An undischarged sentence includes occasions when defendants have been previously convicted, but not yet sentenced. U.S.S.G. § 5G1.3(a). The basic premise, under the sentencing guidelines, has always been to achieve multiple sentences that would be similar to those imposed at a single proceeding. Witte v. United States, 515 U.S. 389, 404-05 (1995).

Under the guidelines, federal courts are supposed to impose sentences, consecutive to any undischarged terms of imprisonment, if the current federal offenses were committed during the undischarged sentences. Undischarged sentences include imprisonment, probation, parole, work release, furlough, or escape status. U.S.S.G. § 5G1.3(a). If new federal offenses did not occur during the undischarged sentences, and the undischarged sentences are relevant conduct to the instant offenses of conviction, then the federal sentences should be concurrent to the undischarged sentences. U.S.S.G. § 5G1.3(b).

3. BOP Regulations

The United States Attorney General, acting through the BOP, is responsible for calculating credit toward a federal sentence. Wilson, 503 U.S. at 333. Courts cannot calculate sentencing credit. The BOP will only credit defendants' previous time in custody toward a single sentence. Id. It will only credit time spent in a "jail-type facility." Reno v. Koray, 515 U.S. 50, 65 (1995). Presentence credit is governed by the principle that BOP will only apply credit toward a single sentence. Sentence credit depends upon when sentences have been imposed and if the defendants are in institutions designated for those sentences by the BOP. 18 U.S.C. § 3585(a).

Presentence credit for state offenses that were the same act as the federal offenses will be given, if that time is not credited toward other sentences. 18 U.S.C. § 3585(a). This only applies to identical acts charged in different jurisdictions, not merely charges arising from the same transactions. *Federal Prison System Statement (FPSS)*, No. 5880.28(3)(c). Presentence credit for arrests on unrelated offenses will only be given if the arrest occurred after the commission of the federal offenses, and if that custody is not credited toward any other sentences. 18 U.S.C. § 3585(b).

If judges do nothing to indicate the sentences run concurrent to unexpired state sentences, and the defendants are in state custody, the BOP may treat the sentences as consecutive and give the defendants no credit for time served until the defendants actually enter federal custody. 18 U.S.C. § 3584. The sentences for the current federal offenses will be credited from the day sentences are imposed. 18 U.S.C. § 3585(a). If BOP designates the state facilities as the place of confinement for the federal sentences, the sentences for state offenses will be credited from the date the federal sentences are imposed. 18 U.S.C. § 3621(b).

The sentences for other offenses that are not recommended to be concurrent, will not be credited toward the federal sentences, and will be treated as consecutive. 18 U.S.C. § 3584. No credit will be given for time in custody before the occurrence of the federal offenses. FPSS No. 5880.28(3)(c). BOP regulations will bar credit for prior custody when the defendant has prior unexpired sentences, to which this time has already been credited. FPSS No. 5880.28 (3)(c).

D. Presentence Reports

Even without mandatory guidelines, the presentence report is still the most important tool to get sentencing information to the court. This means that not only should counsel be vigilant about assuring that no inaccurate or slanted aggravating information is included, but that all relevant mitigating information is also presented. The information is derived primarily from the files of the Court, the prosecutor, the case agents, and pretrial services. The reports are confidential and may only be disclosed to the defendant, defense counsel, the prosecutor, and the BOP. NECrimR 32.0.2.

1. Aggravating Information

The USPO responsible for completing the presentence report will receive information from the prosecutor and directly from law enforcement agencies. This comes from reports, such as FBI 302s and DEA 6s. Although these reports are often supplemented, they do not necessarily provide a complete picture of the charged offenses. *Office of Probation and Pretrial Services Monograph 107* (“The Presentence Investigation Report”) (rev. March 2006), at III-10, states, “A simple recitation of the government’s version of events is inconsistent with the independent nature of this [offense conduct] section.”

For instance, at the beginning of a drug investigation a defendant may have been viewed as a conspiracy leader responsible for many kilos of illegal controlled substances. However, after discovering contradictions from their confidential informant, the agents may later downgrade the defendant to a minimal participant. This discrepancy is unlikely to be explained in a supplemental report, because the agents will not want there to be competing versions that could be used against them in another case.

Defendants are also a source of aggravating information. That is why defendants should never be left alone at a presentence interview. For the same reasons that defendants confess to the police, they volunteer information that may increase their sentences. The defendant will be interviewed by a USPO in virtually every case where a presentence report has been ordered. Defense counsel has a right to attend and counsel should always attend. [e.g., “Officers should never hesitate to question defendants about their financial condition. . .” *Office of Probation and Pretrial Services Monograph 107* (“The Presentence Investigation Report”) (rev. March 2006), at III-14)].

The federal sentencing guidelines say “that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction” for acceptance of responsibility. U.S.S.G. § 3E1.1 Note 1(a). “Acceptance of responsibility is distinguished from the offense conduct because an assessment of the defendant’s acceptance of responsibility focuses primarily on behavior occurring after law enforcement authorities have initiated an investigation or have arrested the defendant.” *Office of Probation and Pretrial Services Monograph 107* (“The Presentence Investigation Report”) (rev. March 2006), at III-14. However, lawyers must use their best judgment when advising a defendant to either answer questions or to refuse, because it is often a close call about what conduct must be admitted to fully accept responsibility. The FPD advises its clients not to answer any questions by the USPO regarding the offense or the defendant’s prior criminal history.

Defense counsel will generally have to wait to see the presentence report to attempt to correct erroneous aggravating information. However, to the extent it can be anticipated or prevented, counsel should make their concerns known to the USPO as early as possible. Even then, defense objections may be unresolved and end up in an addendum.

Neither the presentence report, nor the addendum, will advocate the defendant’s position. That is up to the defendant’s attorney. A reasoned sentencing memorandum should be filed in every case. This may be filed under seal to protect sensitive information.

2. Mitigating Information

When the federal sentencing guidelines were considered mandatory, the mitigation evidence considered in a noncapital federal sentencing hearing was limited. Many categories of information were discouraged and some were prohibited. Today, defense counsel should bring the Court’s attention to any mitigating fact that is conceivably covered by 18 U.S.C. § 3553(a).

This includes investigating each defendant’s background, and the circumstances of the offense, and looking for ways of explaining them. The government’s version may be that the defendant’s conduct was intentional and remorseless, and that there is nothing about the defendant’s history that gives any hope the defendant will change. Absent any mitigating information provided by the defense, this bleak version will likely end up in the presentence report and will ultimately be adopted by the court. After Booker, noncapital sentencing hearings should be approached more like those in capital cases, where all

mitigating evidence is considered essential to the defendant's representation. See Wiggins v. Smith, 539 U.S. 510 (2003).

Letters of reference are also helpful to show there are others who care about the defendant and will assist when the defendant returns to the community. However, do not have friends and relatives of the defendant merely send letters to the Probation Office. They will not be made part of the presentence report. It is better for the defense attorney to collect them, review them for appropriateness, and send them as a package to the sentencing judge.

3. Sentencing Hearing

Depending on the issues, a sentencing hearing can be very informal or an extensive adversary proceeding. FED. R. CRIM. P. 32(i). If there was a legally binding plea agreement, the Court will either accept it and impose a sentence accordingly, or allow the defendant to withdraw his plea. FED. R. CRIM. P. 11(c)(1)(C) and (5). If there were no objections to the presentence report, and the parties agree on an appropriate sentence, then a short proffer to the Court is usually sufficient.

However, if the sentencing issues are more complex there may be a need to call witnesses. For instance, after a guilty plea to participating in a large drug conspiracy, a defendant may have to contest the presentence report's assessments of role in the offense and the attributable drug quantity. This can require the direct and cross examinations of informants, co-defendants and law enforcement agents.

Once all the relevant facts are before the Court, defense counsel should make a record of any sentencing guideline issues that were found against the defendant. Even without mandatory guidelines, a misapplication of the guidelines can be grounds for reversal.

The defendant's right to address the judge at sentencing is called an allocution. FED. R. CRIM. P. 32(i)(4)(A). Counsel should discuss this option with the defendant well before the day of the hearing. A sincere statement accepting responsibility, and indicating that the defendant wants to improve, can positively influence a judge. However, evasions and remorseless explanations of their offense conduct will only make matters worse.

4. Types of Sentences

Sentences for individuals can be probation, a fine, or imprisonment. 18 U.S.C. § 3551. Felony probation may not be less than one year, nor more than five. 18 U.S.C. § 3561(c).

The maximum potential fine is based upon the statute of conviction. 18 U.S.C. § 3571(b). In cases where the defendant is found to be unable to pay a fine, it may be waived. 18 U.S.C. § 3572(a). Restitution is a form of compensation, not a fine, but in some cases it is mandatory. 18 U.S.C. § 3663A.

The maximum terms of imprisonment are either stated in the offense of conviction or they are based up the class of offense. 18 U.S.C. § 3581. Some crimes have mandatory minimum punishments. *E.g.*, 21 U.S.C. § 841, 18 U.S.C. § 924(c) and (e). Most federal crimes require imprisonment to be followed by a term of supervised release. 18 U.S.C. § 3583.

VII. Appeals

Defendants are told of their right to appeal by the Court at their sentencing hearing. FED. R. CRIM. P. 32(j). In every case in which a defendant requests an appeal, defense counsel *must* file an appeal. Failure to do so is ineffective assistance of counsel. However, there are cases in which there are no meritorious issues to be appealed. It is acceptable to explain to a defendant that an appeal would be without merit and discourage the client from pursuing the appeal. Often defendants do not understand that the court of appeals will only review legal errors. An appeal is not a new trial or new sentencing hearing. However, if a defendant will not accept his or her lawyer's evaluation, the lawyer must file a notice of appeal no later than 14 days from the entry of the judgment and sentence. FED. R. APP. P. 4(b). Simply ignoring the client's calls and letters is not an option.

In some cases, lawyers will file appeals because their clients demand an appeal, although the claim is frivolous. This is true even when a client signed a plea agreement waiving the appeal of the same sentence the defendant actually received. In those cases, the lawyer will need to file a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The brief examines all aspects of the case and explains why there are no meritorious issues for appeal. The procedure for such briefs, and their accompanying motions, is not simple. In some cases, they can be more time consuming than a brief on the merits. Examples of such materials can be obtained from the FPD.

Even when cases are affirmed in the court of appeals, a rehearing before the same panel or a rehearing en banc, before the entire court of appeals, may be filed. There is no procedural requirement that they be requested. There also remains the option of filing a petition for a writ of certiorari in the United States Supreme Court within 90 days from a final decision in the court of appeals. Only cases with significant constitutional or statutory questions are likely to receive review. If a defendant demands such a petition, and a lawyer believes it is without merit, the lawyer should ask permission from the Eighth Circuit to withdraw. However, counsel contemplating such a withdrawal should do so immediately, as delay could result in the lawyer having to file the petition for a writ of certiorari.

VIII. Prison

Although there are a handful of lawyers that specialize in the laws and procedures involving prison placement, sentence credit, and release, most criminal defense lawyers know very little about what happens to a defendant once a sentence of imprisonment becomes a final judgment. It is beyond the scope of this handbook to deal with all information affecting an imprisonment. This is only an attempt to cover some recurring issues. A more comprehensive guide is Alan Ellis', *Federal Prison Guidebook*, James Publishing (2008).

Unless a defendant's sentence is brief enough that it can be completed in the county jail, defendants are placed in a facility run by the Federal Bureau of Prisons (BOP). 18 U.S.C. § 3621(a). The decision of where to place an inmate is made by BOP. 18 U.S.C. § 3621(b). BOP relies primarily upon the Judgment and Sentence and the presentence report. *Office of Probation and Pretrial Services Monograph 107* ("The Presentence Investigation Report") (rev. March 2006), at III-18. Those documents are used to score each defendant's security level so they may be placed in a facility within that criteria. It also affects which BOP programs that the defendant may be eligible. Then BOP attempts to place the inmate in the lowest security facility for which they qualify, within a 500-mile radius of the defendant's release residence. FPSS No. 5100.07. A judge's recommendation will also be considered.

This means lawyers should make sure those documents are accurate. As stated in *Office of Probation and Pretrial Services Monograph 107* ("The Presentence Investigation Report") (rev. March 2006), at III-4, "Time spent in pretrial custody is critical information for the Bureau of Prisons in calculating the number of days of pretrial detention credited

to any sentence of imprisonment.” That item is listed on the first page of each presentence report.

BOP facilities are four security levels: minimum, low, medium, and high. There are also administrative facilities, such as medical centers. None of them have golf courses or tennis courts. An inmate could walk away from a minimum security facility, but in all likelihood, the prisoner will be recaptured and sent to a less desirable place. High security facilities are fortresses of cement and concertina wire. The Special Housing Unit (SHU) is a locked down portion of a facility for disciplinary violations and special protection.

There are a number of common misunderstandings about BOP programs. One area is the Residential Drug and Alcohol Program (RDAP). This program lasts 4 or 5 hours a day, five days a week, for nine months. It is available at about half of BOP facilities. However, many defendants are only interested in getting a year reduced from their sentences for completing the program. 18 U.S.C. § 3621(e). While most inmates are allowed to enter the program, there are many exclusions from receiving a reduced sentence, generally concerning the nature of their offense(s) of conviction. *See* FPSS No. 5330.10 and 5162.10. Also, while there is a maximum one year sentence reduction, the average decrease is significantly less.

Another point of confusion is shock incarceration or boot camp. This was a program of military type training that ultimately resulted in a reduced sentence upon completion. BOP has discontinued the program, although several federal judges have contested this unilateral action.

Release to a halfway house by the BOP typically precedes supervised release. BOP took the position that it could uniformly deny this type of community confinement to all inmates except those with six months left, or 10% of their sentence remaining. The Eighth Circuit held that the policy was arbitrary and struck it down.

Defendants can earn credit for satisfactory behavior, also known as “good time” credit, to be reduced from their time of imprisonment. 18 U.S.C. § 3624(b). After a defendant has served a calendar year, BOP will start calculating good time credits at 54 days for each year served. For that reason, a sentence from a judge of one year will require a defendant to serve more time in prisons than if the sentence was a year *and* one day.

IX. Supervised Release

Supervised release is a sentence to a term of community supervision to follow a period of imprisonment. 18 U.S.C. § 3583. Supervised release is mandatory only for certain offenses such as drug trafficking and sex offenses. Otherwise, it is discretionary with the sentencing judge. Unlike parole, it is not a form of early release, but a separate sentence in addition to imprisonment. After release from prison to supervised release, a defendant will be supervised by a probation officer. 18 U.S.C. § 3624(e).

Conditions of supervised release may be mandatory, standard, or special. Some examples of mandatory conditions are that the defendant commit no new federal, state, or local crime; that the defendant not unlawfully possess a controlled substance; or that the defendant allow the collection of a DNA sample. 18 U.S.C. § 3563(b). Examples of standard conditions are reporting to a probation officer; seeking or maintaining employment; or giving notice of a change of address or a new arrest. Special conditions are specific to the defendant's situation. For example, substance abuse treatment may be ordered for someone with an addiction, or financial counseling for a fraud offender.

Once defendants are on supervised release there is then the opportunity for them to be revoked. Supervision of defendants is based upon the "Risk Prediction Index" (RPI). The more the risk, the more scrutiny they get. Probationers, Parolees, and Supervised Releasees are subject to suspicionless and warrantless searches by USPOs. Sampson v. California, 126 S. Ct. 2266 (2006).

High severity violations may be felony conduct, chronic noncompliance with conditions, or possession of illegal drugs or firearms. These almost always result in a petition to the Court for revocation. Defendants may get a summons or an arrest warrant may be issued. It is not unusual for clients to get arrested when they show up for a scheduled meeting with their probation officer.

The hearing itself is much like a sentencing hearing. It may proceed by proffer or by calling witnesses. Often, the petition alleges repeat violations of the terms of release, such as not meeting with the probation officer, avoiding restitution, or failing to attend counseling. In those cases, the issue is usually whether the release should be revoked or modified, and if so, what the punishment or modification will be. When new criminal conduct is alleged, the petition is usually stayed until any other proceedings concerning their proof are resolved. For instance, the USPO may wait until a new state charge has been disposed of before filing a petition based on that conduct.