PRACTICE GUIDE FOR DEFENDING A FEDERAL CRIMINAL CASE

... My Other Book

2001 Edition

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Chapter 1: Overview of a Federal Criminal Case

1.00 OVERVIEW OF A FEDERAL CRIMINAL CASE

Welcome to federal court. Beware pretrial detention, the Speedy Trial Act and sentencing guidelines. In this chapter, we hope to provide you with an overview and areas to consider in representing an accused in federal court. The chapters that follow each address typical considerations in handling specific criminal offenses.

1.01 THE CRIMINAL JUSTICE ACT

Whether retained or appointed, the Criminal Justice Act, 18 U.S.C. §3006A et seq., should be considered. The Act provides for the creation of Federal Public Defender offices as well as Community Defender Organizations. See 18 U.S.C. §3006A(g). The Act also provides that private attorneys shall be appointed in a substantial portion of the cases. See 18 U.S.C. §3006A(a)(3). Many federal courts have developed lists of attorneys who are eligible and/or willing to accept federal appointments. These lists of lawyers are typically referred to as “CJA Panel Attorneys.” Some districts require certain standards and experience for lawyers to serve as CJA Panel Attorneys. Other districts have no requirements other than admission to the bar of the state. The continuing trend is the creation of federal public or community defender organizations in each district to handle a growing percentage of the work.

Your district court clerk’s office should have a copy of the local plan for implementation of the Criminal Justice Act which will provide details on appointment procedures. Volume 7 of “The Guide to Judiciary Policies and Procedures” contains the guidelines for appointing and reimbursing counsel. Most judges and court clerks, as well as federal defenders, should have this book available for your review.

1.01(a) EXPERT, INVESTIGATIVE AND OTHER SERVICES

The Criminal Justice Act provides for payment for services other than counsel, including expert and investigative services. See 18 U.S.C. §3006A(e). The total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred. 18 U.S.C. §3006A(c)(2). Application for these services should be made ex parte and include the reasons the services are required as well as the projected costs involved.

A sample ex parte application for other services can be found in Appendix, II.32– Ex Parte– Application for Services. These applications must be accompanied by a CJA Form 21, a copy of which is included at Appendix IV.2, Forms– CJA Form 21.

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1This chapter is prepared by Judy Clarke, Executive Director, Federal Defenders of Eastern Washington and Idaho.
Expert and other investigative services may also be available under the CJA to clients who have retained counsel. The standard is whether the defendant is able to afford the services. See 18 U.S.C. §3006A(e)(1).

1.01(b) TRANSCRIPTS

Transcripts are also available under the CJA. They can be obtained by the use of CJA Form 24, a copy of which is included in Appendix IV.1, CJA Form 24 approved by the court.

1.02 THE BASIC LIBRARY


The Federal Sentencing Guidelines are amended yearly (in November of each year) and West Publishing produces the new version each year, including the amendments. This book is a must and typically costs $12. It is also available through the government printing office at a higher cost.

In addition to these two necessary publications, there should be easy access to the following:

1. United States Code (Annotated) or the United States Code Service;

2. The Federal and Supreme Court Reporters;

3. Devitt and Blackmar on Federal Jury Instructions;

4. Your Circuit’s Pattern Jury Instructions (these may be available on the Internet under your circuit’s web page, e.g. the Ninth Circuit Pattern Instructions are available at www.ca9.uscourts.gov);


\(^2\)Federal Defenders Offices pay from their budgets for transcripts and do not need court authorization for transcripts.
(6) West’s Federal Practice Digests;

(7) Wright’s Federal Practice and Procedure (a West publication) or Orfield’s Criminal Procedure under the Federal Rules (Clark, Boardman, Callaghan);

(8) The Department of Justice Manual (this is available under www.usdoj.gov).

An excellent primer on federal criminal defense is the "Defending a Federal Criminal Case" manual published about every two years by Federal Defenders of San Diego, Inc. Also available from Federal Defenders of Eastern Washington and Idaho is "My Little Red Rules Book," a pocket size publication containing the Federal Rules of Evidence mostly annotated, select Federal Rules of Criminal Procedure and the Sentencing Table ($5). The Training Branch, Defender Services Division, Administrative Office of the U.S. Courts (formerly Federal Defender Training Group) has a variety of materials available to CJA panel attorneys. The Training Branch can be reached at 800-788-9908.

Access to Westlaw or Lexis is extraordinarily helpful and the costs are reimbursable under the Criminal Justice Act. The local federal defender office may have Westlaw and/or Lexis available to panel attorneys for use on appointed cases.

1.03 ARREST AND CHARGING DOCUMENTS

Many defendants are initially charged by complaint; others make their initial appearance pursuant to an indictment. The United States Attorney can decide to permit a summons from the court for the defendant to appear or a warrant for the defendant to be arrested and brought before the court.

The initial appearance on a complaint is pursuant to Fed. R. Crim. P. 5. The defendant is then entitled to a preliminary examination within ten days (if in custody) or within 20 days (if not in custody). See Fed. R. Crim. P. 5 and 5.1.


The filing of an indictment excuses the need for a preliminary examination because the grand jury has found probable cause by returning the indictment. See Fed. R. Crim. P. 5.1(c).

Arraignment on an indictment is pursuant to Fed. R. Crim. P. 10.

1.04 PRETRIAL SERVICES

In many districts, a pretrial services officer will interview the defendant before contact with counsel. Other districts permit counsel to interview and advise the defendant before the
pretrial services interview. The practice in a district is usually the practical issue—whether counsel is readily available.

If possible, counsel should be present at the pretrial interview in order to assist the defendant in avoiding later problems with statements and sentencing consequences.

The pretrial services report usually contains information relevant to bail or detention—ties to the community, employment and prior record. The report will typically contain a recommendation for conditions of release and/or detention.

Pretrial services officers may also be probation officers or they may be from an independent pretrial services agency.

Pretrial services were established under 18 U.S.C. §3152. The statute contains confidentiality requirements as set forth in 18 U.S.C. §3153(c). Except as otherwise provided, information obtained in the course of performing pretrial services functions in relation to a particular accused is to be used only for the purposes of a bail determination and is otherwise confidential. However, the exceptions may swallow the rule. The exceptions include access by probation officers for the purpose of compiling presentence reports and in limited cases by law enforcement agencies for law enforcement purposes. See 18 U.S.C. §3153(c)(2). Information made confidential is not admissible on the issue of guilt in a criminal judicial proceeding unless the proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failing to appear with respect to which pretrial services were provided. See 18 U.S.C. §3153(c)(3). The bottom line is that the information will make its way into the presentence report and can affect the sentence.

Forms used by pretrial services officers are included in Appendix IV.4, Pretrial Service Report and Appendix IV.5, Worksheet.

1.05 INITIAL CLIENT INTERVIEW

A sample initial client interview form is included in the Appendix IV.6, Client Interview Form. This form helps focus on information necessary for the initial appearance.

1.06 BAIL REFORM ACT PROCEDURES

The Bail Reform Act, 18 U.S.C. §3142 et seq. sets forth the procedures for determining whether the defendant will be released or detained pending trial. The Act contains a presumption of release on the least restrictive conditions. See 18 U.S.C. §3142(b). The Act sets forth 14 suggested potential conditions of release. 18 U.S.C. §3142(c). The judicial officer may not impose a financial condition that results in pretrial detention. 18 U.S.C. §3142(c)(2). If a financial condition is the only condition that will reasonably assure the defendant’s appearance and/or safety of the community, detention may result. See 1984 U.S.C.C.A.N. 19; United States
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v. Westbrook, 780 F.2d 1185 (5th Cir. 1986); United States v. Mauill, 773 F.2d 1479 (8th Cir. 1985) (en banc). “Nebbia” hearings to determine the source of collateral (United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966) have been codified. See 18 U.S.C. §3142(g)(4).

In certain circumstances, either the court or the government may move for pretrial detention. There are also provisions for temporary detention for a ten day period for those on conditional release, probation or parole or who are not citizens of the United States. See 18 U.S.C. §3142(d).

The government may move for detention where the case involves a crime of violence, an offense for which the maximum sentence is life imprisonment or death, a drug offense carrying a maximum term of imprisonment of ten years or more, or any felony committed after the person has been convicted of two or more of the above offenses. See 18 U.S.C. §3142(f)(1). The court and the government may move for detention where there is a serious risk of flight or a serious risk of obstruction of justice. See 18 U.S.C. §3142(f)(2).

There is a presumption that no condition can assure the safety of the community when the defendant has been convicted of an (f)(1) offense committed while on release pending trial and not more than five years have elapsed since the date of conviction or release from imprisonment, whichever is later. There is a second rebuttable presumption that no condition or combination of conditions will reasonably assure appearance and safety if the judicial officer finds there is probable cause to believe that the defendant committed a drug offense punishable by ten years or more or an offense under 18 U.S.C. §924(c) (carrying or using a firearm in the commission of a felony).

The presumptions have been interpreted as shifting only the burden of production and not the burden of persuasion to the defendant. United States v. Dillon, 938 F.2d 1412 (1st Cir. 1991); United States v. Martir, 782 F.2d 1141 (2d Cir. 1986); United States v. Dominguez, 783 F.2d 702 (7th Cir. 1986); United States v. Fortna, 769 F.2d 243 (5th Cir. 1985). This “burden of production” may require the defendant to produce some credible evidence showing reasonable assurance of appearance and/or no danger to the community. United States v. Carbone, 793 F.2d 559 (3d Cir. 1986).

The request for detention must be made at the defendant’s initial appearance and a hearing must be held within 3-5 days thereafter. See 18 U.S.C. §3142(f). The government may seek a three day continuance and the defendant may seek a five day continuance.

The factors to be considered in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community are set forth in 18 U.S.C. §3142(g). They are:

(1) the nature and circumstances of the offense including whether the offense is a crime of violence or involves a narcotic drug;
(2) the weight of the evidence against the person;

(3) the history and characteristics of the person including character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history of drug or alcohol abuse, criminal history and record of appearance at court proceedings;

(4) the nature and circumstances of the danger to any person or the community that would be posed by the person’s release.

The defendant may proceed by proffer and may confront witnesses. See 18 U.S.C. §3142(f). Most circuits permit the government to proceed by proffer. See United States v. Gaviria, 828 F.2d 667 (11th Cir. 1987); United States v. Martir, 782 F.2d 1141 (2d Cir. 1986); United States v. Delker, 757 F.2d 1390 (3d Cir. 1985); United States v. Fortna, 769 F.2d 243 (5th Cir. 1985). The court probably has discretion to issue a subpoena for a live witness. See United States v. Delker, 757 F.2d 1390 (3d Cir. 1985); United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985). The weight of the evidence is probably the least significant factor. United States v. Motamed, 767 F.2d 1403 (9th Cir. 1985).

In United States v. Salerno, 107 S.Ct. 2095 (1987), the Supreme Court upheld the Bail Reform Act against a facial constitutional challenge (due process). However, the opinion is significant in that it notes the “number of procedural safeguards” contained in the Bail Reform Act. The court referred to the detention hearing as a “full blown adversarial hearing” during which the government must convince a “neutral decision maker” that an individual should be detained. The court found that the extensive safeguards set forth in the Act were sufficient to repel the facial challenge.

In United States v. Montalvo-Murillo, 110 S.Ct. 2072 (1990), the court found that violation of the rigid time requirements of the Bail Reform Act did not require release of the defendant. The court placed emphasis on a “prompt” hearing sought immediately upon the government’s discovery of its delinquency. The opinion would seem to be limited to a brief, good faith or inadvertent delay that the government seeks to remedy by promptly seeking and moving forward with a hearing at the earliest possible time.

A detention order is subject to review under 18 U.S.C. §3145. It can also be appealed to the court of appeals under expedited procedures available in each circuit. See F.R.A.P. 9.

1.07 SPEEDY TRIAL ACT

The Speedy Trial Act, 18 U.S.C. §3161 et. seq., provides for specific time limits in which federal criminal cases are to be prosecuted and brought to trial. In general, the defendant must be indicted within 30 days from the date on which he or she was arrested or served with a summons in connection with federal charges and must be tried within 70 days of the filing date
of the information or indictment or the date of appearance on the information or indictment, whichever date is last. See 18 U.S.C. §3161(b) and (c)(1). There is a defense preparation period of 30 days during which the defendant may not be tried absent consent in writing. The 30 day period runs from the date on which the defendant first appears through counsel. 18 U.S.C. §3161(c)(2). An "arrest" is the actual charging of a federal offense, not simply a detention or charge by state or military authorities. United States v. Bloom, 865 F.2d 485 (2d Cir. 1989); United States v. Candelaria, 704 F.2d 1129 (9th Cir. 1983); United States v. Sayers, 698 F.2d 1128 (11th Cir. 1983).

There are certain periods of excludable time which can extend the 70 day arraignment to trial rule. These potential excludable time delays are set forth in 18 U.S.C. §3161(h). Failure to follow the time restrictions of the Speedy Trial Act will result in dismissal of the charges. See 18 U.S.C. §3162(a)(1) and (2). Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere waives the right to dismissal under §3162. Dismissal can be with or without prejudice and the factors to be considered are set forth in §3162.

The Supreme Court has addressed the Speedy Trial Act. In United States v. Rojas-Contreras, 106 S.Ct. 555 (1985), the court held that the Speedy Trial Act does not require that another 30 day preparation period be provided to the defendant upon the filing of a superseding indictment. The court noted that the district court has discretion to grant a continuance under §3161(h)(8) where further preparation time is necessary following a superseding indictment.

In Henderson v. United States, 106 S.Ct. 1871 (1986), the court held that the period of time from the filing of a pretrial motion (or the making of an oral motion) through the date on which the motion is ruled upon is excluded from the 70 day time period during which the defendant must be brought to trial.

In United States v. Taylor, 108 S.Ct. 2413 (1988), the Supreme Court addressed the factors which must be considered in determining whether a dismissal under the Speedy Trial Act is to be with or without prejudice.

The federal Speedy Trial Act is to be distinguished from the Speedy Trial Clause of the Sixth Amendment. The right to a speedy trial is protected by the Sixth Amendment to the United States Constitution. See United States v. MacDonald, 102 S.Ct. 1497 (1982). A defendant moving to dismiss an indictment based on a Sixth Amendment speedy trial claim must show some kind of actual prejudice. United States v. Lovasco, 97 S.Ct. 2044 (1977); United States v. Marion, 92 S.Ct. 455 (1971). A four part test will be applied in determining whether an indictment should be dismissed under the Sixth Amendment Speedy Trial Clause. See Doggett v. United States, 112 S.Ct. 2686 (1992); United States v. Loud Hawk, 106 S.Ct. 648 (1986); Barker v. Wingo, 92 S.Ct. 2182 (1972).
1.08 DISCOVERY

One of the most difficult problems in a federal criminal case is obtaining adequate discovery. Discovery is generally available under Fed. R. Crim. P. 16. However, discovery is limited in most federal cases. Rule 16 provides access generally to statements of the defendant, criminal record of the defendant, physical evidence, scientific reports and summaries of expert testimony as well as the bases for expert opinions.


There are also constitutional requirements for discovery. The prosecutor has the duty to disclose, at least upon request, all favorable evidence to the defendant which is “material either to guilt or punishment.” Brady v. Maryland, 83 S.Ct. 1194 (1963); United States v. Bagley, 96 S.Ct. 2392 (1985). A defendant’s request for information must be specific. United States v. Agurs, 105 S.Ct. 3375 (1976). The government does have an obligation to give exculpatory evidence. See Kyles v. Whitley, 115 S.Ct. 1555 (1995).

Other rules touch on discovery. See Fed. R. Crim. P. 6(e) (grand jury transcripts); Rule 7(f) bill of particulars; Rule 12(i) (production of statements at suppression hearings); Rule 15 (depositions); Rule 17 (subpoenas); Rule 17.1 (pretrial conferences).

There are certain reciprocal obligations on the defendant. For example, when a Rule 16 request is invoked, the defendant may also have a reciprocal obligation. See Fed. R. Crim. P. 16(b). The defendant must also provide certain information regarding an alibi defense upon request. See Fed. R. Crim. P. 12.1. The defendant has an affirmative duty to notify of an insanity or mental condition defense. See Fed. R. Crim. P. 12.2. The defense must give notice of an intent to rely on a public authority defense. Fed. R. Crim. P. 12.3. Fed. R. Crim. P. 26.2 requires the production of defense witness statements, with the exception of the defendant’s statement.

Many districts have standing discovery orders that provide encouragement to prosecutors to provide discovery at early stages, including witness statements.

Defense lawyers must aggressively pursue discovery and seek the setting of time limitations.

For a sample discovery letter that may also be converted into a motion, see Appendix II.20, Discovery Letter.
1.09 PRETRIAL MOTIONS

Most districts have time limitations for the filing of pretrial motions and certain notice requirements. Motions will normally be made to seek specific relief, e.g., suppression, severance, discovery but may also be made to educate the court or cause the prosecutor to more closely evaluate the case.

Certain motions must be brought pretrial or they will be considered waived. See Fed. R. Crim. P. 12.

An evidentiary hearing is appropriate where factual issues exist. See United States v. Diceare, 765 F.2d 890, 895-96 (9th Cir. 1985) (failure to grant hearing requires reversal); United States v. Pena, 961 F.2d 333 (2d Cir. 1992) (evidentiary hearing needed where probable cause based on informant’s tip). An evidentiary hearing can be valuable not only in seeking the relief sought, but also in obtaining discovery and locking in the testimony of government witnesses. Also, Fed. R. Crim. P. 26.2 and 12(i) provide for production of witness statements at pretrial hearings.


It is probably the rare case where the defendant should testify at a pretrial hearing. This is so because before a judge alone, the defendant will usually lose the credibility battle against a law enforcement officer. In addition, the prosecution gets a free crack at cross examination. The primary time a defendant may need to testify pretrial (unless an affidavit can be used) is to establish standing to suppress. See United States v. Salvucci, 100 S.Ct. 2547(1980); Rawlings v. Kentucky, 100 S.Ct. 2556 (1980). In that situation, care must be taken to limit the testimony to the issue of standing.

Testimony of a defendant at a suppression hearing may not be used against him or her in the government’s case in chief at trial. Simmons v. United States, 88 S.Ct. 964 (1968). However, the testimony may be used to impeach. Harris v. New York, 91 S.Ct. 643 (1971).

Following are some basic pretrial motions to consider. Many of these motions are discussed in the chapters on specific offenses and are contained in the Appendix.

- Motion for CIA Assistance (Ex Parte)
- Motion For Second Counsel, Investigator, or Expert
  See Ake v. Oklahoma, 105 S.Ct. 1087 (1985)(state must provide expert psychiatric services when the defendant’s sanity at the time of the offense is likely to be a significant factor at trial); and United States v. Fields, 709 F.2d 1518 (9th Cir. 1993) (requiring the
district court to authorize defense expert services when a reasonably competent attorney would engage such services having independent means to pay for them).

- Motion to Seal CIA Form 23 (Financial Statement of Client)

  **See** Guide to Judiciary Policies and Procedures Volume VII Chapter II Section A (judicial inquiry into financial eligibility shall not be utilized as a forum to discover whether a person has assets subject to forfeiture, or ability to pay a fine or make restitution).

- Motion to Suppress Evidence

  **See** *Weeks v. United States*, 34 S.Ct. 341 (1914) (finding the exclusionary rule applies to federal courts); *Mapp v. Ohio*, 81 S.Ct. 1684 (1961) (extending the exclusionary rule to the states); and *United States v. Leon*, 104 S.Ct. 3430 (1984) (creating the good faith exception to the exclusionary rule).

- Motion to Suppress Statements


- Motion to Conduct or Suppress Pretrial Identification

  **See** *Stovall v. Denno*, 87 S.Ct. 1967 (1967) (due process requires that the lineup not be unnecessarily suggestive); and *United States v. Wade*, 87 S.Ct. 1926 (1967) (Sixth Amendment right to counsel exists at post indictment, pretrial lineup).

- Motion to Dismiss Because of Illegal Grand or Petit Jury Selection

  **See** *Taylor v. Louisiana*, 95 S.Ct. 692 (1975) (fair cross section of the community is an essential component of the Sixth Amendment right to a jury trial); *Duren v. Missouri*, 99 S.Ct. 664 (1979) (fair cross section required); and *United States v. Hobby*, 104 S.Ct. 3093 (1984) (requiring a fair cross section of the community in grand jury selection).

- Motion to Dismiss Based on Estoppel

  **See** *Ashe v. Swensen*, 90 S.Ct. 1189 (1970) (collateral estoppel is embodied in the Fifth Amendment protection against double jeopardy); and *Sealfon v. United States*, 68 S.Ct. 237 (1948) (collateral estoppel in criminal cases is not to be applied with hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality).

- Motion to Dismiss for Lack of Jurisdiction

  **See** *Duro v. Reina*, 110 S.Ct. 2053 (1990) (criminal jurisdiction in Indian country is governed by a complex patchwork of federal, state, and tribal law); *United States v. John*, 98 S.Ct. 2541 (1978) (federal jurisdiction over the offenses covered by the Major Crimes Act is exclusive of state jurisdiction); *United States v. McBratney*, 104 U.S. 621, 14 OTTO 621 (1881) (crimes committed against non-Indians by non-Indians in Indian country are subject to the jurisdiction of the states); and *Oliphant v. Suquamish Indian Tribe*, 98 S.Ct. 1011 (1978) (non-Indian who commits a crime against an Indian in Indian country is subject to federal jurisdiction).
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- Motion to Dismiss or Strike Predicate Counts

- Motion to Dismiss for Multiplicity or Duplicity

- Motion to Dismiss for Former Jeopardy
  See United States v. Dixon, 113 S.Ct. 2849 (1993)(double jeopardy prosecution applies to successive punishments and to successive prosecutions for the same criminal offense); Oregon v. Kennedy, 102 S.Ct. 2083 (1982) (jeopardy can attack where prosecutor intentionally provokes mistrial); Cris v. Brentz, 98 S.Ct. 2156 (1978)(federal rule that jeopardy attaches when the jury is sworn applies to the states); Abney v. United States, 97 S.Ct. 2034 (1977)(no person shall be subject for the same offense to twice put in jeopardy of life or limb); United States v. Dinitz, 96 S.Ct. 1075 (1976) (double jeopardy clause does not bar retrial when mistrial granted from defense motion, absent government bad faith); and Richardson v. United States, 104 S.Ct. 3081 (1984) (no double jeopardy following a hung jury).

- Motion to Dismiss for Lack of Probable Cause
  See Albright v. Oliver, 114 S.Ct. 807 (1994) (prosecution that lacks probable cause violates the Fourth Amendment not substantive due process).

- Motion to Dismiss for Vagueness or Overbreadth

- Motion to Dismiss under Rule 48(b)
  See United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976) (indictment may be dismissed due to unnecessary delay in prosecution).

- Motion to Dismiss for Violation of the Petite Policy
  See Petite v. United States, 80 S.Ct. 450 (1960) (enforcing government policy to not expose defendant to successive prosecutions when multiple offenses arise out of a single transaction).

- Motion to Dismiss for Selective or Vindictive Prosecutions
  See Wayte v. United States, 105 S.Ct. 1524 (1985) (selective prosecution claims to be reviewed under equal protection standards); and Blackledge v. Perry, 94 S.Ct. 2098 (1944)(vindictive prosecutions).

- Motion to Dismiss for Loss or Destruction of Evidence

- Motion to Dismiss for Outrageous Governmental Misconduct
  See Hampton v. United States, 96 S.Ct. 1646 (1976) (recognizing the possibility of an outrageous governmental misconduct defense).
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- Motion for Discovery
- Motion to Preserve Notes, Reports, and Evidence
- Motion for Grand Jury Transcript
  See United States v. Wallace, 528 F.2d 863 (4th Cir. 1976)
- Motion for Witness Statements Three Weeks Before Trial
  See Fed. R. Crim. P. 26.2(a)
- Motion to Produce Personal Records of Government Witnesses
  See United States v. Greer, 939 F.2d 1076 (5th Cir. 1991)
- Motion to Inspect Evidence and View Scene
  See Harris v. United States, 261 F.2d 792 (9th Cir. 1959)
- Motion for Equal Access to Evidence
  See United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983) (fairness requires that notice be given to defense to check the findings and conclusions of government experts).
- Motion to Disclose Sentencing Evidence Prior to Plea of Guilty
  See Brady v. Maryland, 83 S.Ct. 1194 (1963) (government must disclose evidence specifically requested by the defense which is material to guilt or punishment).
- Motion to Take Deposition of a Witness (Rule 15)
  See United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972) (deposition may be ordered if the witness will not be available at trial).
- Motion for Bill of Particulars
  See Will v. United States, 88 S.Ct. 269 (1967) (the district court has broad discretion in ordering the government to provide a bill of particulars).
- Motion of Transcripts of Prior Proceedings
- Motion for Brady Material
  See Brady v. Maryland, 835 S.Ct. 1194 (1963) (government must disclose evidence specifically requested by defendant which is material to guilt or punishment); and United States v. Bagley, 105 S.Ct. 3375 (1985) (government's failure to disclose evidence violates due process if the undisclosed evidence is material to guilt or punishment); Kyles v. Whitley, 115 S.Ct. 1555 (1995).
- Motion for Severance of Defendants or Counts
  See Bruton v. United States, 88 S.Ct. 1620 (1968) (severance of co-defendants trial necessary to avoid confrontation clause violation); and United States v. Droms, 566 F.2d 361 (2d Cir. 1977) (court must sever counts to avoid duplicity).
- Motion to Dismiss for Lack of Speedy Trial
  See United States v. Taylor, 108 S.Ct. 2413 (1988) (in determining whether to dismiss criminal prosecution for violation of Speedy Trial Act, district court must carefully consider specific statutory factors as applied to the particular case, and articulate clearly their effect in rendering its decision); Henderson v. United States, 106 S.Ct. 1871 (1986)(Speedy Trial Act exclusion from any pretrial motion is not limited to reasonably necessary delay).
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- Motion to Recuse Judge
  See In Re Murchison, 75 S.Ct. 623 (1955) (due process requires that the judge not appear biased).

- Motion to Recuse or Disqualify the Prosecutor
  See 18 U.S.C. §208 (improper for a prosecutor to participate in a case when he has a pecuniary interest in the outcome); and United States v. Goot, 894 F.2d 231 (7th Cir. 1991) (there is a distinction between what may be inappropriate ethical conduct for a prosecutor and what may be a constitutional violation).

- Motion to Strike Aliases
  See United States v. Beadle, 463 F.2d 721 (3d Cir. 1972) (aliases should be stricken from the caption on the indictment before reaching the jury).

- Motion to Strike Surplusage
  See Fed. R. Crim. P. 7(d) (the court on motion of the defendant may strike surplusage from the indictment or information); and, United States v. Huppert, 917 F.2d 507 (11th Cir. 1990) (words will not be stricken from the indictment unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial).

- Motion for Private Interview Room with Client
  See Bach v. Illinois, 504 F.2d 1100 (7th Cir. 1974) (opportunity to communicate privately with an attorney is an important part of meaningful access to the courts).

- Motion for Defendant to Proceed Pro Per
  See Faretta v. United States, 95 S.Ct. 2525 (1975) (defendant has a Constitutional right to proceed without assistance of counsel).

- Motion to Withdraw Because of Conflict of Interest

- Motion for Rule 17(b) Subpoenas (Ex Parte)

- Motion to Disclose Informant and Basis for Reliability
  See Roviaro v. United States, 77 S.Ct. 623 (1957) (government must disclose an informant’s identification if informant actually participated in or was a witness to the criminal activity).

- Motion for Change of Venue
  See Ehrlichman v. Sirica, 95 S.Ct. 6 (1974) (court has discretion to change venue to avoid prejudicial impact of pre-trial publicity); Irvin v. Dowd, 81 S.Ct. 1639 (1961) (change of venue required for actual prejudice); and Murphy v. Florida, 95 S.Ct. 2031 (1975) (change of venue appropriate where pretrial publicity creates inherent prejudice).

- Motion for Jury Trial
  See Bloom v. Illinois, 88 S.Ct. 1477 (1968) (no jury trial for petty offenses); Baldwin v. New York, (1970) (offenses are petty if they carry punishment of less than six months imprisonment and less than a $500.00 fine).

- Motion to Compel Performance of Plea Bargain
  See Santobello v. New York, 92 S.Ct. 495 (1971) (the district court should compel
performance of the plea bargain when the government attempts to renege).

- Motion for Hearing on Competency (Time of Offense or Trial)
  See Dröp-p v. Missouri, 95 S.Ct. 896 (1975) (due process requires the district court to hold a competency hearing when there is sufficient doubt as to the defendant's competence to stand trial); and Pate v. Robinson, 86 S.Ct. 836 (1966) (unlike the insanity defense, the defendant's competency to stand trial is determined by defendant's state of mind at the time of trial).

- Motion for Special Verdicts
  See United States v. Romo, 914 F.2d 889 (7th Cir. 1990) (while special interrogatories or verdicts are generally not favored in criminal cases, they are permitted).

- Motion for Pretrial Conference
  See Fed. R. Crim. P 17.1 (the court may, on motion of either party or on its own motion, order a pretrial conference).

- Motion in Limine

- Motion to Exclude Bad Acts or Convictions
  See Hudde-llston v. United States, 108 S.Ct. 1496 (1988) (other act evidence may be admitted if there is sufficient evidence to support a finding by the jury the defendant committed the similar act); and Dowling v. United States, 110 S.Ct. 668 (1990) (prior act evidence is admissible even though the defendant was acquitted of the prior act).

- Motion to Admit Polygraph Results
  See Daubert v. Merrell Dow, 113 S.Ct. 2786 (1993) (general acceptance is not a precondition to admissibility of scientific evidence under Federal Rules of Evidence); and United States v. Falsia, 724 F.2d 1339 (9th Cir. 1983) (trial court has discretion to admit polygraph tests).

- Motion for Personal Voir Dire and Jury Questionnaires
  See Gomez v. United States, 109 S.Ct. 2237 (1989) (judge cannot delegate task of selecting a jury to a magistrate without the defendant's consent); and United States v. Levin, 467 F.2d 1132 (7th Cir. 1972) (judge does not have unlimited discretion to ignore proposed questions, nor to arbitrarily refuse such questions).

1.10 PRETRIAL CONFERENCES

Fed. R. Crim. P. 17.1 provides for the setting of a pretrial conference. These conferences can be valuable hearings to discuss evidentiary or discovery problems. Motions in limine may also be considered at this time.

1.11 MOTIONS IN LIMINE

Motions in limine are brought to limit the introduction of evidence. Evidentiary issues faced in the typical federal criminal case include the admission of the defendant's prior record (See FRE 609), prior bad acts (FRE 404(b)) or co-conspirators statements (FRE 801(d)(2)(E)).
Many other evidentiary issues can be raised in limine—hearsay, relevancy problems and problems with unduly prejudicial evidence.

Each district court should have procedures for in limine motions.

For sample motions, in limine, see Appendix II.39, In Limine—404(b)—General; et. seq.

1.12 SUBPOENAS

Witnesses and documents can be subpoenaed to pretrial hearings as well as trial under Fed. R. Crim. P. 17. Unless the court approves otherwise, subpoenas are to bring witnesses and/or documents to the hearing at which the witness or document has relevancy. See Fed. R. Crim. P. 17(b) and (c). In order to obtain prehearing production, the moving party must show that (1) the documents are evidentiary and irrelevant; (2) they are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend to unreasonably delay the trial; and (4) the application is made in good faith and is not intended as a general fishing expedition. United States v. Nixon, 94 S.Ct. 3090 (1974).

Counsel appointed under the Criminal Justice Act should make ex parte, sealed application for subpoenas.

For sample motions, see Appendix II.34, Ex Parte (Witness) and Appendix II.35, Ex Parte Motion (Subpoena).

1.13 THE JURY PANEL

Jurors are drawn pursuant to the district court jury plan and 28 U.S.C. §1861-1871. In Test v. United States, 95 S.Ct. 749 (1975), the Supreme Court held that a defendant has the right to inspect juror records in order to file a challenge to the composition of the venire.

Most districts draw jurors from voter registration lists. Some districts have expanded to drivers licenses. The statute, 28 U.S.C. §1863, permits the district courts to develop their own plans for jury selection.

The right to a trial by jury contemplates that an impartial jury will be drawn from a fair cross section of the community. Taylor v. Louisiana, 95 S.Ct. 692 (1975); Thiel v. Southern Pacific Company, 66 S.Ct. 984 (1946). The Jury Selection and Service Act entitles a federal criminal defendant to a jury selected at random from a fair cross section of the community, free from discrimination on the basis of race, color, religion, sex, national origin or economic status. 28 U.S.C. §1861-1862. To establish a prima facie violation of the fair cross section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive group” in the community; (2) that the representation of this group in venires from which juries are selected is
not fair and reasonable in relation to a number of such persons in the community; (3) that this under representation is the result of systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 99 S.Ct. 664 (1979).

### 1.14 JURY SELECTION

Most federal courts have basic information on the potential jurors available for a review by counsel. Some courts utilize a jury questionnaire, which may be made more extensive in any given case. These cards or questionnaires are usually available a day or two before trial.

Counsel may also consider requesting that a questionnaire be used. Questionnaires may be tailored to the individual case.

The juror questionnaire form used in the Eastern District of Washington is included in Appendix IV.9, Juror Questionnaire.

#### 1.14(a) VOIR DIRE

Under Fed. R. Crim. P. 24, federal judges have the discretion to conduct voir dire and to permit counsel to participate. Many federal judges have begun to permit 15-20 minutes of attorney conducted voir dire.

Counsel should submit questions to the court as well as request limited attorney conducted voir dire on some of the more sensitive issues in the case.

For a sample request for voir dire and voir dire questions, see Appendix 11.94, Voir Dire—Judge Requested.

#### 1.14(b) JURY SELECTION PROCEDURES

A common method of jury selection in federal court is the "struck system" or the "Arizona system" of jury selection. Under this system, a panel of 30-40 prospective jurors are called to the court room and given the oath by the clerk of the court. Of this number, 28 names are called. There may be three or more names called from which alternate jurors will be selected. The 28 or more individuals will be questioned and will remain as the pool from which selection will be made unless there are challenges for cause. The prosecution has six peremptory challenges and the defense has ten peremptory challenges. See Fed. R. Crim. P. 24(b). The court may grant additional peremptory challenges. Once the challenges are exercised, the first 12 names will become the jury and up to six alternates may be selected.

Another common federal jury selection method is the "modified struck system" in which only 12 members from the venire are brought forward and questioned. Both counsel are given an opportunity to exercise challenges for cause and when the 12 are passed for cause, one side is
given the opportunity to exercise a peremptory challenge to excuse a prospective juror and another is seated in the excused juror’s place. Once the new juror is questioned, and if passed for cause, another peremptory challenge is exercised. As soon as all of the peremptory challenges are used, the 12 sitting in the box become the jurors for the case. Alternates may be selected in a similar manner.

In a series of cases following Batson v. Kentucky, 106 S.Ct. 1712 (1986), the Supreme Court extended restrictions on race based challenges to gender and also restricted the defense exercise of peremptory challenges.

In Batson, the Supreme Court held that purposeful racial discrimination in the selection of an individual jury violates a defendant’s right to equal protection by denying him or her the protection a trial by jury is intended to secure. The defendant must establish a prima facie case of purposeful discrimination and the burden shifts to the government to establish a neutral basis for the challenge.

In Powers v. Ohio, 111 S.Ct. 1364 (1991), the Supreme Court found that a defendant in a criminal case may raise a third party equal protection claim for jurors excluded based on race.

In Georgia v. McCollum, 112 S.Ct. 2348 (1992), the Supreme Court held that the constitution likewise prohibits a criminal defendant from engaging in purposeful, racial discrimination in the exercise of peremptory challenges.

The restriction on racial based challenges was extended to gender based challenges in J.E.B. v. Alabama, 114 S.Ct. 1419 (1994).

1.15 THE TRIAL

There is nothing peculiarly different about the actual trial of a federal case from the trial of the state criminal case. The surroundings are usually more formal and many federal judges require lawyers to remain at the podium.

Counsel should always check with the courtroom deputy or law clerk on the particular procedures for the trial judge. It is wise to know the court’s position on the use of demonstrative evidence during opening statements and how the court marks and admits its exhibits. As electronic courtrooms become the norm, counsel should familiarize themselves with creative use of the technology.

A motion for judgment for acquittal (whether it is realistic or not) must be made at the close of the government’s case and renewed at the close of the defense case. See Fed. R. Crim. P. 29. Failure to make the Rule 29 motion can result in the waiver of certain issues on appeal. See e.g. United States v. Baxley, 982 F.2d 1265 (9th Cir. 1992); United States v. Kuball, 976 F.2d 529 (9th Cir. 1992).
Motions for severance must be renewed during trial at the time the severance related problem is presented. If not renewed at trial, a severance motion may be deemed waived even if it was properly filed pretrial. See e.g. United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994).

Under Fed. R. Crim. P. 29.1, after the close of the evidence, the prosecution opens the argument; the defense is permitted to reply; the prosecution is then permitted to reply in rebuttal.

1.15(a) THE TRIAL NOTEBOOK – CHECKLISTS AND FORMS

You’ve probably watched them – the lawyer who touches the stack of reports and knows which pages contain the impeachment material – the lawyer who has an associate or paralegal magically pull the right file for the cross examination – and then there are the rest of us who struggle on our own to get ready for trial. In the spirit of Thomas Edison’s “Rule of Genius”, 99% perspiration and 1% inspiration – the following Checklists and other Forms for Trial Preparation are offered. The forms are reprinted in Appendix 1, 1-10, Trial Prep Aids.

I. Index to Trial Notebook

Many lawyers organize by file folder, others by three ring binder. Some use a combination of the two systems. The following index is a suggested approach:

<table>
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<th>INDEX TO TRIAL NOTEBOOK</th>
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<tr>
<td>1. Investigation/To Do</td>
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<td>2. Indictment/Complaint</td>
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<td>3. Legal Issues/In Limine Motions</td>
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<td>4. Government Witnesses</td>
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<td>5. Physical Evidence</td>
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<td>6. Defense Witnesses</td>
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<td>7. Opening</td>
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<td>8. Closing</td>
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<td>9. Exhibit List</td>
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<td>10. Voir Dire Questions</td>
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<tr>
<td>11. Jury Instructions</td>
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<tr>
<td>12. Major Errors</td>
</tr>
</tbody>
</table>

(1) Investigation/To Do. This section should contain your notes on investigation and follow up that is necessary in the case. It will also serve as your brainstorming section, a place to jot down ideas as they occur in the course of preparing the case for trial. The “to do” list should be checked periodically to make sure the case is ready.

(2) Indictment/Complaint. This is a convenient place to find the charging documents. Many times, lawyers forget to focus on the charge actually involved. The complaint also contains a statement of facts sworn to by one of the investigating officers.
(3) Legal Issues/In Limine Motions. Every case has evidentiary problems. There will be evidence the defense will want to exclude and evidence the defense may have difficulty admitting. This is a good place to keep legal research and thoughts on evidentiary problems. The actual motion in limine that is filed with the court may also be stored in this section. It may be easier for reference purposes to keep the actual file stamped copy of the motion(s) in a separate, labeled file folder.

(4) Government Witnesses. This section contains witness statements and notes for examination of witnesses. The witness statements can be separately indexed, either by subject matter or alphabetically. Within each witness section should be your notes on areas to examine, your image goals for the witness and all impeaching documents. If there are too many documents or the size is unmanageable for any particular witness, you can supplement with a labeled file folder.

(5) Physical Evidence. This section can contain a listing of the physical evidence seized by the government and the usual xeroxed copies of the photographs that you cannot see anyway.

(6) Defense Witnesses. This section is similar to the government witness section, but typically will only contain your notes (and those of your investigator) regarding what witnesses have told you. This section should also contain your notes for direct examination, as well as problem areas for cross examination prep.

(7) Opening. This section will contain notes for your opening statement as well as the notes you take of the prosecutor’s opening statement. Many times you may want to remind a jury during closing of a prosecutor’s unfulfilled promises made during opening.

(8) Closing. This section will contain your notes for closing argument as well as notes of the prosecutor’s closing argument. It is a good place to note facts as they arise at trial that support your closing argument.

(9) Exhibit List. This section is to keep the government’s exhibit list, as well as a listing of defense exhibits. It provides for an easy reference at the close of the case to make sure exhibits have been moved into evidence.

(10) Voir Dire. Notes for attorney conducted voir dire as well as proposed voir dire questions for the court are kept in this section. It may be easier to keep the file stamped voir dire filing in a separate labeled folder.

(11) Jury Instructions. This section is for notes on jury instructions to request. Again, as with voir dire and in limine motions which are filed with the court, it may be easier to keep these documents in a separate labeled file folder. The defense should always remember to prepare a theory of defense jury instruction.
(12) **Major Errors.** This is a section to note trial errors as they occur. It is helpful with mistrial motions based on a combination of errors and also provides a place to note errors to raise at the next recess. This section will also help with the appeal.

II. **Pretrial Checklist**

The Pretrial Checklist is a handy reminder of things that must be done in preparation for trial. This list should be modified for the particular requirements of your jurisdiction.
### PRETRIAL CHECKLIST

1. **Investigation**
   - Investigator Memos
   - Witness Interviews
   - View Scene
   - Review Seized Evidence
   - Weigh/Test Drugs
   - Character Witnesses
   - Defendant's Family

2. **Discovery**
   - Letters to Prosecutor
   - Omnibus Form
   - Motions
   - Compliance Dates
   - Reciprocal Discovery

3. **Pretrial Motions**

4. **Demonstrative Evidence**
   - Opening
   - Testimony
   - Closing

5. **Exhibits**
   - Tags
   - List
   - Review Gov't Exhibits
   - Copies for Court/Prosecutor

6. **Stipulations**
   - Chemist/Chain of Custody
   - Foundations

7. **Motions In Limine**
   - Bad Act Evidence
   - Prior Convictions
   - *Prejudicial v. Probative*

8. **Other**
   - Subpoenas
   - Out of District
   - Duces Tecum
   - Writs
   - Parole Letters

9. **Prosecutors Trial Memo**

10. **Witness Preparation**
    - Direct
    - Cross
    - Witness Statements
    - Impeachment
    - Documents
    - Tapes
    - Transcripts
    - Reports

11. **Jury Instructions**
    - Standard
    - Theory of Case
    - Modified

12. **Voir Dire**
    - For Court
    - Attorney Questions
    - Jury List
    - Juror Information Cards
    - Other Information on Jurors

13. **Review Court File**

14. **Clothes for Defendant**

### III. Investigator Assignment Sheet

Lawyers often fail to give adequate direction to investigators with regard to what they want. Many times, this failure of direction is a result of having no direction. Writing a memorandum to the investigator is often helpful, not only in giving guidance to the investigator,
but in helping the lawyer get focus.

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<tr>
<th>TO:</th>
<th>DATE:</th>
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<td>FROM:</td>
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<td>DATE DUE:</td>
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<tr>
<td>LOCATION OF DEFENDANT/IDENTIFYING INFO:</td>
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<th>TYPE OF CASE:</th>
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**INVESTIGATION REQUIRED:**

- [ ] Interview Defendant
- [ ] Locate/Interview Other Witnesses
- [ ] Bail Work
- [ ] Registration Check
- [ ] Warrants/Holds
- [ ] Car Inspection
- [ ] Record Check
- [ ] Pictures
- [ ] Background Check
- [ ] Examine Scene/Evidence
- [ ] Arrange Polygraph
- [ ] Prepare Charts/Maps/Diagrams
- [ ] Material Witness
- [ ] Subpoenas
- [ ] Interviews
- [ ] Other

**LOCATION OF INVESTIGATION/TRAVEL REQUIRED:**

**DETAILED INSTRUCTIONS:**

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**IV. Demonstrative Evidence Checklist**

Like the Pretrial Checklist, this Demonstrative Evidence Checklist is simply a review of things that could be done in the case with regard to demonstrative evidence. Computers can do marvelous things for demonstrative evidence, including drawing diagrams and duplicating
pictures. Also, counsel should always consider enlarging pictures and diagrams. Most photo developing companies can provide an enlargement at very little cost. Many copy shops can provide color photo blow ups at marginal cost.

<table>
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<tr>
<th>CHECKLIST FOR DEMONSTRATIVE EVIDENCE</th>
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<tr>
<td>1. Photographs</td>
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<td>2. Slide Show</td>
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<td>3. Diagrams</td>
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<td>4. Charts</td>
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<td>5. Maps</td>
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<td>6. Police Reports</td>
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<td>7. Transcripts</td>
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V. Witness Instructions

Defense witnesses are rarely experienced courtroom players. They must be prepared for the experience. The Witness Preparation Checklist is simply something for witnesses to read, or a checklist for the lawyer preparing a witness. There are many techniques, ranging from the actual practice in a witness chair with practice cross examination to the more informal review of the questions with the witness. However, the lawyer should always prepare the witness for the experience and the examination.
CHECKLIST: Witness Preparation

1. Your appearance is almost as important as what you have to say. Wear clean clothes in court and dress conservatively.

2. You should stand up straight when taking the oath and say, “I Do” clearly. Remember to sit up straight in the witness chair and be careful not to slouch or lean on the stand.

3. Don’t have anything in your mouth such as gum, candy, or toothpicks.

4. Out of courtesy, keep your voice up so that no one has to ask you to repeat. Don’t put your hand over you mouth.

5. Testify in a confident, straightforward manner--this makes the jury have more faith in what you are saying.

6. Don’t memorize what you are going to say.

7. Be serious at all times. Avoid laughing and talking about the case in the halls, restrooms, or anyplace in the courthouse and be aware that the jurors may see you entering the courthouse.
CHECKLIST: Witness Preparation (Continued...)  

8. Talk to the jury when you answer the questions. Look at them most of the time and speak to them frankly and openly as you would do any friend or neighbor.

9. Listen carefully to the questions asked of you. Just answer the question asked and do not volunteer anything. You are entitled to explain your answer if necessary. You do not always have to answer yes or no if an explanation is necessary.

10. If your answer was wrong, correct it immediately and if your answer was not clear, clarify it immediately.

11. Stick to the facts, not hearsay, conclusions or opinions. You usually cannot testify about what someone else told you or you have heard.

11. If you don’t understand the question, say so and ask that it be repeated.

12. Don’t lose your temper when the prosecutor cross-examines you.

13. Always be polite to all of the lawyers asking you questions and to the judge.

14. If the prosecutor asks you if you have talked to anyone about this case—that is a trick question—just tell him yes, you have talked to me (or the police, etc.). Don’t let the prosecutor speed you up. Take time to think about the question and then answer.

15. If I object to a question, do not answer until the judge rules on the objection. If a judge sustains an objection, this means that you do not have to answer the question. If the judge overrules an objection, this means that the question must be answered. If you have forgotten the question by that time, you can ask it be repeated.

16. If you don’t know the answer to a question, don’t let that get you nervous. Simply say, “I don’t know.”

17. If you do not want to answer a question, don’t ask the judge whether you must

VI. Trial Checklist

The Trial Checklist is another check-off system, or reminder of things to do during trial. Lawyers must focus on many levels during trial and a checklist of things to do can help alleviate some of the distractions.
TRIAL CHECKLIST

- VOIR DIRE
  - Challenges to Venire
  - Additional Peremptory Challenges
  - Challenges for Cause
  - Batson/Powers

- EXCLUDE WITNESSES PRIOR TO OPENINGS

- JENCKS
  - RULE 29 (Motion for Judgment of Acquittal)
    - Close of Government Case
    - Close of Case
  - MOVE EVIDENCE IN
  - OFFERS OF PROOF
  - RULINGS ON EVIDENCE
  - JURY INSTRUCTION CONFERENCE
  - POLL JURY
  - EXTEND TIME FOR POST-TRIAL MOTIONS

VII. Forms for Testimony/Inconsistent Statements

The following are sample forms to use in taking notes of testimony and in preparing the impeachment of a witness. Impeachment by a prior inconsistent statement by necessity requires that there be a prior statement. Many times, there will be a preliminary hearing transcript, a transcript from the grand jury or a pretrial motion hearing. There may even be prior testimony from an earlier trial or a related case. It is helpful to be able to keep track of critical statements made by the witness, by date and document, so that the witness can be impeached. This form is a suggested format for organizing the statements.
## Chapter 1: Overview of a Federal Criminal Case

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### INCONSISTENT STATEMENTS

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VIII. Objections

The Objections Checklist is a quick reminder of several grounds for objections to questions and evidence. Many times you will know of objectionable evidence before the prosecutor seeks admission of it. This evidence can be the subject of a pretrial in limine motion or certainly a timely objection as the prosecutor calls the relevant witness. Other objections arise as a result of the type of question put to the witness or for the kind of answer, e.g., hearsay, sought from the witness. This checklist can give you ideas of various objections to make.

When an objection is sustained, you should consider a motion to strike the answer and an instruction to disregard the answer. A limiting instruction may be appropriate if evidence is admitted for a limited purpose, e.g., other bad act evidence. Finally, if the evidence is very damaging and an objection is sustained, you should consider a mistrial motion.
## OBJECTIONS CHECKLIST

<table>
<thead>
<tr>
<th>I. OBJECTIONS TO THE FORM OF THE QUESTION</th>
<th>Privilaged</th>
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<tbody>
<tr>
<td>Ambiguous</td>
<td>Speculation</td>
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<tr>
<td>Argumentative</td>
<td>Vouching</td>
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<tr>
<td>Assumes facts not in evidence</td>
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<tr>
<td>Compound</td>
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<tr>
<td>Confusing</td>
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<td>Harassing the Witness</td>
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<td>Leading</td>
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<td>Misstating the Evidence</td>
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<tr>
<td>Narrative</td>
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<td>Unintelligible</td>
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<td>Vague</td>
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| II. OBJECTION TO THE ANSWER SOUGHT       |            |
| Asked and Answered                       | Comment on defendant’s failure to testify, direct or indirect, e.g., “Evidence uncontradicted” or “evidence unchallenged” |
| Best Evidence                            | Comment on exercise of right to counsel |
| Beyond the scope                         | Misstates burden of the government, e.g., arguing that to acquit the jury must find the government witnesses committed perjury |
| Cumulative                               | Shifting burden, e.g., “we saw no evidence that . . . .” |
| Conclusion                               | Personal opinion |
| Foundation                               | Facts not in evidence |
| Hearsay                                  | Inflammatory/Prejudicial |
| Immaterial                               | Improper characterization of defense, e.g., “total fabrication,” “a lie,” “cock and bull story” |
| Improper Impeachment                     |            |
| Irrelevant                               |            |
| Narrative                                |            |
| Opinion                                  |            |
| Personal Knowledge                       |            |
| Prejudicial                              |            |

| III. OBJECTIONS TO PROSECUTOR’S CLOSING  |            |
| Comment on defendant’s failure to testify, direct or indirect, e.g., “Evidence uncontradicted” or “evidence unchallenged” | |
| Comment on exercise of right to counsel | |
| Misstates burden of the government, e.g., arguing that to acquit the jury must find the government witnesses committed perjury | |
| Shifting burden, e.g., “we saw no evidence that . . . .” | |
| Personal opinion | |
| Facts not in evidence | |
| Inflammatory/Prejudicial | |
| Improper characterization of defense, e.g., “total fabrication,” “a lie,” “cock and bull story” | |

| IV. LIMITING INSTRUCTION                 |            |
| IV. MOVE TO STRIKE                       |            |
| V. MOTION FOR MISTRIAL                   |            |

### IX. Common Foundations

The following are common foundations for evidence. This listing can help you if a prosecutor objects to your evidence or if you need to object to the prosecutor’s foundation.
COMMON FOUNDATIONS

I. BUSINESS RECORDS (FRE 803)
1. Memorandum, report, record, data compilation
2. Of acts, events, condition, opinions or diagnoses
3. Made at or near time
4. By, or from information transmitted by
5. A person with knowledge
6. Kept in course of regularly conducted business activity
7. Regular practice to keep such records

II. CHAIN OF CUSTODY
A. Not Readily Identifiable
   1. W received object at certain time/place
   2. W safeguarded object
   3. W ultimately disposed of object
   4. Exhibit is object previously handled
   5. Exhibit in same condition as when initially received
B. Readily Identifiable Object
   1. Object has unique characteristic
   2. W observed characteristic on prior occasion
   3. W identifies exhibit as object
   4. W rests identification on present recognition of characteristic
   5. Exhibit in same condition as when initially received

III. CHARACTER TESTIMONY
A. Reputation
   1. W is a member of same community (residential, business, or social) as D
   2. W has resided there a substantial time
   3. D has a reputation for a specific relevant character trait
   4. W knows the reputation
   5. W states the reputation
B. Opinion
   1. W personally acquainted with D
   2. W knows D well enough to have formed a reliable opinion of a specific relevant character trait of D
   3. W has opinion of this character trait of D
   4. W states opinion

IV. COMPETENCY
A. Personal Knowledge of Lay Witness
   1. W in position to perceive event
   2. W actually perceived event
B. Voir Dire of Child
   1. Capacity to observe
   2. Capacity to remember
   3. Capacity to relate
   4. Child recognizes duty to tell truth
### COMMON FOUNDATIONS (Continued...)

<table>
<thead>
<tr>
<th>V. COMPUTER RECORDS</th>
<th>2. Drawing useful to W</th>
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<tbody>
<tr>
<td>--Validity of underlying theory and reliability of instrument</td>
<td>3. Drawing reasonably accurate</td>
</tr>
<tr>
<td>1. Business uses computer</td>
<td></td>
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<tr>
<td>2. The computer is reliable</td>
<td></td>
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<tr>
<td>3. The business has developed a procedure for inserting data into the computer</td>
<td></td>
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<tr>
<td>4. The procedure has built-in safeguards to ensure accuracy and identify errors</td>
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<tr>
<td>5. The business keeps the computer in a good state of repair</td>
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<tr>
<td>6. W had the computer read out certain data</td>
<td></td>
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<tr>
<td>7. W used the proper procedures to obtain the readout</td>
<td></td>
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<tr>
<td>8. The computer was in working order at the time W obtained the readout</td>
<td></td>
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<tr>
<td>ID 9. W recognizes the exhibit as the readout</td>
<td></td>
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<tr>
<td>10. W explains how he or she recognizes the readout</td>
<td></td>
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<tr>
<td>11. W explains symbols or terms</td>
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<tr>
<th>VI. DIAGRAM</th>
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<tbody>
<tr>
<td>1. W familiar w/scene represented by diagram</td>
<td></td>
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<tr>
<td>2. W familiar w/scene at relevant date</td>
<td></td>
</tr>
<tr>
<td>3. Diagram useful in helping W</td>
<td></td>
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<tr>
<td>4. Diagram reasonably accurate</td>
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<thead>
<tr>
<th>VII. DRAWINGS BY WITNESSES</th>
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</thead>
<tbody>
<tr>
<td>1. W familiar w/scene on relevant date</td>
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<thead>
<tr>
<th>VIII. MODELS</th>
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<tbody>
<tr>
<td>1. W needs visual aid</td>
<td></td>
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<tr>
<td>2. Aid shows certain scene/object</td>
<td></td>
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<tr>
<td>3. W familiar with scene/object</td>
<td></td>
</tr>
<tr>
<td>4. W explains basis for familiarity</td>
<td></td>
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<tr>
<td>5. Aid is accurate model of scene/object</td>
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<tr>
<th>IX. TAPE RECORDINGS</th>
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<tbody>
<tr>
<td>1. Operator qualified</td>
<td></td>
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<tr>
<td>2. Operator recorded conversation--time/place</td>
<td></td>
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<tr>
<td>3. Operator used certain equipment</td>
<td></td>
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<tr>
<td>4. Equipment in good working order</td>
<td></td>
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<tr>
<td>5. Operator used proper procedures</td>
<td></td>
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<tr>
<td>6. Tape is good reproduction of conversation</td>
<td></td>
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<td>7. Operator accounts for tapes’ custody</td>
<td></td>
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<tr>
<td>ID 8. Operator recognizes exhibit as tape</td>
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<td>9. Tape is still good reproduction</td>
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<tr>
<th>X. ORAL STATEMENTS</th>
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<tbody>
<tr>
<td>1. Time and place W heard voice</td>
<td></td>
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<tr>
<td>2. W recognized voice as that of certain person</td>
<td></td>
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<tr>
<td>3. W familiar with voice</td>
<td></td>
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<tr>
<td>4. W explains basis for familiarity</td>
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<tr>
<td>5. Person made statement</td>
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X. Areas of Cross-Examination

Much has been written about cross examination and preparing for cross. The following is a checklist of areas to investigate and possibly cover on cross examination. Certainly not all of the areas apply to every witness.
CROSS-EXAMINING INFORMANTS AND OTHERS: A CHECKLIST

I. INVESTIGATION
   ___ Prior Record
   ___ Probation/Parole
   ___ Aliases
   ___ Drug Use
   ___ Witness Protection
   ___ Prior Testimony
   ___ Extent of Cooperation
   ___ Specific Instances of Conduct
   ___ Relationship with Accused
   ___ Assets
   ___ Tax Returns
   ___ Loan Applications
   ___ Employment Applications
   ___ Business Applications
   ___ Legitimate Income
   ___ Present Environment
   ___ Promises
   ___ Money
   ___ Interview Informant
   ___ Consequences of Conviction or Testimony

II. MOTIVATION
   A. Fear
      ___ The Initiation of Criminal Proceedings
      ___ Conviction
      ___ Sentence
      ___ Modification
      ___ Forfeiture
   B. Revenge
      ___ The Defendant
      ___ The Defendant’s Family
      ___ The System
      ___ The Informant’s Family
   C. Ego
   D. Financial
      ___ Expenses
      ___ Rewards
      ___ Needs
   E. Other

III. COMMON INCENTIVES
   A. No Prosecution
   B. Immunity
   C. Witness Protection
   D. Dismissal
   E. Plea/Sentencing
   F. Expenses, Reward

IV. THE “DIRTY DOZEN” AREAS OF CROSS-EXAMINATION
   A. The Oath
      ___ Prior Perjury
      ___ Tax Returns
      ___ Driver’s License Applications
      ___ Immigration Applications
      ___ Guilty Pleas
      ___ Bail Hearings
   B. Perception
      ___ Voir Dire on Competency
      ___ Alcohol
      ___ Drug History
      ___ Mental Problems/Medical Treatment
   C. Memory
      ___ Details Remembered v. Not Remembered
   D. Ability to Communicate
      ___ Tape Recordings
   E. Prior Inconsistent Statements
      ___ Agent’s Reports
      ___ Grand Jury Transcript
      ___ Motion Hearings
      ___ Guilty Pleas
      ___ Bail Hearings
      ___ Preliminary Hearings
   F. Prior Convictions
   G. Other Bad Acts Bearing on Truthfulness
1.16 JURY INSTRUCTIONS

Most federal judges require that instructions be submitted in writing in advance of trial. When filing proposed instructions, counsel should make certain to request leave to file other instructions that may be raised by the evidence. Many times counsel may not want to reveal certain defenses by the pretrial filing of some instructions.

A jury instruction conference must be held before closing argument so counsel will know what instructions will be given. See Fed. R. Crim. P. 30.

The Rule 30 conference should be held on the record so that objections are not missed. The informality of an off the record discussion followed by an on the record ruling may lull counsel into forgetting to make all objections on the record. The plain error standard is difficult to meet on appeal. See United States v. Olano, 113 S.Ct. 1770 (1993) (explaining plain error); United States v. Williams, 990 F.2d 507 (9th Cir. 1993) (failure to distinctly states grounds for objections to instructions limited issue to plain error review); United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993) (no plain error in failing to instruct on definition of possession).

Some judges instruct before closing argument and others wait until after closing argument. The timing of instructions is within the discretion of the court. See Fed. R. Crim. P. 30.

1.17 THE VERDICT

Fed. R. Crim. P. 23 requires that a federal jury consist of 12 jurors. However, at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury shall
Chapter 1: Overview of a Federal Criminal Case

consist of any number less than 12. In addition, the court may take a verdict of 11 jurors even absent a stipulation if it finds that it is necessary to excuse a juror for just cause after the jury has retired to consider its verdict. Alternate jurors may be retained and substitute into deliberations if necessary. See Fed. R. Crim. P. 24 (c)(3).

Under Fed. R. Crim. P. 31 the verdict must be unanimous. If there are two or more defendants, the jury at any time during deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. The defendant or defendants may be found guilty of an offense necessarily included in the charged offense or of an attempt to commit either the charged offense or an offense necessarily included therein if attempt is an offense.

1.18 POST TRIAL MOTIONS

Post trial motions are usually made pursuant to Fed. R. Crim. P. 29 or 33. These motions must be made or renewed within seven days after the jury is discharged or within such further time as the court may fix during the seven day period. Rule 29 is the motion for judgment of acquittal and Rule 33 is the motion for a new trial. It is a good idea to ask the judge at the time the guilty verdict is returned, to extend the seven day period so that there is sufficient time to investigate and prepare any necessary post trial motions.

1.19 SENTENCING

Sentencing in federal court is now pursuant to the federal sentencing guidelines which took effect November 1, 1987. These guidelines are based on the determination of an offense level and a criminal history category and a grid containing various sentencing ranges. Departures upward or downward are permitted both pursuant to statute and the sentencing guidelines. See 18 U.S.C. §3553(b) and §5K2.0.

The offense of conviction drives the determination of the applicable guideline although in some instances guidelines can be determined by stipulation. See §1B1.2. The conduct which is considered under the federal sentencing guidelines is “relevant conduct.” See §1B1.3.

The guidelines utilize a sentencing table comprised of 43 offense levels which increase in severity and six criminal history categories which also increase in severity. There are 19 separate sections which cover most federal offenses and assign a base offense level as well as additional levels for certain specific offense characteristics for each crime. The offense level is then subject to various adjustments relating to the victim of the crime, the defendant’s role in the offense, obstruction or reckless endangerment, multiple counts and acceptance of responsibility. The criminal history category is determined by adding points for most prior sentences served by the defendant. There are aggravated offense levels and criminal history categories for career offenders and armed career criminals. Much of the work in federal sentencing today is arguing for a downward departure, once the guideline range is determined. See, e.g. Koon v. United States, 116 S.Ct. 2035 (1996) (explaining authority for departures).
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The manual, "Defending a Federal Criminal Case," includes a thorough chapter on federal sentencing, and an excellent section on departures. Another excellent, short primer on federal sentencing is "Introduction to Federal Sentencing Guidelines," which can be found at www.fpd.home.texas.net/intro5.pdf.

Forms used by the United States Probation Office in conducting the presentence investigation are included in Appendix IV.6, Presentence Investigation Report.

1.20 APPEALS

The Federal Rules of Appellate Procedure (FRAP) govern appeals in criminal cases as well as civil cases in federal court. The various court of appeals also have local circuit rules which must be consulted.

The notice of appeal in a criminal case must be filed within ten days after the entry either of the judgment or order appealed from, or of a notice of appeal by the government. See F.R.A.P. 4(b).

A defendant may appeal his or her conviction only if the case goes to trial or a conditional plea (under Fed. R. Crim. P. 11) is entered. Otherwise, a guilty plea will waive any appeal of conviction or pretrial motions, e.g., suppression. A defendant has the right to appeal a sentence under 18 U.S.C. §3742. The government may also appeal a sentence in certain circumstances. See 18 U.S.C. §3742(b). The government has other appellate rights under 18 U.S.C. §3731.

1.21 INTERNET RESOURCES

Many of the Federal Defender offices now have Web pages, which offer information about local practices, as well as sample motions. In addition, many of the courts are now accessible on the Internet, and offer access to court files as well as a variety of court publications. Jeff Flax, the National Systems Support Analyst for the Administrative Office of the U.S. Courts has a Web page with links to many good federal court cites. The page can be found at www.jflax.com.