

# Handbook for Criminal Justice Act Lawyers Northern District of New York

The following is a guide to representing federal criminal defendants in the Northern District of New York. It was written by the Federal Public Defender. It is not legal advice from the District Court, the United States Attorney, the United States Probation Office, or any other law enforcement agency.

The purpose is to give lawyers a simple guide to the rules, cases, and procedures that are specific to practicing in the Northern District of New York. 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.

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# Criminal Justice System in the Northern District of New York<sup>1</sup>

## I. Courts and Agencies

### A. Judges

**1. Magistrate Judges** are appointed by the District Court. 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; and to rule on motions when delegated by district judges. *See* L. R. Cr. P. 58.1. Magistrate judges' decisions may be appealed to district judges who will review the issues *de novo*.

**2. 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 trials, pleas, and sentences. Some states have multiple federal districts and others do not. New York has four districts (Northern, Southern, Eastern, and Western). Each district has separate divisions. Northern New York has six divisions within the district. L. R. 47.1.

**3. The Second Circuit Court of Appeals** is located in New York City and is composed of judges from New York, Connecticut, and Vermont. 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 rulings 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. 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.

### 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 assigns Assistant United States Attorneys (AUSAs) to handle cases. Cases may be investigated by federal agents, e.g.,

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<sup>1</sup>Abbreviations: "L. R." are the Local Rules of Northern New York, or "L. R. Cr. P." for Local Rules in Criminal Cases. "Fed. R. Crim. P." are the Federal Rules of Criminal Procedure. "F.R.E." are the Federal Rules of Evidence. "U.S.S.G." are the United States Sentencing Guidelines. "U.S.C." is the United States Code.

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., New York State Troopers or Albany Police Department; or task forces of state and federal agents. Prosecutions may begin as the result of arrests or as part of ongoing investigations.

**2. The Federal Public Defender (FPD)** is appointed by the Second 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. *See* [NDNY General Order 1](#). Funding and salaries of FPD employees are appropriated through the Administrative Office of the U.S. Courts, Office of Defender Services.

**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 District Court for admission to the panel. They are paid an hourly rate and reimbursed for designated expenses.

**4. The United States Probation Office** is an agency under the authority of the Administrative Office of the U.S. Courts. In the Northern District of New York it has three main functions: (1) pretrial evaluation and supervision of defendants, (2) presentence investigations and reports; and (3) supervision of defendants on probation or supervised release.

**5. 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. They also search for fugitives and serve subpoenas.

**6. The United States District Clerk** administers all court procedures and court records. Documents are primarily filed electronically and are available via the Internet. *See* L. R. 5.1.2 <http://www.nynd.uscourts.gov> . [NDNY General Order 22](#).

## **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. Fed. R. Crim. 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, 424 (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 L. R. Cr. P. 5.1), 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. *See* United States v. Perez, 733 F.2d 1026, 1027 (2d Cir. 1984).

If officers charge a defendant in state court this does not preclude filing federal charges later. In many cases, state authorities will defer prosecutions in lieu of federal charges. *See* Bartkus v. Illinois, 359 U.S. 121, 123 (1959). 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), unless the succession is used as a sham. *See* United States v. Aboumoussallem, 726 F.2d 906, 910 (2d Cir. 1984) . Prosecution of the same charges in different federal districts *is* double jeopardy. United States v. Olmeda, 461 F.3d 271 (2d Cir. 2006).

## **B. Pretrial Services Reports**

Before initial appearances in court, defendants will be interviewed by pretrial services officers (PTSOs). *See* NDNY General Order 7 and L. R. Cr. P. 46.1. In the Northern District of New York, PTSOs are employees of the United States Probation Office (USPO). 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. *See* Walder v. United States, 347 U.S. 62, 65 (1954). 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 2007), 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 2007), 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 2007), at II-4. In the Northern District of New York, magistrate judges allow the FPD and CJA counsel to meet with defendants before the interview, and may decline the interview when appropriate. Even when circumstances prevent that private meeting, defense counsel is authorized to attend the interview. *Id.*, at II-1. Therefore, whenever possible, counsel should at least attend the interviews. It is also defense counsel’s responsibility to complete the financial affidavit with the client. The FPD must be notified whenever a defendant is being interrogated and requests the assistance of counsel. NDNY General Order 1, §IX(A).

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 fading memories. These are also 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 that opinion from a person who has not bothered to build a good relationship first. Additionally, lawyers should not unnecessarily 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 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 thirty days. 18 U.S.C. §3161(b); NDNY General Order 17. 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 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 and early discovery.

### **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 Northern New York, grand jurors are selected among registered voters and licensed drivers. L. R. 47.1. Defendants should read the charges or have the charges read to them. Defense attorneys should then explain the effect of waiving the reading of the charges in court and what it means to plead "not guilty."

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. In some federal districts, magistrate judges receive felony guilty pleas on behalf of district judges. In the Northern District of New York, magistrate judges typically do not accept guilty pleas to felonies. Magistrate judges will either read the indictments in their entirety, summarize the allegations, or defense lawyers can waive the reading with their defendant's 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).

### **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. For instance, in a case of illegal entry into the United States, the government might not oppose a sentence of time served. 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. 18 U.S.C §3006A. A magistrate judge determines if a defendant qualifies for appointed counsel. 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). Interference with the right to representation can even result in dismissal. *See* United States v. Stein, 541 F.3d 130, 141 (2d Cir. 2008). In potential capital cases, the Court must consult the FPD about appointment of counsel, and two lawyers are necessary. 18 U.S.C. §3005.

The determination is based upon defendants' assets, not family or friends. There is a limit to how much the government can interfere with third-party funding. *See* United States v. Stein, 541 F.3d 130 (2d Cir. 2008). 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. The government may not use this information in its case against the defendant, except in a separate prosecution for perjury or making a false statement. NDNY General Order 1, IV(E).

### **b. Appointment**

The FPD is typically called by a magistrate judge's chambers whenever a new arrest appears to require the appointment of counsel. NDNY General Order 1. The FPD represents about 60% 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. *See* United States v. Oberoi, 331 F.3d 44 (2d Cir. 2003). For a broader discussion of potential conflicts, *see* Ventry v. United States, 539 F.3d 102 (2d Cir. 2008). There is no right to have any particular CJA counsel appointed. United States v. Parker, 469 F.3d 57 (2d Cir. 2006).

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. L. R. 44.2.

### **c. Compensation**

CJA counsel is compensated upon completion and review of a voucher provided by the Clerk's Office. The voucher documents hourly work and other expenses. Worksheets and instructions about how to complete them are available on the District Court's website under the link for *Criminal Justice Act Information*. There are maximum amounts that can be paid in each case, and requests to exceed that amount are reviewed by the Second Circuit Court of Appeals. Whenever a voucher is reduced by the District Court for reasons other than mathematical or technical errors, the judge must advise the attorney in writing and allow the lawyer an opportunity to respond. NDNY General Order 1, Append. I.

### **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. 18 U.S.C. §3142(f); *See United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004). 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 the Northern District of New York cash bonds are not allowed. NDNY General Order 20; *See The Supervision of Federal Defendants*, Monograph 111, Chapt. V, pp.8-20 (Administrative Office of the U.S. Courts, rev. March 2007) (explaining the various options).

#### **a. Options**

##### **i. 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).

##### **ii. 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 sureties, 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.

##### **iii. 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).

##### **iv. 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). *See United States v. Barnett*, 2003 WL 22143710 (N.D.N.Y.) (Sharpe, J.). However, even when there is a serious flight risk, the government must show no conditions would ameliorate the risk. *United States v. Sabhnani*, 493 F.3d 63 (2d Cir. 2007).

#### **v. 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. Michael H. 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**

##### **i. 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.

##### **ii. 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. 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 (1985). Although defense counsel have the right to cross-examine government witnesses, prosecutors typically call case agents who summarize the government's evidence. *See United States v. Matir*, 782 F.2d 1141, 1145 (2d Cir. 1986).

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, a 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 other 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. The Northern District of New York has adopted standard conditions of release. NDNY General Order 23. 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 writs of habeas corpus ad prosequendum (writs to bring persons confined in other jurisdictions).

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. However, if facilities fail to provide adequate medical care, or attorney access, that should be reported to the Marshal and FPD. Detention orders are appealable. United States, Abuhamra, 389 F.3d 309 (2d Cir. 2004).

## **D. Criminal Pretrial Orders**

In the Northern District of New York, at a felony arraignment, magistrate judges will enter the District's Standard Criminal Pretrial Order. *See* L. R. Cr. P. 14.1. That order is explained in detail in United States v. Elliott, 363 F. Supp. 2d 439 (N.D.N.Y. 2005). The standard 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. Elliott, 363 F. Supp. 2d at 445. Those motions must be accompanied by a certificate of conference describing informal attempts to resolve the matters.

### **1. Government's Discovery**

Within fourteen (14) 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. Those rules list certain documents, objects, and information that are subject to discovery. The government must give notice of any statements or tangible evidence to be offered by the government in its case-in-chief. United States v. Elliott, 363 F.Supp.2d at 443; United States v. Miller, 382 F.Supp.2d 350, 360 (N.D.N.Y. 2005) (Sharpe, J.). A defendant must know he is speaking to a government agent for his statements to be discoverable. United States v. Siraj, 533 F.3d 99 (2d Cir. 2008).

The government must also provide exculpatory evidence, as defined by Brady v. Maryland, 373 U.S. 83 (1963), and its notice of intention to introduce evidence of defendants' prior acts, as defined by F.R.E. 404(b). 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); United States v. Rivas, 377 F.3d 195 (2d Cir. 2004).

At least fourteen (14) days before jury selection, 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. *See* United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997). The government must transcribe all prior testimony of its witnesses, as described in Fed. R. Crim. P. 26.2 and 18 U.S.C. §3500, and it is recommended that they be disclosed to the defense as early as possible. The government shall advise agents and officers to preserve all rough notes. These are all continuing duties. However, late disclosures will not always be punished. *See* United States v. Douglas, 525 F.3d 225 (2d Cir. 2008).

## **2. Defendant's Discovery**

Unless defendants affirmatively refuse discovery from the government in writing, they must provide the government reciprocal discovery, pursuant to Fed. R. Crim. P. 16(b) within twenty-one (21) days of arraignment. Like the government, defendants are encouraged to provide witness statements, pursuant to Fed. R. Crim. P. 26.2, as early as possible.

## **E. Pretrial Filing Procedures**

### **1. Method**

Except for sealed and pro se filings, all written motions in criminal cases must be filed electronically. See L. R. 5.1.2. Faxing pleadings to the Court is not allowed. L. R. 5.5. 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 <http://www.nynd.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**

Pretrial motions will be due four weeks from the date of the Criminal Pretrial Order. The exact date will be listed in the Order. Motion papers are to be filed no less than 31 days prior to the return date. L. R. Cr. P. 12.1. Motion return dates are available on the district's website. L. R. 78.1. Opposing papers are to be filed 17 days before the return date, and if the a reply is allowed by the Court, not less than 11 days before the return date. L. R. Cr. P. 12.1.

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, otherwise count every day. 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. Although motions may be supported by an affidavit, sworn affidavits are not required in the Northern District of New York, except for some motions to suppress (explained below). L. R. Cr. P. 12.1. A certificate of service is required in all cases. Fed. R. Crim. P. 49.

Unless assigned to a magistrate judge for a report and recommendation, pretrial motions will be reviewed by a district judge. Indicted cases are assigned to district judges on a rotating basis. *See NDNY General Order 12*. Supporting memoranda may not exceed 25 pages, and a table of contents is only required if a memorandum exceeds five pages.

### **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 Northern District of New York, pursuant to L. R. Cr. P. 14.1, discovery motions may only compel, protect, or modify, what is already required by the standard criminal pretrial order. For example, it would be redundant to file a motion requesting the defendant's statements when the standard order 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 the order (and the government refused to turn it over), a motion to modify the order would be the proper instrument. Prosecutors have a duty to turn over evidence favorable to the defendant. *See Drake v. Portuondo*, 553 F.3d 230 (2d Cir. 2009); *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008); *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007).

### **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.

Once notice is given, the government may concede that a suppression hearing is necessary, or that certain facts are uncontested. If the parties agree that an evidentiary hearing is required to resolve contested facts, then written stipulations to that effect should be filed and a hearing will be scheduled. If the government does not agree that a hearing is necessary, then the defendant should file a motion to suppress which specifies the items or statements sought to be suppressed and identifies the facts justifying relief. An affidavit, accompanying the motion, is needed if the defendant asserts facts that are denied by the government. For instance, if a defendant needs to establish an expectation of privacy in places that were searched, the defendant would need to attest so in an affidavit. However, in many cases affidavits are unnecessary because the facts are not in dispute, only their legal effect is in controversy. *See United States v. Mathurin*, 148 F.3d 68 (2d Cir. 1998) (Court improperly denied a hearing when suppression motion properly raised contested issue).

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

### **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 are necessary to defend a charge. *See United States v. Allen*, 289 F.Supp.2d 230 (N.D.N.Y. 2003)(Munson, J.). 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, federal cases may precede without any pending pretrial motions. Sanctions may be imposed for filing frivolous motions. L. R. 7.1(i). However, that does not mean that lawyers should not try to spot pretrial issues and file motions to address them.

### **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

ten (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 ten (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. If the government has a good faith reason to believe a defendant acted with government authority they are estopped from prosecuting that person. United States v. Abcasis, 45 F.3d 39 (2d Cir. 1995).

## **G. Speedy Trial**

The right to a speedy trial is guaranteed by the Sixth Amendment. Barker v. Wingo, 407 U.S. 514 (1972). The right begins when the defendant is arrested if detained or released on bail. United States v. Hawk, 474 U.S. 302 (1986); Dillingham v. United States, 423 U.S. 64 (1975); United States v. Marion, 404 U.S. 307 (1971). 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. 1 (1982).

### **1. Deadlines**

In federal courts, there are also statutory requirements for speedy trials. 18 U.S.C. §3161 *et seq.* These procedures are also stated in NDNY General Order 17. The government has thirty (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 seventy (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). *See also* United States v. Vanhoesen, 529 F.Supp. 2d 358, 363 (N.D.N.Y. 2008). For instance, the time while pretrial motions are pending may be excluded, Henderson v. United States, 476 U.S. 321 (1986), as may the time used to prepare and file them. United States v. Oberoi, 547 F.3d 436, 450 (2d Cir. 2008).

The Interstate Agreement on Detainers Act also has time limits. 18 U.S.C. App.2, §2. Persons held 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). Filing a detainer does not start time limits under the §3161 *et seq.* United States v. Guevara-Umana, 538 F.3d 139 (2d Cir. 2008).

## **2. Delays**

In the Northern District of New York it is not unusual for prosecutors to propose written stipulations seeking to attempt to toll the time limits for commencement of trial. Lawyers must use their judgement in deciding whether to enter into such agreements. If the cases are complex, if the clients have been released, or if there are benefits for cooperating with the government, then there may be incentives to agree to such postponements. The first page of any pretrial motion is required to show any speedy trial time limit exclusions. L. R. Cr. P. 12.1.

In Zedner v. United States, 547 U.S. 489 (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. Nor, can a defendant waive speedy trial “for all time.” Therefore, unless the District Court makes findings that the delays in the stipulations serve the ends of justice, defendants will retain the ability to move to dismiss the charges, regardless of any prior waiver or agreement. However, failure to object before trial or plea waives even plain error review on appeal. United States v. Abad, 514 F.3d 271 (2d Cir. 2008).

## **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). The length of time they may be involuntarily hospitalized or medicated are subject to interlocutory appeal. United States v. Magassouba, 544 F.3d 387 (2d Cir. 2008).

### **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. F. 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.

### **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. The FPD has a *Client Fact Sheet* on its website that is suitable for all defendants. Lawyers should also make sure defendants have copies of all public documents.

##### **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 inside. 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.

## **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 their perspective. 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); *United States v. Hansel*, 70 F.3d 6 (2d Cir. 1995).

### **1. The Charges**

If an indictment contains a defect of form then a motion to dismiss must be filed prior to trial. F. 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. *e.g. United States v. Holmes*, 44 F.3d 1150 (2d Cir. 1995); *United States v. Kerley*, 544 F.3d 172 (2d Cir.), *cert. denied*, 129 S.Ct. 1052 (2009). 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). The Double Jeopardy Clause protects criminal defendants against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *United States v. Olmeda*, 461 F.3d 271, 279 (2d Cir. 2006). Crimes that are distinct, and separated by time, may be grounds for severance of the charges. *United States v. Sampson*, 385 F.3d 183 (2d Cir. 2004).

Charges must be filed within the statute of limitations for that crime. 18 U.S.C. §3282, *See United States v. Kozeny*, 541 F.3d 166 (2d Cir. 2008); *United States v. Podde*, 105 F.3d 813 (2d Cir. 1997). They must also be filed in the district for which venue is proper. *United States v. Cabrales*,

524 U.S. 1 (1998); United States v. Ramirez, 420 F.3d 134 (2d Cir.), *cert. denied*, 546 U.S. 1113 (2006). Venue must be proper as to each count. United States v. Novak, 443 F.3d 150 (2d Cir. 2006). 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); United States v. Needham, 604 F.3d 673 (2d Cir. 2010); United States v. Perrotta, 313 F.3d 33 (2d Cir. 2002).

## **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 Pretrial 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 rarely allowed except when witnesses are outside the subpoena power of the court. *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 Criminal Pretrial 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. *See Miller*, 382 F.Supp.2d at 355. Without knowing what the government will offer at trial, motions to suppress cannot adequately describe the relief requested. However, there is no legal requirement that agents take notes of all interviews of potential witnesses. *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007).

### **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 and get preapproval from the court. Those requests may be *ex parte* and *in camera*, but should be supported by affidavit. *NDNY General Order 1*, Append. I, II(D).

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. *United States v. Kliti*, 156 F.3d 150 (2d Cir. 1998). If that likelihood is strong, requesting the appointment of an investigator should be studied. Similarly, whenever there are issues of diminished capacity, consultation with a mental health expert should be contemplated.

#### **b. Subpoenas**

Attorneys may subpoena documents to be brought to court at trial. Fed. R. Crim. P. 17(c). Subpoenas to bring documents prior to trial require a court order. L. R. Cr. P. 17.1(a). However, often if provided a subpoena, businesses or agencies will voluntarily provide records directly to an attorney in order to avoid having to appear in court.

#### **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. Legal Research**

Most lawyers today know how to use computer assisted legal research such as Westlaw and Lexis-Nexis. To update research that have been previously explored, these tools are adequate. However, when lawyers confront new and confusing areas of the law (such as the interrelation of concurrent or consecutive state and federal sentences), more specific help is necessary. Articles on various subjects are located on the FPD website <http://www.nynd-fpd.org> . Calls to the FPD are always encouraged. There is no need to duplicate research that can be shared.

#### **5. 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 because of 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 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. Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001). Until the court unconditionally accepts the plea, it may be withdrawn for any reason. 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 rights they will give up by waiving a trial, the nature of the charges, the potential penalties, and the terms of any plea agreements; as well as making findings 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. United States v. Cruz-Rojas, 101 F.3d 283 (2d Cir. 1996). The factual basis incorporates all elements



of the offenses, including any facts that increase statutory maximums. Blakely v. Washington, 542 U.S. 296, 302 (2004). United States v. Yu, 285 F.3d 192 (2d Cir. 2002).

Judges must make sure that defendants understand there is a factual basis for each plea. United States v. Andrades, 169 F.3d 131 (2d Cir. 1999). Defendants must be admonished of all consequences of their pleas, including the imposition of restitution. United States v. Showerman, 68 F.3d 1524 (2d Cir. 1995). Omissions in a plea colloquy may be grounds for reversal on appeal. United States v. Blackwell, 172 F.3d 129 (2d Cir.), *superceded*, 199 F.3d 623 (1999).

In the Northern District of New York, plea agreements always contain a written factual basis for the pleas. It is important for lawyers to make sure defendants will accept these facts as true before plea hearings. Judges will certainly ask defendants, “Is that what you did?” and in some cases, may ask defendants about additional details.

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?” Unless the answer to all 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. In those situations, many defendants will claim 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 limit the quality or quantity of charges. Fed. R. Crim. P. 11(c)(1)(A). The second type recommend, or acquiesce to, sentences or sentencing ranges. Fed. R. Crim. P. 11(c)(1)(B). The third type contract for specific sentences or sentencing ranges. Fed. R. Crim. P. 11(c)(1)(C). Only the third type (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).

In the Northern District of New York, binding plea agreements are used infrequently. However, this does not mean the practice is never used. In cases where lengthy and expensive trials may be avoided, and the court can be assured no injustice will occur, binding plea agreements are

viable solutions. However, 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).

Most plea agreements will contain some limited waiver of the right to appeal the sentence. Blanket waivers of appeal are prohibited. United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). In the Northern District of New York, the government will calculate a guideline sentencing range (not including a reduction for acceptance of responsibility), and the defendant will agree to waive an appeal of any sentence below the upper end of that range. See Cobb v. United States, 496 F.Supp.2d 215, 218 (N.D.N.Y. 2006). Defendants should only enter into such agreements 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. United States v. Lawlor, 168 F.3d 633 (2d Cir. 1999). The government must not seek enhanced sentences when it promised not to. United States v. Palladino, 347 F.3d 29 (2d Cir. 2003). The government cannot argue for different sentences than previously promised, United States v. Vaval, 404 F.3d 144 (2d Cir. 2005); see also United States v. Ramsey, 503 F.Supp.2d 554 (N.D.N.Y. 2007) (Specific performance was remedy for government breach), or argue against acceptance of responsibility. United States v. Griffin, 510 F.3d 354 (2d Cir. 2007). However, it is permissible to include a provision that the sentencing estimate is not binding on the government or the court. United States v. Habbas, 527 F.3d 266, 270-71 (2d Cir. 2008).

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. United States v. Roe, 445 F.3d 202, 207-08 (2d Cir. 2006).

## **D. Post-Plea Proceedings**

After a plea hearing is completed, a sentencing date is issued. It takes at least 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. United States Probation Officers (USPOs) attend plea hearings. Often the same USPO will investigate and write the report in that case. Defense lawyers should find out who the assigned USPOs for their cases are and make appointments to be present with their clients when 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); United States v. Ming He, 94 F.3d 782 (2d Cir. 1996).

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 question of fact or law likely to result in relief on appeal. 18 U.S.C. §3143(b).

## **V. Trials**

### **A. Pretrial Conference.**

On a day prior to jury selection, the District Judge presiding over the trial will hold a pretrial conference. Fed. R. Crim. P. 17.1. 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. An extensive list of examples is located in L. R. Cr. P. 17.1.1. A waiver of a jury trial must be knowingly, voluntarily, and intelligently made. United States v. Carmenate, 544 F.3d 105 (2d Cir. 2008).

Pursuant to the Criminal Pretrial Order, seven days before the final pretrial conference date, counsel must file electronically voir dire requests, proposed jury charges, a trial memorandum, any stipulations of fact, and an exhibit list. There is also a questionnaire attached to the order that the parties must complete and file electronically.

#### **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. L. R. Cr. P. 17.1(c). If the defendant is indigent, the court will order the government to pay the witness's costs and fees. Fed. R. Crim. P. 17(b).

Although any nonparty at least 18 years old may serve a subpoena, CJA counsel will rely upon the U.S. Marshal for service of subpoenas. L. R. Cr. P. 17.1(c). 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 completed subpoenas; and 10 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. A copy is located on the FPD website.

## **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. In capital cases and complex cases, counsel should propose a written questionnaire for the court to have prospective jurors complete. These are typically completed by the prospective jurors, and copied for the parties by the Clerk's Office, well before the day jury selection begins.

In all cases, counsel should consider case-specific questions suitable for voir dire. Some judges will allow the lawyers to ask questions directly to the panel. Other judges will ask questions proposed by the parties.

### **B. Jury Selection.**

The composition of panels of potential jurors and grand jurors is covered by NDNY General Order 24. 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).

### **1. Strikes**

Jurors are then 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). A pattern of improper strikes may raise a *prima facie* claim of discrimination. Jones v. West, 555 F.3d 90 (2d Cir. 2009). Exclusion for those reasons is never harmless error. Tankleff v. Senkowski, 135 F.3d 235 (2d Cir. 1998); Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000). The court must make findings to support a ruling that race or gender was not the basis for a challenge. United States v. Thomas, 320 F.3d 315 (2d Cir. 2003).

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. L. R. 47.2(b). 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.

Under “the struck panel method” a numbered panel of prospective jurors is questioned. When a venire person’s answer requires more specific questioning, the person is brought before the bench, out of the earshot of the panel. Challenges for cause are typically made as the questioning goes along and peremptory strikes are made after the inquiries are done. The parties make their strikes among the remaining prospective jurors. Once strikes are made, the first twelve remaining persons become the jury. The next two are usually retained as alternates.

Under “the twelve in the box method” twelve prospective jurors and alternates sit in the jury box and the remaining venire persons sit in the gallery. Those in the box are questioned and, if necessary, challenged for cause. Any persons removed are replaced by others in the gallery. A round of peremptory strikes occurs, and those persons removed are replaced from the gallery. This continues until all peremptory strikes are exhausted and twelve jurors and the alternates (typically two) remain.

## **C. The Trial**

The Criminal Pretrial Order will set a date for trial, not later than 60 days from arraignment. Criminal trials are open to the public. U.S. Const. Amend. VI. Courts may not remove spectators without sufficient findings explaining the necessity. United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005); Pearson v. James, 105 F.3d 828 (2d Cir.), *cert. denied*, 524 U.S. 958 (1998). Victims have special rights to appear. 18 U.S.C. §3510. In rare cases, defendants may seek to close proceedings

for their own safety. United States v. Doe, 63 F.3d 121 (2d Cir. 1995). Absent permission from the Court, the proceedings may not be photographed or recorded, and even lawyers must ask to bring in any electronic devices, including cellular phones and computers. NDNY General Order 26.

A 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. See United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984).

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 judgement of acquittal. Fed. R. Crim. P. 29(a). The defendant has a Sixth Amendment right to be confronted by the witnesses against him. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009); United States v. Lee, 549 F.3d 84 (2d Cir. 2008). 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 judgement of a 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 they have testified. However, because providing statements after a witness has testified will almost always delay a trial or hearing, the District's *Criminal Pretrial Order* directs 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. Although the lawyers will have written copies of the Court's final instructions to the jury before beginning their closing arguments, the Court will not read them to the jury until closing arguments are completed. Closing arguments begin with the government, then the defendant(s), following 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. The defendant must be present for all parts of the trial. United States v. Tureseo, 566 F.3d 77 (2d Cir. 2009).

A motion for new trial must be filed within seven 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 District has a *Uniform Presentence Order* that is entered listing the date and place of the sentencing hearing. The hearing is to occur approximately 120 days from the order, 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. Each party must electronically file a sentencing memorandum 14 days before the hearing. A filing date is included in the *Uniform Presentence Order*. Responses are due three days thereafter.

### **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 fashion 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 jury trial. The Second Circuit explained the effect of Booker in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). The guidelines are now weighed as one of the statutory sentencing factors under 18 U.S.C. §3553(a). The guidelines are the starting point for determining a sentence. United States v. Robles, 562 F.3d 451 (2d Cir. 2009). A court of appeals may treat a guidelines sentence as presumptively correct *if* the trial court has complied with §3553(a). Rita v. United States, 551 U.S. 338 (2007). The Second Circuit has held that applying the sentencing guidelines, does not alone, make a sentence presumptively correct. United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006).

Therefore, judges do not necessarily have the unfettered discretion they had prior to the sentencing guidelines, but 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. Even a judge's gut reaction to the appropriateness of a sentence has been held to be a valid consideration. United States v. Jones, 460 F.3d 191 (2d Cir. 2006). On the other hand, acquitted conduct may also be considered. United States v. Watts, 519 U.S. 148 (1997).

The Circuit has found that reliance on the guidelines, without looking at the specific facts of the case, may be substantively unreasonable. In United States v. Dorvee, 604 F.3d 84 (2d Cir. 2010),

a panel found that a judge may not presume a guideline sentence is reasonable, may not make assumptions unsupported in the record, and that a sentence must be “sufficient, but not greater than necessary.” In dicta, the panel also found no empirical basis for the child pornography guidelines. This decision was endorsed by another panel. United States v. Tutty, 2010 WL 2794601 (2d Cir. July 16, 2010). Failure to follow these directions may cause the case to be remanded to a different district judge. *See* United States v. Hernandez, 604 F.3d 48 (2d Cir. 2010).

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 be upheld as reasonable. *See* United States v. Rattoballi, 452 F.3d 127 (2d Cir. 2006).

Certain categorical reasons for ignoring the guidelines were previously rejected in this Circuit, but may now have new life pursuant to Gall v. United States, 552 U.S. 38 (2007) (No extraordinary circumstances are needed to vary from guidelines range) and Kimbrough v. United States, 552 U.S. 85 (2007) (A court may act upon disagreement with guideline policies such a crack/powder disparity). The Circuit has remanded cases where it is unclear the district court knew of its authority to consider that disparity, United States v. Regalado, 518 F.3d 143 (2d Cir. 2008), and even when it failed to acknowledge that authority. *See* United States v. Keller, 539 F.3d 97 (2d Cir. 2008).

The Circuit previously refused to consider whether the lack of a “Fast Track” program - in a district to expedite and reduce sentences for immigration crimes - is a basis for leniency. United States v. Mejia, 461 F.3d 158 (2d Cir. 2006). After Kimbrough, that disparity may now be a viable argument for lower sentence. *See* United States v. Hendry, 522 F.3d 239 (2d Cir. 2008). There has never been a “Fast Track” program in the Northern District of New York.

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.

## **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 moves 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. §2251et seq.; smuggling of non-citizens, 18 U.S.C. §1324; 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. United States v. Smith, 812 F. Supp. 368, 371 (E.D.N.Y 1993). 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. *See e.g.* Shumate v. United States, 893 F.Supp. 137, 140-43 (N.D.N.Y. 1995). 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. For instance, a sentence may be partially concurrent. United States v. Stearns, 479 F.3d 175 (2d Cir. 2007).

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). A federal sentence may not be consecutive to another sentence that has not yet been imposed. United States v. Donoso, 521 F.3d 144 (2d Cir. 2008).

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 arrests 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 enters 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 BOP. L. R. Cr. P. 32.1(c).

##### **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. A right against self-incrimination exists even after a guilty plea. Mitchell v. United States, 526 U.S. 3114 (1999). 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 (L. R. Cr. P. 32.1(b)), 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 judgement 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.

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. L. R. Cr. P. 13.1. The mere fact a defendant is cooperating alone is probably insufficient to override public access to those court documents. *See e.g. Lugosch v. Pyramid Co.*, 435 F.3d 110, 119 (2d Cir. 2006); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). However, without additional action, all documents in a case may be unsealed 60 days after final judgement or return of mandate. *NDNY General Order 29*. *See also United States v. Strevell*, 2009 WL 577910 (N.D.N.Y. 2009).

## **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 Chambers.

### **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 and the attributable drug quantity. This can require the direct and cross examinations of informants, co-defendants, and law enforcement agents. Hearsay is admissible if it is found to be reliable. United States v. Martinucci, 561 F.3d 533 (2d Cir. 2009). If the court intends to impose a sentence above the recommended range, the defendant should receive advance notice. United States v. Cole, 496 F.3d 188 (2d Cir. 2007). At a sentencing occurring after remand, the defendant is entitled to be present and represented by counsel. United States v. DeMott, 513 F.3d 55 (2d Cir. 2008).

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. United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). Failure to object on the record may waive objections or limit review to a plain error standard. United States v. Espinoza, 514 F.3d 209 (2d Cir. 2008). Counsel must be allowed to argue on defendant's behalf. United States v. Gutierrez, 555 F.3d 105, 109 (2d Cir. 2009).

The defendant's right to address the judge at sentencing is called an allocution. Fed. R. Crim. P. 32(c)(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. A defendant cannot get probation for a Class A or B felony, where the statute prohibits probation, or when a sentence of imprisonment is being imposed at the same time. 18 U.S.C. §3561(a). 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. Campusano v. United States, 440 F.3d 770 (2d Cir. 2006); Espinal-Martinez v. United States, 499 F.Supp.2d 213 (N.D.N.Y.2007). Claims of ineffective assistance of counsel cannot be waived in plea agreements. Parisi v. United States, 529 F.3d 134 (2d Cir. 2008).

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 10 days from the entry of the judgement and sentence. Fed. R. App. P. 4(b). Simply ignoring the client's calls and letters is not an option. The 10-day period to file an appeal is not jurisdictional. United States v. Frias, 521 F.3d 229 (2d Cir. 2008).

If counsel feels they are not capable of representing their client in the court of appeals, counsel may seek permission from the District Court to withdraw. L. R. Cr. P. 44.2. Before doing so, counsel must file notice of appeal and order the transcription of any court proceedings. Fed. R. App. P. 10(b). Court Reporter transcript fees in appointed cases are addressed in NDNY General Order 3.

If counsel is relieved, the Second Circuit Court of Appeals will appoint counsel for the appellant. The Circuit has its own panel of lawyers who specialize in federal criminal appeals. If counsel remains on the case, the procedures and rules for an appeal are located on the Second Circuit website. <http://www.ca2.uscourts.gov>.

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. If counsel believes the defendant is incapable of understanding his options by letter, there is a duty to speak to the defendant about them. United States v. Santiago, 495 F.3d 27 (2d Cir. 2007). 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, but each must be specifically tailored to the facts in that case. *See* United States v. Whitley, 503 F.3d 74 (2d Cir. 2007) (Rejecting Anders brief for failing to address all potential issues).

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 the lawyer believes it is without merit, the lawyer should ask permission from the Second Circuit to withdraw. *See* Nnebe v. United States, 534 F.3d 87 (2d Cir. 2008).

## **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 judgement. It is beyond the scope of this handbook to deal with all information affecting a imprisonment. This is only an attempt to cover some recurring issues.

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 Judgement 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 less a 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 offenses of conviction. *See* FPSS Nos. 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.

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 percent of their sentence remaining. The Second Circuit held that the policy was arbitrary and struck it down. *Levine v. Apker*, 455 F.3d 71(2d Cir. 2006).

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 prison than if the sentence were 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. 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); *see also* United States v. Amerson, 483 F.3d 73 (2d Cir. 2007). 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 can be subject to suspicionless and warrantless searches by USPOs. Samson v. California, 547 U.S. 843 (2006). Polygraph testing may be used to enforce some conditions of release. United States v. Johnson, 446 F.3d 272 (2d Cir. 2006).

Non-compliance with supervised release is rated low, moderate, or high. Low severity violations are minor and non-recurring. For instance, a traffic violation that did not result in arrest is considered low. These incidents call for intervention less drastic than seeking revocation.

Moderate violations are more chronic or severe. Examples might be a misdemeanor arrest, a positive drug test, or missing reporting dates. These also call for intervention short of revocation. A modification of conditions may be sought. Fed. R. Crim. P. 32.1(c); 18 U.S.C. §3583(e).

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.

If the defendant gets a summons, their first appearance will be the final revocation hearing before the district judge with jurisdiction over their case. Fed. R. Crim. P. 32.1(a)(4). If arrested, they will have a preliminary hearing before a magistrate judge to determine probable cause. Fed. R. Crim. P. 32.1(a)(1) and (b). Then an appearance before the district judge for a final revocation hearing will be set.

The hearing itself is much like a sentencing hearing. It may proceed by proffer or by calling witnesses. No notice is necessary to sentence above the recommended guideline range. United States v. Hargrove, 497 F. 3d 256 (2d Cir. 2007). 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.