FEDERAL CRIMINAL PRACTICE AND PROCEDURE

By Ed Weis, Esq.

2. Judgment of Acquittal - Rule 29. Motion discussed previously. The motion is addressed to the evidence itself viewed in the light most favorable to the government. It must be filed within seven days after discharge of a jury or at such later time as the court may set within the seven-day period.

3. New Trial - Rule 33. Except when based on newly discovered evidence, it must be filed within seven days after discharge of a jury or at such later time as the court may set within the seven-day period. Court may grant a new trial to a defendant "if the interests of justice so require." The motion may raise all the grounds that may have been advanced during trial on a motion for a mistrial. Newly discovered evidence motions may be made within two years.

4. In Arrest of Judgement - Rule 34. Made for failure of indictment to charge an offense or for lack of jurisdiction. Pretrial motion to dismiss would often preview the issues. May be made after a plea of guilty or nolo contendere also. Must be filed within seven days after a plea or finding of guilty, or by date set within the seven-day period.

B. Withdraw Plea of Guilty - Rule 32(e). Not a post-trial, but a post-conviction motion. If made before sentencing, may be granted if the defendant shows fair and just reason. Otherwise, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

C. Sentence and Judgement - Rule 32. While this discussion occurs under the post-trial proceedings heading, it obviously includes post-guilty plea without trial. The court will order the preparation of a presentence report by the probation department of the court upon the entry of a judgment of guilt.

1. Presentence Report - Rule 32(b). Such reports are intended to assist the court in determining the applicable guidelines and imposing an appropriate sentence. They can be dispensed with under the rule, only when the sentencing judge finds that she or he can discharge the obligations required by 18 U.S.C. §3553. It has major impact on prison assignment, and sentence.

a. Contents - Rule 33(b)(4). The report will include the probation officer's findings of the offense conduct and any "relevant conduct." It also will include the background of the defendant. The probation officer will conduct an interview of the defendant and will receive information from the defense. The probation department, however, will put great reliance on the government. Some particular contents will be addressed because of their importance.

(1) The Offense Conduct. The probation officer is charged with making an independent investigation into the offense conduct and other matters which will affect the sentencing guidelines. In doing this, the officer will receive information from the assigned Assistant United States Attorney. The officer may interview the investigating agents. In some cases, the officer may conduct interviews of informants or other witnesses. The officer will also conduct an interview of the defendant and receive whatever information counsel provides to the officer. It is extremely important that counsel be present when the defendant is being interviewed. Any false material statement to the probation officer will end the defendant's chances for a reduction in the offense level for acceptance of responsibility and may result in an enhancement for obstruction of justice. If the defendant has

following:

> "b. Initial Charging Document in Misdemeanor Cases. The prosecution of a misdemeanor may proceed on the basis of an information or a complaint. See Rules 7(b) and 58(b)(1)."

7. The section entitled "c. Indictment - Rule 7 . . .." on page 7 should be replaced with the following:

> "c. Initial Charging Document in Felony Cases. The Sixth Amendment to the Constitution and Rule 7 provide that the prosecution of all felony cases must be by indictment. Except in cases punishable by death, Rule 7 allows the defendant to waive this right and consent to prosecution by information."

8. The section entitled "(1) Grand Jury Subpoena." on page 7 should be amended to reas as follows:

> "(1) Grand Jury Subpoena. Any person may be subpoenaed to testify or bring material to a grand jury. Targets of criminal investigation, those who the prosecutor has decided to seek to charge, usually are not called to testify. However, they may be required by subpoena to bring documents other material. Counsel should examine the subpoena to see that it does not seek privileged material or is unreasonable and oppressive in scope. Targets may be called before a grand jury and instructed to give handwriting, fingerprints, or other non-testimonial evidence. The prosecutor may call a "subject" of an investigation before a grand jury. This is a person, not a target, who is suspected of involvement in criminal activity. Such a person may become a target. The prosecutor may carefully examine the testimony of such a person to see if perjury charges can be brought. Note that only those individual identified as targets have the right to appointed counsel as witnesses under the Criminal Justice Act."

9. The introductory paragraph "IV. INITIAL COUNSEL ACTIVITY" on page 8 should be re-written as follows:

"IV. INITIAL COUNSEL ACTIVITY." Each practitioner will develop his or her own approach to the initial meetings with a client. Some thoughts are set out below for potential guidance. Of course the stage at which counsel enters the picture will influence counsel's initial activities. For example, if the attorney is retained at the beginning of the investigation, she or he will seek to uncover that which might spare the client a criminal charge. If the client has been arrested and indicted, initial efforts may be directed at securing the client's release."

10. The section "V. Initial Appearance . . .." at the bottom of page 9 and continuing on to the top of page 13 should be re-written as follows:

"V. INITIAL APPEARANCE - RULES 5(D), 9(c)(1) AND 58 (B)(2); ARRAIGNMENT - RULE 10.

program she or he will be allowed to complete the remainder of the sentence in a half-way house and on home confinement. The defendant must volunteer for this program. The Bureau will only not allow a defendant to participate in this program unless it is recommended by the sentencing judge. Under Bureau regulations, the defendant may not be convicted of a crime of violence as defined by the Bureau of prisons. A defendant convicted of a drug offense whose sentence has been enhanced under the Guidelines for presence of a firearm is considered by the Bureau to have committed a crime of violence. A defendant who successfully completes a long term residential drug treatment program in the federal prison system and who has been convicted of a non-violent offense may have her or his sentence reduced by up to one year. 18 U.S.C. 3621(e)(2)(B). The Bureau's list of offenses which makes a prisoner ineligible for the reduction is very broad. As with the shock incarceration program any inmate who has been convicted of a drug offense whose sentence was enhanced for possession of a firearm is ineligible for the reduction.

Parole has been replaced by supervised release. See 18 U.S.C. 3583 and 21 U.S.C. 841 (b). The term of supervised release may vary, depending on the nature of the conviction. In most cases it will be between two and five years. In some drug cases, it can be as long as life. The conditions of supervised release are similar to the conditions of probation or parole. If a defendant violates the terms of supervised release, the defendant may be sentenced to serve a term of up to five years if the original offense was a class A felony (maximum of life), three years in prison if the original offense was a class B felony (maximum of twenty-five years or more), two years if the original offense was a class C or D felony (maximum of less than twenty-five years, but at least five), and one year in any other case. If the court imposes a prison term which is less than the maximum it may reimpose a term of supervised release equal to the original term of supervised release less the length of the prison sentence imposed. 18 U.S.C. 3583(h).

b. Probation . The court may impose probation under the applicable statutes if the defendant has been convicted of any offense other than a class A or B felony. Probation is permitted under the Guidelines only if the bottom of the sentencing range is six months or less. If the bottom of the range is more than zero months, a period of home confinement, intermittent confinement, or confinement in a community treatment center must be substituted for the period of incarceration.

c. Fines. Most criminal statutes carry fines. An alternative schedule of fines is found in 18 U.S.C. § 3571. The guidelines also contain a table of fines to be imposed depending on the offense severity level. Inability to pay the fine is a grounds for a departure below the guideline fine.

d. Restitution - 18 U.S.C. § 3663, et seq. An order of restitution is permitted in almost all cases and required most cases were an identifiable victim suffered physical injury or pecuniary loss. If the amount of loss is in dispute the court decides the issue under the procedures set out in 18 U.S.C. 3664.

e. Forfeitures. Forfeitures under the criminal statutes may be ancillary to a criminal prosecution. Many criminal statutes now authorize forfeiture of assets directly or indirectly derived from the criminal conduct or used in connection with the offense. A fee from a criminal defendant paid to a lawyer may not be safe, and

The magistrate judge announces the name of any judge assigned to the case and any scheduled dates for pretrial motions, hearings and trial. Under the local rules in the Southern District of West Virginia, counsel for the defendant elects whether to invoke the standard discovery procedure and executes the appropriate form.

The magistrate judge will ask whether the defendant wishes to waive his or her presence at the argument or hearing of pretrial motions. Signing the waiver does not deprive the defendant of the ability to attend the hearing. It merely gives the option to be absent. See Rule 43.

With the consent of counsel, the defendant may waive the right to be present at the arraignment. The waiver must be in writing, state that the defendant has received a copy of the indictment or information and that the plea is not guilty. If the defendant consents, the arraignment may be by video teleconferencing."

11. At the bottom of page 15, "4. Detention Hearing upon Motion" should be changed to "5. Detention Hearing upon Motion." Similarly, "5. Factors to be considered." should be changed to "6. Factors to be Considered." "Contents of Decision Order" should be "8", and "Appeal - 3145." should be 9.

12. "IX. PRELIMINARY HEARING (EXAMINATION) - RULE 5.1" on p. 17 and the top of p. 18 cam be eliminated. It is redundant.

13. On page 18, "B. 3." "Inquire as to whether the willingness to plead results from prior discussions between the defense and the government." should be eliminated and the following subparagraphs renumbered. Rule 11 has been amended to eliminate this requirement.

14. At the bottom of page 20, "1. Time - Rule 22." should be changed to "1. Time - Rule 21(d)."

15. At the bottom of page 20, "2. Within the District - Rule 18." should be amended to read:

> "In deciding where within a district a case shall be tried, the cour must "the convenience of the defendant and the witnesses and the prompt administration of justice." Note that the convenience of the counsel is not a consideration. This rule may serve as a basis to have the place of trial transferred within the district."

16. On page 22, "3. Bill of Particulars - Rule 7(f)." Should be amended to read:

"The defendant may request a more particularized statement of the charges. Such requests typically are made in the form of requests for specific information deemed necessary for the preparation of the defense in addition to that required by Rule 7(c)(1)."

17. On page 22, "5. Sufficiency of the Indictment." should be amended to read:

"Whether the indictment sufficiently charges an offense as required by Rule 7(c)(1) is a question peculiar to each case. The sufficiency of an indictment may be challenged by motion."

18. On page 22, "7. Joinder - Rules 8, 13, and 14" should be amended to read:

"Rule 8 sets the requirements for joinder of offenses and defendants in one indictment.

II. SPECIAL PROVISIONS, MISCELLANEOUS

A. Revocation or Modification of Probation or Supervised Release - Rule 32.1, 18 U.S.C. §§ 3565 and 3583(g). The rule fairly well sets out a simple procedure on revocation. Proof of violation is required to be to the satisfaction of the judge. It may be that a probation officer, not a prosecutor, is the true prosecutor. The Sentencing Commission has issued policy statements setting forth recommended sentencing ranges upon a finding of violation. Unlike guidelines, these are not binding on the court; the court is only required to consider them.

B. Rule 20. Rule 20 provides for the transfer of a case from the charging district to the district of arrest or presence for plea and sentencing. The defendant must plead guilty or nolo contendere, although it is possible that such pleas may be to less than all counts in any indictment or information.

C. Rule 25. If the district judge trying a case becomes disabled during the trial, another district judge upon certifying he has familiarized himself with the case may proceed.

D. Rule 49. Papers are served and filed as provided in the Federal Rules of Civil Procedure and must be served on all parties.

E. Rule 57. Local rules have been promulgated by the district courts and should be referred to for general rules of practice in the district.

F. Pretrial Diversion. Under certain circumstances the United States Attorney may, in his discretion and based on certain recommended guidelines of the Department of Justice, place a potential defendant in a pretrial diversion program. Under the Department of Justice Guidelines, the United States Attorney may divert from prosecution any person, against whom a prosecutable case exists, who voluntarily agrees to submit to the program. Under this program the accused (this plan may he used at any stage of the prosecution but, as a practical matter, it will probably be applied most often between arrest and indictment) must agree to submit to an investigation by the probation office of the court for an evaluation study. If the probation office recommends diversion based upon a suitable program of supervision by the probation office, and the defendant, his counsel, and the United States Attorney agree, the accused may enter the diversion program for a period of not more than twelve months. During the period specified, the accused is supervised; and if he breaches the conditions of the supervision agreement, which decision rests exclusively in the hands of the United States Attorney, he may be prosecuted in the same manner as if the diversion program had not been tried. If the diversion is successful, the United States Attorney at the end of the period will formally decline prosecution of the accused for the offense alleged. Pretrial diversion has no statutory basis and is strictly within the discretion of the United States attorney acting under guidelines promulgated by the Attorney General of the United States. It is mentioned in the Speedy Trial Act, 18 U.S.C. § 3161(h)(2), as a "period of delay . . . for the purpose of allowing the defendant to demonstrate his good conduct." Of course, any delay in prosecution does have speedy trial implications, and a defendant who enters such a program must waive any ultimate objection based on any right to a speedy trial or the statute of limitations in order to enter such a program.

G. Juvenile Delinquency - 18 U.S.C. § 5031, et seq. Juvenile delinquency is defined under the Act as the violation of any law of the United States by a person prior to his eighteenth birthday which would he a crime if committed by an adult. Under the Act, a juvenile shall not be proceeded against in the federal courts unless the Attorney General of the United States certifies

plea before sentence is imposed if the court rejects a plea agreement or if the defendant can show "fair and just reasons." After the court imposes sentence, the defendant may withdraw a guilty plea only as the result of a successful appeal or a successful collateral attack."

25. The catch line, " a. Contents - Rule 33(b)(4)." on page 30 should be amended to read, "a. Contents - Rule 32(d)."

26. The catch line, "b. Disclosure and Objections - Rule 32(b)(6)." on page 30 should be amended to read "b. Disclosure and Objections - Rule 32(e) and (f)."

27. The following sentence should be added to the end of "c. Motions for Departure." on page 30:
"If the court is contemplating a departure on a ground not identified in the presentence report or in the objections of the parties, the Court must give notice of this fact and the ground on which the court is contemplating departure. Rule 32(h)."

29. The catch line, "2. Sentencing Hearing - Rule 32(c)." Should be amended to read, "2. Sentencing Hearing - Rule 32(i)."

30. The first sentence on of, "A. Revocation or Modification . . .." at the top of page 33 should be replaced with the following two sentences, "A person charged with violating probation or supervised release is entitled to an initial appearance and a preliminary hearing before a magistrate judge. If the magistrate Judge finds probable cause, the person charged will have a final hearing before a district court judge."

31. Add the following new second sentence to "B. Rule 20" on page 33, "The United States Attorneys in both districts must consent to the transfer."

TABLE OF CONTENTS

FEDERAL CRIMINAL PRACTICE AND PROCEDURE IN WEST VIRGINIA

I. INTRODUCTION

This work is an outline with some commentary on federal criminal practice with a procedural emphasis. Specific details of practice may vary between judges and between districts in West Virginia. Consultation with other criminal practitioners, the assigned judge's clerks, and other court personnel is the best source of information about these differences. This work covers only direct criminal prosecutions against individuals. It does not cover the added nuances of criminal prosecutions against corporations. It does not cover collateral attacks on convictions pursuant to 28 U.S.C. §§ 2254 and 2255. These actions are governed by complex procedural rules which are beyond the scope of this outline. It does not cover other habeas corpus actions under 28 U.S.C. § 2241.

This outline is no substitute for a study of the rules of evidence and procedure, the criminal statutes, and court decisions involved in a particular case. It is not a substitute for a thorough knowledge of the Federal Sentencing Guidelines as they apply to the case at question. Knowledge of how these guidelines might effect the case is essential for counseling the client, planning trial strategy, and engaging in effective plea negotiatoins. Other general works might lead to a false sense of security in this way; this work now warns against such sense. To some, this outline will be oversimplified but this is inevitable for an outline meant to introduce all practitioners to federal criminal practice .

II COURT AND PROSECUTION COMPONENTS

Important court and prosecution components are as follows:

A. Court System

1. District Courts. The United States District Courts have original jurisdiction of all offenses against the laws of the United States. (In misdemeanor and petit offense cases, the defendant may waive the right to disposition in the district court and consent to plea, trial and sentencing before a Magistrate Judge.) West Virginia is divided into two judicial districts, the District Court for the Southern District of West Virginia and the District Court for the Northern District of West Virginia. Each district has a Chief judge, and the federal system is structured in accord with this division.

a. Magistrate Judges. Each district of West Virginia has three magistrate judges. Magistrate Judges conduct initial appearances, set bail and, where the United States has moved for detention, conduct detention hearings. If the defendant has not been indicted, they hold preliminary hearings. They usually conduct arraignments when the defendant has been indicted. Usually, a defendant's first contact with a judicial officer is with a magistrate judge.

b. District Clerks. Each district in West Virginia has its own clerk. The clerk keeps the court records and is utilized as the court determines. Each district has more than one division. There is a clerk's office in each division. All pleadings and orders are filed with the clerk. (Copies of pleadings should also be sent to the chambers of the assigned judge.)

c. Probation Department. Each district in West Virginia has its own probation Office, headed by a chief probation officer. The probation office tries to interview a defendant as soon as possible after arrest, or after a summons is issued to conduct a pre-trial interview. The office then conducts a pre-trial investigation to aid the magistrate judge or judge in setting bail. The information given by the defendant at this interview may not be used against the defendant on the issue of guilt at trial, but it may be used for other purposes including determining the sentencing range under the Guidelines, should the defendant be convicted. If possible, counsel should be present with her or his client during this interview. If the defendant is convicted, the probation department prepares a

presentence report. In this report, the probation officer makes factual determinations and calculates the guideline sentencing range. While these are subject to revision by the sentencing judge, they ar very influential. Finally, probation officers supervise defendants released on bond pending trial, defendants granted probation or who are on supervised release after service of the custodial portio of their sentence, and the dwindling number of federal parolees. They initiate violation petitions when they believe a person under supervision has violated the conditions of bond, probation, supervised release, or parole. Probation officers receive information from federal prosecutors and agents on a daily basis as part of their work. Most will be willing to receive information from defense counsel, also. Federal Probation Officers are considered to be Agents of the Court.

2. Fourth Circuit Court of Appeals. Both districts of West Virginia are in the Fourth Circuit for appellate purposes. The circuit also includes Maryland, Virginia, North Carolina and South Carolina. The court primarily in Richmond, Virginia. Its clerk's office is located there. Currently, there are two West Virginia judges on the Court of Appeals, M. Blane Michael and Robert B. King. Both have chambers in the United States Courthouse in Charleston. For administrative purposes, it also has a circuit executive who administers the business of the Circuit and its courts for the Administrative Office of the United States Courts in Washington, D.C.

3. Supreme Court. The United States Supreme Court has discretionary jurisdiction over federal criminal cases. Review is sought by filing a petition for writ of certiorari with the Clerk of the Supreme Court. Very few writs of certiorari are granted.

B. Prosecution System

1. United States Attorney. There are United States Attorneys appointed for both districts of West Virginia. They direct the criminal and civil work of the government in the courts under the authority of the Attorney General of the United States.

2. Assistant United States Attorneys. Each United States Attorney has a staff of assistants to whom cases are assigned. Except in rare instance the practitioner will deal with the assigned assistant rather than with the United States Attorney.

3. Law Enforcement Agents. Typically, federal prosecutors do not investigate their own cases. Most of the investigation is done by local, state, or federal law enforcement agents. Local and state law enforcement agencies work closely with the United States Attorney's offices in both districts, so it is not unusual for a case to be prosecuted which has been investigated primarily or exclusively by state and local law enforcement officers. Of course, federal law enforcement agencies have a presence in West Virginia. The Federal Bureau of Investigation, the Drug Enforcement Administration, and the Immigration and Naturalization Service all have offices in this state. These agencies are under the Department of Justice. The Internal Revenue Service, the Bureau of Alcohol, Tobacco and Firearms, and the Secret Service, all in the Treasury Department, also have a presence in West Virginia. Of course, the United States Postal Inspection Service also has agents stationed in West Virginia. There are a number of joint federal - state task forces which employ both federal and state officers. They primarily investigate drug offenses.

By the time of trial, the prosecutor will have designated a case agent who will assist the prosecutor during the presentation of the case. This agent usually will be the primary investigator in the case. It may be a state of local officer.

4. Grand Jury. While grand juries receive their charge from the court, the courts will

not interfere in the prosecution's control and direction of the grand jury. Jurors are selected in accord with 28 U.S.C. 1861-1864, and a grand jury must contain not more than 23 nor less than 16 members to act, 12 of whom must concur in returning an indictment. An indictment is considered a probable cause finding. The government controls the evidence which is presented to the grand jury.

Sometimes, prosecutors use the grand jury process to aid the investigation of a case. Grand Juries have the power to compel testimony and the presentation of documentary evidence. They have the power to compel a target to give finger prints, handwriting, voice samples and other non-testimonial evidence which may later be used against the target at a trial. If a witness asserts her or his privilege against self incrimination, the prosecutor can obtain a grant of use immunity from the court to compel testimony. The witness is not allowed to have her or his attorney present in the grand jury room. The witness must leave the grand jury room to consult with counsel. The secrecy of the proceedings is closely guarded by the courts. See Rule 6 of the Federal Rules of Criminal Procedure.

5. United States Marshal Service. Both districts of West Virginia have a United States marshal and deputy marshals. It is unlikely that a criminal defendant will miss all contact with the marshals. While marshals may not arrest a person at the outset of a prosecution, they very likely will have custody of a defendant at some point when the case comes before the court. Their function largely is a service function to the courts, although they are within the Department of Justice. If a defendant is sentenced to a period of incarceration, they will likely transport the defendant to the designated place for service of sentence. They are, nevertheless, federal law enforcement agents and have an investigatory role which the defense lawyer might forget because of their service to the court function.

6. Bureau of Prisons. This bureau is within the Department of Justice. It maintains facilities of its own and contracts to house persons sentenced to the custody of the Attorney General. It has three of its facilities in West Virginia– a minimum security prison camp at Alderson for women, a minimum security institution for men at Morgantown and a medium security institution for men with a satellite prison camp at Beckley. The federal correctional institution at Alderson is for women and also houses prisoners for the State of West Virginia under contract with the State at this writing. A federal defendant sentenced to the custody of the Bureau of Prisons will receive a designation of the place of incarceration from the Bureau of Prisons through the Marshal Service in the district. The designation is based on a calculation of the defendant's security level, any judicial recommendation regarding the place of incarceration or programs which should be made available, and space availability. The security level calculation is governed by the Bureau's Security Designation and Custody Classification Manual, Program Statement 5100.07. This Manual is frequently amended so as to keep the institutions in any one security level from becoming too overcrowded. It is available on the Bureau's web site, www.bop.gov. In determining the defendant's security level, the Bureau relies on information contained in the presentence report. This is another reason why counsel should be sure that the report is accurate.

7. The United States Sentencing Commission. The Sentencing Reform Act of 1984 eliminated federal parole and established the United States Sentencing Commission has promulgated a set of guidelines and policy statements. The guidelines provide a formula for determining the severity of the offense, the severity of the criminal record, and the resulting range punishment under the guidelines. In determining the offense severity

level, the guidelines consider not only the offense of conviction but also what Guideline section 1B1.3 defines as "relevant conduct." For crimes where the offense severity is determined primarily by quantity, such as drug distribution, theft, and fraud, "relevant conduct" consists not only of the offense of conviction but also acts which are part of the same course of conduct as the offense of conviction. These are sentencing facts which do not change the maximum penalty; they only determine where withing the maximum the sentence should fall. Thus they are determined by the sentencing judge on a preponderance of the evidence standard. Thus, for example, a defendant charged with five drug sales in an indictment might agree to plead guilty to one of the sales in exchange for dismissal of the other sales. The total amount of the drugs distributed in all five sales will be used in determining the offense level so long as the prosecution can show the sentencing judge that it is more likely than not the defendant engaged in the other four sales. If the defendant went to trial and was acquitted of four of the five sales, the result would be the same. So long as the sentencing judge believed that the government had shown by a preponderance of the evidence that the defendant had engaged in the four sales of which the defendant was acquitted the drugs involved in those sales would be used to calculate the offense severity under the guidelines. Also, the guidelines permit the use of uncharged similar conduct. Thus, if an informant claims that the defendant distributed additional drugs during the same course of conduct as the offense of conviction and the judge determines it is more likely than not that the informant is truthful and accurate, this evidence will be considered, also. Of course, the final sentence cannot be above the statutory maximum for the count of conviction, nor can it be below any mandatory minimum. The calculation of the guideline range is frequently a contested issue at sentencing. Both the defendant and the prosecution can appeal that calculation to the Court of Appeals.

The sentencing court may depart from the sentencing range specified by the guidelines if and only "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission has listed several factors which it did not consider and may be grounds for departures either above or below the sentencing range. One of these factors is the defendant's substantial assistance in the investigation or prosecution of others who have committed crimes. However, the Commission requires that the prosecution file a motion for such a departure before it may be granted. Without a motion from the prosecution, the sentencing court may not depart on its own. The defendant may appeal an upward departure and the prosecution may appeal a downward departure. A refusal to depart may not be reviewed on appeal unless the sentencing court mistakenly believed it did not have the authority to depart.

The presentence report of the probation Office is a very important factor in the guideline sentencing process. The party objecting to a factual statement, such as the amount of drugs for which the defendant is responsible under the guidelines, has the burden of coming forward with a reason why that finding is mistaken or unreliable. Sentencing judges often give substantial weight to the determinations of the probation officer who wrote the presentence report. Similarly, the attorney who believes that the probation officer has misapplied the guidelines to the facts of the case will have the burden of showing that the officer made a mistake. Familiarity with the Sentencing Guidelines is essential to effective representation of a criminal defendant in federal court.

The guidelines must be considered in all conversations with the government, all agreements made with the government, all contacts with the probation department beginning with any pretrial services contacts, all reviews of any presentence report, and all representations to the court which involve any history of the client whatsoever. Lack of

such consideration may have severe consequences for a criminal defendant.

The Defense. The client and counsel will deal with the court and prosecution agencies described ve in a number of different circumstances. Counsel may be appointed or retained. These circumstances are described below.

1. The Defendant. The "client" may be a better, more general term. A person may seek counsel as the subject or target of an investigation. A goal of representation will be to avoid indictment. The person may be already sentenced and face a possible probation or supervised release revocation. We assume, however, that the person has a legal question related to the criminal law, and, therefore, reference is made to the "defendant."

2. The right to counsel for a person's defense is protected by the Sixth Amendment. Counsel may be provided to a person without a court appearance. If a court appearance is required, the lawyer must be admitted in the federal court where he appears. This is true as to each of the federal districts in West Virginia, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States.

a. Retained Counsel. Lawyers routinely advise persons who have contacted them on problems related to criminal law. Fee arrangements are unregulated, but this is not to say that these arrangements have not or will not come under some scrutiny of the court or the prosecution. The fee itself may be affected by forfeiture, fines and restitution, as well as attempts by a defendant to launder money. Care should be exercised by counsel to avoid discomfort or embarrassment.

b. Appointed Counsel. The Sixth Amendment guarantee of counsel is implemented by Rule 44 of the Federal Rules of Criminal Procedure and the Criminal Justice Act, 18 U.S.C. § 3006A. A person is entitled to counsel when there is a judicial proceeding which potentially will affect that person's liberty. This means that a person who is under investigation does not have the right to appointed counsel until he is formally charged, or he receives a "target letter" or formal notice from an Assistant United States Attorney that he is the target of a grand jury investigation. A person who is the subject of custodial interrogation also has the right to appointed counsel if she or he is unable to afford retained counsel. Appointments under this Act in West Virginia are of two types. Normally, appointments are made by the magistrate judges, although the district court has the power to appoint. Additionally, new appointments are made by the Fourth Circuit on appeals.

(1) Panel Appointments. Private practitioners are appointed to represent qualified individuals in both judicial districts in West Virginia. These are the only types of appointments made in the Northern District of West Virginia because there is no Federal Defender Organization in that district. There is a Criminal Justice Act Panel resource attorney for panel members in the Northern District of West Virginia. At this writing that attorney is Jay T. McCamic of Wheeling.

(2) Federal Public Defender Appointments. The Southern District has a Federal Public Defender office established under the Criminal Justice Act. The Federal Defender is appointed in the same way as private attorneys on the panel are appointed. The office also serves as a resource for panel members in the Southern District. It has a web site, www.fpdsdwv.org.

(3) Services Other Than Counsel. Retained counsel and the defendant may, of

course, secure such other services, such as investigative services, that they desire and can afford. In most circumstances counsel must obtain advance judicial approval of any expert of investigative services. The application for these services may be made ex parte. Appointed counsel should consult 18 U.S.C. §3006A(e) and the applicable Criminal Justice Act Plan for the procedures which should be followed.

(4) Other Money Considerations. Under the CJA, a defendant may later be required to reimburse for the cost of counsel or other service. No provider of services under the Act may accept any payment or promise of payment unless authorized. Defendants and counsel under the Act should be aware of these provisions. 18 U.S.C. S 3006A(f).

III. INITIAL PROSECUTION ACTIVITY. From the practitioner's standpoint, this usually will be some act of the government that causes, or should have caused, a person to consult with, or ask to consult with, a lawyer. In the case of a grand jury subpoena, for example, this may not be the initiation of a prosecution, but it could be a point at which a person needs a lawyer or thinks a lawyer is needed. The most common occurrences initiating a prosecution are as follows:

A. Target Letter. This a letter from the United States Attorney's Office saying you're being investigated for possible charges, you're the target (meaning prospective defendant), and inviting you to testify before a grand jury if you want to. The grant jury is, of course the one that has the power to indict you. Such a letter usually scares a person enough to want to talk to a lawyer. Counsel can be appointed at that point if a person cannot hire counsel and asks the court for counsel. The persons who get the letters usually know what the case is about. Of course, the recipient of a target letter has the Fifth Amendment privilege protecting against se lf- - incrimination and need not testify .
Defense counsel may usually consider the letter an invitation by the United States Attorney' s office to open discussions to resolve the case before arrest or indictment. A person who then secures counsel at this stage may have options available which will not be available at a later date.

B. Summons - Rules 4 and 9. The United States Attorney's Office may ask the magistrate to issue a summons instead of a warrant for arrest upon the filing of a complaint or information or upon the return of an indictment. See C.2.a., b. and c., infra, Arrest on Warrant. A summons is in the same form as a warrant, but the practical effect is to allow a person to appear at a particular magistrate court at a particular time to face charges without being arrested. If the defendant does not appear as summoned, a warrant will issue and the person will be arrested.

While the summons may be issued as indicated, it most often is used after an indictment only. The United States Attorney may also send the defendant a letter indicating an indictment has been returned, the addressee may appear with counsel or ask for appointment of counsel, and the time and place to appear to answer the charges. Such letters also will enclose a copy of the indictment. It will say that failure to appear will result in the issuance of a warrant.

C. Arrest. An arrest may occur with or without a warrant. No complaint, information or indictment may have been filed.

1. Warrantless Arrest - Rule 5(a). The arrested person must be brought before the nearest available magistrate without unnecessary delay, and a complaint shall be filed forthwith complying with the requirements of Rule 4(a).

2. Arrest on Warrant - Rules 4(d), 5(a), 9(c). Such an arrest may occur after the filing of a complaint, the filing of an information, or the return of an indictment. The form of the warrant is governed by Rule 4(c)(1), except as modified by Rule 9(b)(1).

a. Complaint - Rule 3. The complaint is a written statement of essential facts constituting the offense made under oath before the magistrate. To support the issuance of a warrant, probable cause must appear from the complaint or affidavits filed with the complaint. Rule 4(a).

b. Information - Rule 7. An information is essentially the same as an indictment except it is an accusation by the United States Attorney instead of the grand jury. In order to support the issuance of a warrant, Rule 9(a) requires that an information be supported by a showing of probable cause as required by Rule 4(a). This is because the preparation and filing of an information by the attorney for the government requires no such showing. A felony case may be prosecuted by information only if the defendant waives indictment.

c. Indictment - Rule 7, U.S. Constitution, Sixth Amendment. An indictment is an accusation by a grand jury. It must be used to initiate a prosecution which carries the death penalty. A felony must be prosecuted by an indictment unless the defendant waives indictment in open court. Prosecution of a misdemeanor (maximum sentence of one year) may be by information or indictment. An indictment is considered a probable cause finding and will support the issuance of a warrant.

d. Other. The above acts of the government are not exclusive. Several other actions may ultimately become the critical beginnings of federal prosecution. Some are discussed below as most common.

(1) Grand Jury Subpoena. Any person may be subpoenaed to testify or bring material to a grand jury. The subpoena of a person who is the target of an investigation, however, can present problems for the government during the grand jury and in the ultimate prosecution. Such subpoenas are not the practice. any witnesses, however, will run the risk of perjury indictment by giving testimony. Additionally, a person who is not a target of the investigation, when subpoenaed, may later become a target. A subpoena for a person to bring material or to give evidence such as handwriting samples or fingerprints may be served on the target of an investigation without the same legal implications. The fact that materials such as documents are subpoenaed does not mean there are no difficult legal questions. For example, the subpoena may be over broad and abusive, or it may require the production of material that is in whole or in part privileged. While a subpoenaed person can always seek the advice of counsel, his right to the appointment of counsel is affected by the factors discussed above under the CJA.

(2) Agent Interviews. It is not uncommon for the practitioner to find out that his client has been questioned or approached for questioning by federal agents or other law enforcement agents. It is equally common to find that the client has given a statement that constitutes a confession, but the client was not in custody or placed under arrest after confessing. The client also

may have entered into a plea bargain agreement during these interview sessions without consultation with a lawyer. These interviews, needless to say, are very critical points in the case and have a great bearing on the outcome. They may even shape the attitude of the agent and prosecutor toward the defendant.

(3) State Charges. Many federal prosecutions have actually begun with the commencement of state arrest and prosecution. Such prosecutions may or may not be concluded. State action may have been carried out with the knowledge of or in cooperation with federal law enforcement. Regardless, what has transpired in the state case will have an important bearing on the federal prosecution.

IV. INITIAL COUNSEL ACTIVITY. Every practitioner will develop unique approaches to representation, but some generalizations will be ventured for hopeful guidance. The stage upon which the practitioner enters will have already been set by the government. It is likely that the government has taken some or many of the actions discussed under III. If none of these actions have been taken the client probably has a very large and frightening problem. The stage at which counsel enters the case will determine the particulars of what comes first, but one or more of the following probably will he appropriate.

A. Client Interview. The client knows what if any involvement he has in the subject of the charge or investigation and other events leading up to retention or appointment of counsel. This will include both the facts that bear upon the case itself and what has been done by the government in the course of investigating that case. The technical terms for particular government actions may not be used, however, and the lawyer should interpret the layman's terminology in the legal setting. Trust is important to establish because the absence of such trust may result in the lawyer being the only person in the case who is unaware of important factors bearing upon some question in the case.

A person under arrest should be questioned about factors that bear on pretrial release or detention. If the client has not been questioned by a probation officer in connection with the preparation of the pretrial services report she or he should be warned that any false statement made to the probation officer may increase the sentence under the guidelines should there be a conviction and that if she or he has any reluctance to give a truthful answer, she or he should say nothing. As a general rule, the client should be advised not to talk about any prior record or prior drug use. (The exception is when counsel has had the time to investigate and be certain that client has not used illegal drugs or has no prior record.)

Memories fade and it is unlikely that a client will remember as much later as is remembered at an earlier point. Thus, talking to the client early can be very important in getting an accurate and complete picture of the posture of the case. Also, the importance of early and thorough discussions in terms of establishing a rapport and confidence cannot be overestimated. This is especially true in the case of appointed counsel who has not been selected by the client but has been selected for the client. Certain suspicion is natural for a client who very likely will see the same forces as not only responsible for the prosecution, but also as responsible for the selection of counsel. It will be of little moment that the court, and not the prosecution, has selected counsel.

At the outset, untoward predictions by counsel as to what might be accomplished for the client may ultimately be as destructive to trust in the long run as they may be constructive in the short run. Instructions to the client are important. First, such instructions can establish that you are

their lawyer, but it is their case. They may be in jeopardy and you are there to do all that you can, but they can help, too, and help themselves. You first should establish that you are in charge of all communication on the case with everyone, and any attempt by anyone to discuss the case with them should be reported to you. Instructions to avoid added problems, especially if on bond, should also be given. A standard condition of bond is that a client have no contact with witnesses or potential witnesses except through counsel. The client should be warned about such contact. At the same time, he should be instructed to assemble such information and documents which she or he can without violating this bond condition. Rapport with and the assistance of the client's family and friends can also be invaluable extensions of the lawyer's effectiveness.

B. Prosecution Contact. Establishing communication with the person responsible for the government's case is a priority. Copies of the documents relevant to the particular stage of the case usually can be secured from the assistant United States Attorney in charge if the lawyer has not already secured them. The direction of the case can also be determined to some extent. The assistant may simply tell the defense lawyer what the government wants. In any event, usually no accurate estimation of the posture of the case can be made without some contact with the government prosecutor. For the purpose of scheduling alone, whatever the case, this contact should be made early. Such contact also should establish that no one should contact the client at the government's behest except through the lawyer.

C. Court Contact. If the case is already in court, some contact with the court should be made if the court has not already contacted counsel. The court needs to schedule matters, if not already scheduled, and needs to know who is responsible for representation. This contact also helps document the presence of counsel and protects against further direct contacts with the client from the government.

D. Other Contacts. There may be additional individuals who should be contacted. If other legal proceedings are underway, civil or criminal, contact should be established with any other counsel for the defendant. Established lines of communication may prevent one legal situation from unwittingly harming another. Mutual aid and consultation in the interest of the common client may also be timesaving and helpful. Civil actions can be the source of depositions and other documents which can be useful to the government and the defense as well. Contact with state prosecutors, courts or law enforcement may be advised when state charges are pending. The presence of other counsel, the extent of the lawyer's representation or responsibility to the client, and whether the lawyer is retained or appointed will affect the contacts and the extent of the contacts made.

V. INITIAL APPEARANCE - RULES 5(b) AND (c), RULE 9(a); ARRAIGNMENT - RULE 10. Rule 5(a) has already been introduced under III.C.1. and 2., above. The term "initial appearance" here refers to the first appearance of a defendant in magistrate court upon unresolved charges pending in the district of appearance. The first appearance of the defendant or counsel in court may not be this initial appearance. The first appearance to face probation violation charges may be different, for example. A first appearance may be upon charges pending in another jurisdiction, which is an appearance with different implications. Some of these matters will be discussed separately under appropriate topics. What happens on initial appearance will be discussed against the background of what preceded the appearance.

A. Without Arrest. Appearance without arrest may occur in ways discussed above. Since charges are pending, this appearance is a surrender by the defendant to the jurisdiction of the court. If the government seeks detention, federal custody may commence. The prosecution activity prior to the surrender does determine what occurs at the surrender in court and what

occurs next.

1. Complaint. It is rare that the filing of a complaint precedes a surrender in court. The procedure which will follow will be the same as in an appearance after an arrest with a complaint pending as discussed below.

2. Information. Surrender in court without an arrest will frequently occur when an information has been filed. Either the charges will be misdemeanors, or negotiations have resulted in an agreement to waive indictment and plead guilty to the charges in the information. In the event of such an agreement, the initial appearance may be before a district court judge rather than a magistrate. What occurs will normally be the same as in an appearance after arrest with an in for mat ion pending as discussed below.

3. Indictment. This is the most common prosecution activity preceding a surrender in court without an arrest. What occurs normally will be the same as in an appearance after arrest with an indictment pending as discussed below.

B. Arrest. While a surrender can hardly occur without charges pending, an arrest may occur without charges having been filed. Rule 5(a) discusses what happens in this situation. Once in court, Rules 5(b) and 5(c) make a distinction between them as to the severity of the charges. This will be dealt with separately under "Classes of Offenses - Jurisdiction Implications" below.

1. Complaint - Rule 5(c). Except in the case of a petty offense, the case is pending for a probable cause showing. The magistrate judge will give the defendant the information and warnings listed below. Except as may occur in the case of a misdemeanor, a plea is not taken.

a. Information imparted:

(1) The complaint and affidavits filed therewith.

(2) Right to retained or appointed counsel. Rule 44, 18 U.S.C. SS 3006A, et seq.

(3) Circumstances to secure release on bond. Rule 46, 18 U.S.C. SS 3142 and 3144.

(4) Warning that any statement made may be used. U.S. Constitution, Amendment V.

(5) The right to a preliminary hearing. Rule 5.1 .

b. Actions taken:

(1) Reasonable time and opportunity to consult with counsel.

(2) Preliminary hearing scheduled, unless the offense is a petty offense or hearing is waived

(a) in custody - 10 days;

(b) not in custody - 20 days;

(c) later than 10 or 20 days --

(i) defendant consents and good cause shown;

(ii) district judge finds extraordinary circumstances and delay indispensable to justice.

(3) Detain or set conditions of release on bond. Rule 46, 18 U.S.C. §§ 3142 and 3144. This will be discussed in a separate topic, "Detention or Release on Bond."

2. Information - Rule 9(a), Rule 5(a); Arraignment Rule 10. The initial appearance on an information after an arrest differs little from that of an appearance on arrest for an indictment except for what may later transpire as will be discussed under "Classes of Offenses - Jurisdiction Implications" below. Rule 7(a) and the provisions of Amendment VI of the Constitution have been discussed and will be addressed under that topic. While arraignment need not be had at the initial appearance, it often will. With this in mind, the next topic may be considered applicable. Details are discussed under that topic because it is the most common.

3. Indictment - Rule 9(a). Rule 5 (c); Arraignment - Rule 10. Rule 9(a) incorporates the applicable provisions of Rule 5. All of the below may not transpire at the initial appearance, but it is the usual course in the Southern District of West Virginia. Where practice may differ will be evident from the discussion. Rule 10 does not require arraignment at the initial appearance, but Rule 5(c) requirements as to advice of charges easily converts an initial appearance to an arraignment. The following, therefore, usually transpires:

a. Information imparted:

(1) The indictment returned against the defendant. It may be read, unless waived by the defendant. This is part of an arraignment under Rule 10 and is the counterpart of the complaint and affidavit.

(2) Right to retained or appointed counsel. Rule 44, 18 U.S.C. §§ 3006A, et seq.

(3) Circumstances to secure release on bond. Rule 46, 18 U.S.C. §§ 3142 and 3144.

(4) Warning that any statement may be used. U.S. Constitution, Amendment V.

(5) Right to be present at the argument of any pretrial motions. Rule 43.

b. Actions Taken:

(1) Reasonable time and opportunity to consult with counsel.

(2) Request for the defendant to enter his plea to the charges. This is part of an arraignment under Rule 10.

(3) Schedule set. 18 U.S.C. § 3161(a), Rule 12(c). The cited statute is the Speedy Trial Act which requires the appropriate judicial officer, at the earliest practicable time and after consultation with counsel, to set a trial date. This date is rarely set at the outset after consultation with counsel. Rule 12(c) provides that dates for filing motions and for any hearings may be at arraignment or as soon thereafter as practicable. With these provisions, the following likely will be announced at the initial appearance/arraignment:

(a) trial date, place and judge;

(b) motion filing date;

(c) response to motion date; and

(d) hearing date for motions.

If these dates are not set at the initial appearance or arraignment, the setting of such dates will be discussed.

(4) Inquiry as to whether the defendant wishes to waive his presence at the argument or hearing of pretrial motions. Signing the waiver does not deprive the defendant of any right to be present. It merely gives the option to be absent. Rule 43.

(5) Detain or set conditions of release on bond. Rule 46, 18 U.S.C. §§ 3142 and 3144. This will be discussed in a separate topic, "Detention or Release on Bond."

(6) In the Southern District, execute a form in which the defendant elects to use the standard discovery procedure and makes the appropriate requests or elects not to utilize this procedure.

VI. APPEARANCE ON CHARGES PENDING IN ANOTHER JURISDICTION.

Such an appearance may be on a surrender or on arrest, but this will not be elaborated on in this topic. Much of the prior elaboration may be consulted. The appearance before a magistrate will be on federal charges, but they can be of two types:

A. Fugitive Warrants - 18 U.S.C. § 1073. These federal warrants usually are issued for interstate flight to avoid prosecution by another state. A person usually is arrested by federal agents and brought before the magistrate on the arrest. A Rule 5 proceeding may be held on the arrest, and counsel may be appointed. Because of certain extradition rights such a prisoner may have, however, and because of the restrictions on such prosecutions as contained in the statute, these cases are never prosecuted. The statute allows a federal arrest, however, in aid of the states. No such warrant will issue unless the state prosecutor assures that he intends to prosecute. The arrest will sometimes give some time for the preparation of extradition papers. The federal warrant then will be turned over to local West Virginia authorities during the pendency of extradition proceedings.

B. Removal to Another Federal District - Rule 40. If charges are pending in another federal district, the defendant may surrender or be arrested in any other federal district. This, of course, may be true as between the two districts in West Virginia. If a person knows of the charges, the possibility of forum shopping by surrender does exist. Surrender, however, does become tantamount to arrest and several things occur thereafter. Arrest on a probation violation may occur in a similar fashion under Rule 40(d), but it differs little from the following:

1. The person is taken without unnecessary delay before the nearest federal magistrate.

2. Rule 5 proceedings held in accord with paragraphs (a) and (c) including all the ad vices, including bond, but of a different nature.

3. A preliminary hearing may be held or scheduled under Rule 5.1 if there is no indictment or information pending in the other district or if the defendant has not elected to have the preliminary hearing in the district of the charges.

4. The person is advised of Rule 20 provision, which basically allows a person to plead guilty in

the district of presence instead of returning to the district of the charges. The United States Attorneys in both districts must consent to the transfer of jurisdiction.

5. Questions to be decided and actions:

a. Determine probable cause if no indictment or information pending nor an election to hold the hearing at the situs of the charges.

b. Whether the person in court is the person charged in the other district.

c. If there is an indictment or information pending or probable cause for the arrest, the person in court is the person so charged, and a certified copy of a warrant for arrest is produced, the person will be held to answer in the other district.

d. Detention or bond will be ordered, and if bond is posted it will be returnable in the other district.

e. All papers and bond are transmitted to the district where the prosecution is pending.

VII. CLASSES OF OFFENSES - JURISDICTION IMPLICATIONS. 18 U.S.C. § 3559.

Offenses are classified by § 3559 as follows:

A. Felony. Punishable by death or a term exceeding one year. Only a district court judge has jurisdiction for trial, judgment and sentencing of felonies. Except for those punishable by death, felonies may be prosecuted by an information if the right to indictment by a grand jury as guaranteed by the Sixth Amendment and Rule 7(a) is waived under Rule 7(b). Rule 7(c) specifies the contents of indictments and in formations, but the practitioner usually will find that the courts find the language of the statute sufficient despite the rule, the purpose of the indictment, or argument.

B. Misdemeanor. An offense not a felony is a misdemeanor. District court judges have jurisdiction in misdemeanor cases. Misdemeanors may be prosecuted and tried upon a complaint in addition to an indictment or information. There is no right to indictment. However, 18 U.S.C. § 3401(a) provides that magistrates shall have jurisdiction in such cases when specially designated to exercise it by the district court that the magistrate serves. Before exercising the jurisdiction, 3401(b) requires the magistrate to:

(1) Explain to the defendant the right to be before a district judge:

(2) Explain the right to a jury trial, if any, in either court.

(3) Secure a written consent to be before the magistrate from the defendant.

Rule 5(b) provides that further proceedings are then in accord with Rule 58 of the Federal Rules of Criminal Procedure. However, Rule 58(a)(2) provides that the other Federal Rules of Criminal Procedure do apply unless the Magistrate Rules specifically provide otherwise.

Appeals are to the district court, are not de novo, and are taken in accord with Rule 58(g).

C. Petty. (18 U.S.C. § 19) A misdemeanor punishable by not more than six months, a fine for an

individual not more than $5,000 or $10,000 if not an individual, or both. These misdemeanors may be prosecuted as other misdemeanors but may also be prosecuted on a citation or a violation notice. Rule 58(b)(1). Jurisdiction and the procedure is the same or similar to other misdemeanors. Unless otherwise noted by the Federal Rules, however, the Federal Rules will not apply if the magistrate determines that no sentence of imprisonment will be imposed even in the event of a conviction in a case that may have a possible term of incarceration. Rule 58(a)(2). The absence of a penalty of incarceration, whether possible otherwise or not, affects the right to appointment of counsel. There is no jury trial right for a petty offense. There is no preliminary hearing right. Rule 58(b)(2)(F) and (G).

VIII. DETENTION OR CONDITIONAL RELEASE, 18 U.S.C. §3142, et seq.

The Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984, introduced the concept of detention prior to trial and made other major substantive and procedural changes in bail pending trial and appeal. Under § 3142, the judicial officer has four alternatives for the defendant.

A. Detention - §§ 3142(e), (f) and (g)

1. Eligible Cases. A defendant may be detained on motion of the government if the case involves a crime of violence, a crime with a maximum of life or death, a drug offense with a maximum of ten years or more, or any felony offense if the defendant has two or more prior convictions for the offenses listed above. A defendant may be detained on motion of the government or the judicial officer on grounds that the case involves a serious risk of flight or a serious risk that the defendant will obstruct justice. 18 U.S.C. § 3142(f).

2. Necessary Determination. A defendant may be detained if, after a hearing, the judicial officer finds that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community. The facts supporting detention on the grounds of dangerousness must be found by clear and convincing evidence.

3. Rebutable Presumption. Subsection (e) sets forth two rebutable presumptions that in certain cases no condition or combination of conditions will either ensure appearance, ensure safety of others, or both. The first is relatively narrow. The defendant must have a prior conviction for an offense which would justify a detention motion by the government, that offense was committed while the defendant was on pretrial release for another offense, and not more than five years has passed since the defendant's release from imprisonment for the offense committed on pretrial release. The second is broad. It applies if the judicial officer finds probable cause that the defendant has committed a drug offense with a maximum penalty of ten years or more, on an offense under section 924(c) (carrying or using a firearm in relation to a federal felony), 956(a) (conspiracy to commit terrorist acts overseas), or 2332b (acts of terrorism transcending national boundaries) of Title 18.

4. Motion to Detain. Subsection (f) provides for a hearing on motion and temporary detention pending the hearing. The grounds for the motion are discussed above.

4. Detention Hearing upon Motion.

a. Time. Immediately upon first appearance unless continued. Except for good cause, the continuance allowed to each side, three days for the government and five days for the defense, may not be exceeded.

b. Temporary Detention. During any Continuance the person is detained during which time the court may order medical examination for suspected addicts.

c. Counsel. The right is observed.

d. Evidence. Both sides may present evidence by witnesses, proffer or otherwise, and cross-examine witnesses. The rules of evidence do not apply.

5. Factors to be Considered. Generally, they are of

a. the nature and seriousness of the offense charged;

b. the weight of the evidence against the defendant;

c. the history and characteristics of the defendant; and

d. the seriousness of the danger release would pose to any person or the community.

6. Contents of Decision Order:

a. Detention -- subsection (i).

b. Release -- subsection (h).

7. Appeal - Section 3145. Review may be sought of the release or detention order.

B. Temporary Detention - § 3142(d). Temporary detention of up to ten days may be ordered in order to notify other authorities and allow them to assume custody if the judicial officer determines the defendant:

1. May flee or pose a danger to another or the community.

2. At the time of the offense the defendant

a. was on some form of conditional release; or

b. was not a citizen or a lawful resident of the United States.

C. Release on Condition § 3142(c). If detention is not ordered and if conditions are deemed necessary to reasonably assure appearance or the safety of any person or the community, the officer may set any one or more of any suggested types of conditions or any other condition. NOTE: The end of the condition subsection forbids the imposition of a financial condition that results in the pretrial detention of the defendant.

D. Release on Personal Recognizance - § 3142(b). Personal recognizance or an unsecured bond in a specified amount are the preferred forms of release where there is no risk of flight or danger. However, the magistrate will always impose conditions upon such a release which seem to bring the release under § 3142(c).

E. Pending Sentence - 3143(a). A person awaiting sentence or the imposition of sentence is to be detained unless the judge finds by clear and convincing evidence that the person is not likely to

flee or pose a danger to others. A person who has been convicted of a drug offense with a maximum penalty of ten years or more, or any other offense the nature of which would give rise to a presumption of detention before trial must be detained except in vary unusual circumstances. See 18 U.S.C. §§ 3143(a)(2) and 3145(c).

F. Pending Appeal - 3143(b). A defendant on appeal or petitioning for certiorari to the Supreme Court is also to be detained unless the judge finds:

1. by clear and convincing evidence no likelihood of flight or danger; and

2. that the appeal is not for delay and presents a substantial question, if decided favorably to the defendant, is likely to result in a reversal. United States v. Steinhorn, 793 F.2d 195, 196 (4th Cir. 1991).

In the case of an appeal by the government, § 3142 applies.

IX. PRELIMINARY HEARING (EXAMINATION) - RULE 5.1. Some of the above has gotten ahead of this stage of a prosecution. There is a right to such an examination when charges are pending on a complaint only, unless the complaint charges a petty offense. See Rule 5(c) and **Rule 58(c)**. An information or indictment will preclude such a hearing even if previously scheduled. **18 U.S.C. § 3060(e).**

A. Waiver. A defendant may waive such a hearing. Rule 5(c)

B. Issue. Whether from the evidence there is probable cause to believe that an offense has been committed by the defendant. Rule 5.1(a).

C. Evidence. The defense may cross-examine government witnesses and introduce evidence. Evidence normally is presented for the government by testimony of an agent who investigated the case.

1. Illegally Obtained Evidence. Not objectionable. Motions to suppress must be made to the trial court under Rule 12 and Rule 5.1(a).

2. Rules of Evidence. The Federal Rules of Evidence except as to matters of privilege. Evidence Rule 1101(d)(3). Cross-examination of the defendant may be limited by the scope of direct, however. Evidence Rule 104(d). hearsay is expressly allowed by Rule 5.1(a).

D. Decision.

1. No Probable Cause - Rule 5.1(b). The magistrate will dismiss the complaint and discharge the defendant. Subsequent charges may, however, be instituted by the government for the same offense.

2. Probable Cause - Rule 5.1(a). The magistrate shall hold the defendant to answer in district court. Failure of the grand jury to indict must be reported to the magistrate. Rule 6(f). If an indictment or information is not filed in 30 days of arrest or summons, the charges are subject to dismissal. 18 U.S.C. §§ 3161(b) and 3162(a)(1).

E. Time for Hearing - Rule 5(c). Except for good cause shown, no later than 10 or 20 days after

initial appearance, depending on whether the defendant is in custody or not.

X. PLEAS - RULE 11. A defendant may plead not guilty, guilty or nolo contendere. A plea is taken at an arraignment on charges. In most circumstances, a not guilty plea is entered. This does not preclude a later plea of guilty or nolo contendere but allows counsel needed time to determine what course ultimately to take.

A. Conditional Pleas. With the approval of the court and the consent of the government, a nolo contendere or guilty plea may be entered conditioned on a written reservation of the right to review any specified pretrial motion decision on appeal. If the review is successful, the defendant may withdraw the plea.

B. Plea Procedure. Before accepting a plea of no lo contendere or guilty, the court must address the defendant personally in open court. The court must:

1. Advise the defendant relative to the charges and possible penalties, including any mandatory minimum sentence, supervised release term and any possible restitution, and that the Court must consider the sentencing range provided by the Sentencing Guidelines, but may depart above or below the guidelines in some circumstances. Advise the defendant of the right to counsel, the right to plead not guilty, the right to a jury trial with the assistance of counsel, the right to confrontation, the privilege against self-incrimination, that the plea will result in no further trial, and that answers to questions may later be used against the defendant.

2. Determine that the plea is voluntary and not the result of any coercion or promises other than those in an agreement with the government.

3. Inquire as to whether the willingness to plead results from prior discussions between the defense and the government.

4. Require the disclosure of any plea agreement and advise the defendant relative to options open if certain terms are not accepted or if the plea agreement is rejected in toto by the court.

5. Satisfy itself by inquiring that a factual basis exists for the plea.

6. Determine to accept or reject the plea.

7. Determine whether to grant release pending sentence.

8. Order a presentence report and set a date for sentencing.

While this section applies to both guilty and no lo contendere pleas, nolo pleas are rare. The court must consent to such a plea. It must also consider the views of the parties and the interests of the public before accepting the plea. The government will oppose such a plea.

XI. SPEEDY TRIAL ACT OF 1974, 18 U.S.C. § 3161, et seq. The Sixth Amendment to the Constitution ensures a speedy trial to the defendant. By virtue of the government's ability to set the timing for commencement of the case and because of other provisions of the Act, the Speedy Trial Act

1. Form. Motions may be written or oral, at the discretion of the court. Rule 12(b). Unless made during a hearing or trial or unless permitted by the court, a motion shall be in writing. It shall state the grounds for and the relief sought and may be supported by affidavit. Rule 47.

2. Service and Filing - Rule 49. Service and filing is much the same as in civil practice. Service is upon all parties unless the motion is ex parte.

3. Motions Required Pretrial - Rule 12(b). These shall be:

a. based on defects in the institution of prosecution;

b. based on defects in the indictment or information;

c. to suppress evidence;

d. Rule 16 discovery requests;

e. Rule 14 severance requests.

4. Dates - Rule 12(c). Filing and hearing dates may be set at arraignment, or soon after.

5. Rulings - Rule 12(e). Unless a party's right to appeal would be adversely affected, the court may, for good cause, defer ruling until trial or later. If facts are necessary for ruling, the court shall state its findings.

6. Failure to Move - Rule 12 (f) . Failure to file any Motion timely may result in waiver of the issue.

7. Speedy Trial Act - 18 U.S.C. § 3161(h) (1) (F). The filing of a motion shall suspend the running of the time until heard.

B. Continuance. The filing of a continuance motion should be contemplated early and often in some cases. It should be addressed to the court in as much factual detail as ethics permit and cite the provisions of the Speedy Trial Act sought to he invoked for excludable time. Lack of due diligence is not a ground. It is suggested that an affidavit of the defendant be attached stating that the motion has been read and is concurred in and that any objection which may be raised for failure to have a speedy trial is waived.

C. Venue, Transfer Motions. The Sixth Amendment guarantees trial in the state and district (which previously shall have been established by law) where the crime was committed. Rule 18 **repeats this, and provides** that the court shall set trial within the district with consideration for the convenience of the defendant and witnesses and prompt disposition. **An offense begun in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which it was begun, continued, or completed. 18 U.S.C. §3237. However, a defendant may move for a change in venue.**

1. Time - Rule 22. By arraignment, or later time set by the court.

2. Within the District - Rule 18. The rule does not state a motion, but it sets a standard as stated above which may be violated by setting a case for trial (or motions) in Huntington when all the witnesses and the defendant are in Bluefield. Convenience of counsel is not mentioned.

clearly was designed to put pressure on the defense in the disposition of criminal cases. Some aspects of the Act have been referred to, but important aspects follow. Counsel for the defense in federal criminal cases must be aware of the Act.

A. Time Limits.

1. Indictment or Information Filing - § 3161(b). In 30 days of arrest or service of a summons.

2. Trial - §§ 3161(c)(1) and (2). May commence not less than 30 days from first appearance through counsel. Shall commence not less than 70 days from the latter of (1) filing or publishing of an indictment or information or (2) first appearance upon the charges before a judicial officer of the court of pendency. Other limits apply in the case of detained defendants and high risk defendants. these exceptional cases are given priority and a 90 day limit commencing with detention or designation as high risk. §§ 3164(a) and (b).

3. Custody - § 3161(j). Since the time limits will not commence to run unless the defendant is somehow before the court, this section puts some burden on the government to act to secure the presence of the defendant against whom charges are pending but who is already imprisoned and not subject to arrest or free to come on his own. The language of this provision also invokes the Interstate Agreement on Detainers. 18 U.S.C. App. III.

B. Exclusions From computation - § 3161(h). These provisions include an enumeration of circumstances, which are suggestive and not exclusive, under which the clock will not or may not run for the purpose of computing adherence to the limits. Before requesting any continuance, the practitioner should carefully study these provisions, for they will surely be in issue.

C. Exceptional Circumstances - §§ 3161(d), (e) and (f). The effect of dismissal and reindictment, mistrial and retrial, and the like on the time computation is sought to be dealt with in these provisions.

D. Sanctions - § 3162. Sanctions are provided in two general situations:

1. Failure to observe the time limits; and

2. Counsel misconduct abusing the Act.

The sanction for failure to observe the time limits is dismissal of the complaint, information, or indictment. However, the dismissal may be with or without prejudice, depending on such factors as the seriousness of the offense and the facts and circumstances which led to the dismissal.

XII. PRETRIAL MOTIONS AND NOTICES. The extent and nature of such pretrial actions, both by the defendant and the government, will vary with every case and many possibilities for mutual probes by the parties exist which will not be mentioned. The material in this topic is organized in a fashion which should help the practitioner organize thought and the case. Careful study of the indictment, the facts as ed by the defendant, the defendant's mental state and intellectual abilities, and the statutes involved will produce some early ideas.

A. Generally - Rule 12(b). Any defense, objection or request which is capable of determination without trial of the general issue may be raised before trial by motion.

3. To Another District - Rule 21.

a. For Prejudice Rule 21(a). May be granted if a fair and impartial trial cannot be had in court sit us in the district. Judges cling to the notion that jury voir dire can cure any such problems.

b. For Convenience - Rule 21(b). This is for the convenience of the parties and witnesses and in the interest of justice. The grant may be for less than all of the counts of the indictment. The primary factors are found in Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240 (1964).

4. Effects. Transfers as to the moving defendant may effect a severance from joinder with other defendants and severance of counts. If this could be an effect, the interests of justice may prevent transfer if other defendants do not move or consent to transfer.

D. Competency of Defendant - 18 U.S.C. § 4241. The government or the defense counsel may file a motion for a hearing to determine competency of the defendant. The question is, can the defendant understand the situation and help the lawyer. Sometimes, the lawyer knows this is not the case, but psychiatrists think they know when a person can assist a lawyer.

The statute does prescribe a procedure to be followed which may be taken at any time prior to sentencing. If resources are not available to the defense for psychiatric examinations, the court can make the resources available and order an examination.

The statutory procedure does contemplate the possibility that such a motion, if successfully concluded with a finding of incompetence, could result in permanent commitment. Of course, the defendant will never be convicted at trial.

E. Other Services - The Indigent Client. A defendant financially unable to obtain necessary investigative, expert or other services for an adequate defense may request such services in an ex Parte motion proceeding before the court. The dollar amounts should be carefully limited as authorized by the court. 18 U.S.C. § 3006A(e).

F. Defects in the Institution of Prosecution - Rule 12(b) (1). These questions must be raised pretrial. Some examples might fall under due process abuses amounting to misconduct that results in an indictment.

Other defects might include irregularities in or before the grand jury and delay in the filing of charges. All such objections typically are raised on motion to dismiss, and, if not raised, Rule 12(f) states that they are waived.

G. The Indictment Or Information Itself - Rule 12(b) (2). This rule has two specific exceptions to the 12(f) waiver: failure to show jurisdiction or state an offense. The court may always notice these defects, however, and the issue may be raised pretrial as well as after jeopardy attaches.

Other questions and rules may be addressed in this topic as relating to the indictment itself and capable of determination without trial of the general issue. Some of the following may or may not be waived if not raised pretrial, and this determination should be made carefully.

1. Miscellaneous. Former jeopardy, statute of limitations, immunity, lack of jurisdiction, failure to state an offense.

2. Multiplicity or Duplicity. The language of the indictment and each count should be studied to determine if all counts charge separate offenses and to see if each count charges but one offense.

3. Bill of Particulars - Rule 7(f). The defense may request a more particularized statement of the charges. Such requests typically are made in the form of requests for specific information that is deemed essential to prepare a defense and required by Rule 7(c)(1).

4. Surplusage - Rule 7(d). Only the defendant may move to strike surplus age from the indictment. The motion to strike is somewhat the reverse of a bill of particulars. Its utilization should be with care because any objection to the absence of the stricken information in the indictment is waived. An example of its use would be an attempt to remove prejudicial aliases or allegations from the indictment that are not essential to the offense. Another example is to remove the nature of an inflammatory prior conviction an a prosecution for possession of a firearm by a convicted felon. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644 (1997)

5. Sufficiency of the Indictment. Whether or not the indictment sufficiently states the offense is a question peculiar to each case, and insufficiency may be continually raised as a question by way of a motion to dismiss.

6. Jurisdiction. Jurisdiction must be shown in the Indictment and proven. This issue will not arise very frequently.

7. Joinder - Rules 8, 13 and 14. The indictment may join defendants and charges as to any particular defendant which the defendant may object to. Separate indictments may also be joined with the effect of joining counts as well as defendants. Such joinder may be sought or objected to. Obviously, joinder must be addressed pretrial as Rule 12(b)(5) requires.

H. Discovery. A standard discovery request/order has been developed and has been utilized extensively, since late 1994. This standard request/order covers all of the basic items of discovery and should be considered by the practitioner. Copies should be available from the Magistrate's office and/or the Assistant United States Attorney responsible for the case. However, a discovery motion may be called for to obtain additional material, or to establish that the material does not exist.

While discovery is often discussed in terms of Rule 16 from the defense standpoint, it really is broader than that. Discovery is a continuing attempt by the defense to find out what is in the government's case. The government also wants to secure information about the defendant's case. There are several different approaches and aspects.

1. Rule 16. Rule 16 largely governs the exchange of information and is available to the government under 16(b) if the government has complied with 16(a). The duty to disclose Rule 16 material is a continuing duty under 16(c).

a. Material Included. While the rule describes particular types of material that must be disclosed by one side to the other, as well as describing material not subject to disclosure, there are some key words and distinctions in the rule:

(1) Disclosure to Defense. Prior statements by the defense and his criminal record must be disclosed, and if the government does not have such material, it must get it and disclose it. As to the other types of material, the rule requires an intent by the government to use the material in its case in chief or the material is material to the preparation of a defense The second aspect is the basis for specific requests since the government may not be able to or want to know what is material to the defense.

(2) Disclosure to Government. Material to be disclosed must be in the possession of the defense and must be intended for introduction or use in the defense case in chief. Such disclosure it an intent to present evidence. The case in chief phrase differs in effect here. The government often has evidence available which may not be intended for use in its case in chief, but the defendant rarely does.

(3) Grand Jury Transcripts. Not discoverable under the rule unless the defendant's statement. Rule 16(a)(3) does have some important exceptions, and it should be noted that grand jury material is treated separately from other material not subject to disclosure under 16(a)(2), but that 16(a)(2) also includes grand jury transcripts under 18 U.S.C. § 3500 without exceptions of 16(a)(3). Such transcripts are one type of document (which may become evidence in chief under the rules of evidence) which the government always has, but the defendant rarely has.

b . While Rule 16 does not use language as a basis for a motion, rather it uses the word "request, n paragraph (d) clearly makes the rule the basis for motions. Discovery may be limited, and failure to disclose may have severe consequences for either side.

2. Specific Requests. The defense should always make requests and motions for any specific material which it knows, believes, or suspects the government has in its possession or available to it that is either damaging to the defense or otherwise useful to know. Specific requests should be supported in whatever fashion possible. Appropriate motions to deal with damaging evidence may be the follow-up.

3. Exculpatory Material . The government is required to turn over Material that is exculpatory to the defendant under Brady v. Maryland, 373 U.S. 88, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This duty exists whether the defense makes a request or motion for Brady material or not, but the defense should make the motion. Brady and its progeny are not really very useful because the government will scrupulously avoid collecting any exculpatory material. The government rarely believes anything is exculpatory of a person whom they believe guilty.

4. Suppressible Material - Rule 12(d)(2). The defendant may request notice of such material at or after arraignment. Notice is required to be given on request if the material is Rule 15 material and subject to a motion to suppress. Whether or not such notice is given, the defendant should request evidence relative to seizures, out of court identification, surveillance, wiretaps, and similar material thought to be present in the government's case. Appropriate motions may then be filed or followed UP.

5. Suppression Hearings - Rules 26.2, 16(a)(3), 12(i). Prior statements of government

witnesses and important aspects of the government's case, as well as the defense, may be discovered at a suppression hearing.

6. Jencks Material - Rule 26.2, 18 U.S.C. § 3500. Discovery of prior statements of government and defense witnesses is limited, but discovery should, nevertheless, be requested in advance of what the rule requires. The government may disclose such material early, although not required to.

7. Witness List. While the court will rarely require such a list from the government, there are some cases in which they can be secured. One is the case of a trial of a capital offense, 18 U.S.C. § 3432. The other is under Rule 12.1(b) after the defendant has given notice of an alibi defense and a list of defense witnesses. If the government's case was entirely circumstantial, the rule should require a list of all of their witnesses.

I. Motions to Suppress. Motions to suppress evidence obviously are intended to keep evidence from going before the jury and can have the effect of disposing of a case because of the evidence involved. If this happens, a government appeal may be contemplated. Such motions most often are based on constitutional defects in a search or seizure. They also may relate to statements given by the defendant, identification procedures, and surveillance. A motion to return seized property under Rule 41(e) made after the filing of an indictment or an information will be treated as a motion to suppress under Rule 12.

J. Motions in Limine. Motions in limine are attempts to obtain a pre-trial ruling on the admissibility or inadmissibility of evidence. They may address damaging or highly prejudicial material that otherwise might be admitted. They may address the admissibility of certain expert testimony. The motions are like objections one might make at trial to particular evidence, but they are filed in advance of trial. Rule 403 of the Federal Rules of Evidence is a strong basis of attack for prejudice. The existence of a prior conviction against the defendant might be but one subject of a motion in limine, and Rule 609 of the Rules of Evidence may provide the grounds for a motion in limine. Evidence of other crimes, wrongs, or acts of the defendant may be admitted under Rule 404(b) of the Rules of Evidence but may be excluded under Rule 403.

K. Notices. The rules of procedure and evidence require notice in several instances. Some are:

1. Alibi - Rule 12.1 and 16(e).

2. Insanity - Rule 12.2. A new provision in Rule forbids an expert from testifying on the ultimate issue.

3. Hearsay. The rules of evidence do allow the use of hearsay in certain instances and in other instances if notice is given. See Evidence Rules 803(24) and 804(b)(5).

4. Suppressible Evidence - Rule 12(d). Notice by the government of Rule 16 material which might be subject to suppression motion under 12(b)(3).

XIII. PRETRIAL HEARINGS - RULE 12(c). At the arraignment or soon after, the court may set a date for hearings on any motions or requests made prior to trial. A defendant has a right to be present, but Rule 43(c)(3) does not require it. Because of the language of the rule, however, the defendant may be asked at the arraignment whether the right to be present at such hearing will be waived, and if so a waiver will be required in writing. The difficulty with the rule is that it says a defendant need not be present at

n argument upon a question of law. Such hearings are sometimes not clearly or completely on such stions.

XIV. PRETRIAL CONFERENCES-RULE 17.1. The purpose of such a conference is to promote a fair and expeditious trial. In fact, a hearing on pretrial motions ultimately can be utilized by the court for precisely the same purpose.

XV. MISCELLANEOUS PRETRIAL PREPARATION

A. Securing Evidence:

1. Subpoena - Rule 17. May be for persons or objects. Costs of such subpoena for an indigent defendant are paid for in the same manner as the government's are paid. Note that Rule 17(c) permits a subpoena for documents to be returnable to the Court before trial to allow the parties to inspect the material.

2. Depositions - Rule 15. Depositions may become substantive evidence if the witness is "unavailable" at trial as defined by Rule 804(a) of the Rules of Evidence.

3. Writ of Habeas Corpus ad Testificandum. If a defense witness is in custody, a writ may be requested to secure such person's presence and testimony at trial. A motion to the court should be made in a timely fashion so that any difficulty in securing the person for trial will not cause any delays.

B. Voir Dire - Rule 24. The court may ask the parties to submit suggested voir dire questions for jury selection somewhat in advance of the commencement of the trial.

C. Jury Instructions - Rule 30. The court may ask the parties to submit proposed instructions prior to the commencement of trial. It should be clear that trial events may change what requests will or will not be made, however. Advance instructions might have the effect of giving the opposing party notice of some strategies, and this possibility should be addressed with the court. Note that Rule 30 requires any objection to the charge be made after the instructions are given. Failure to object will not preserve for appeal the refusal to give a requested point for charge.

XVI. TRIAL. The trial itself and its complexity cannot be fully addressed. Some aspects will be touched on briefly.

A. Situs - Rule 18. The rule and the Sixth Amendment require trial in the district of its commission. Commerce, continuing crime, and conspiracy law can make this requirement almost meaningless. Requests for transfer may be made under Rule 21 at a time set by Rule 22.

B. By the Court - Rules 23(a) and (c). A jury may be waived by the defendant by a written waiver with the consent of the government and approval of the court. The court may then be required to make general and specific findings of fact.

C. Jury - Rules 23(b), 24. After voir dire and the drawing of names of prospective jurors, the parties then are allowed to exercise their peremptory strikes until twelve jurors remain. The defense gets ten strikes and the government gets six in the typical felony case. In capital cases, however, both sides get twenty strikes. Misdemeanors require three strikes per .side, so only

eighteen names need be drawn in the first place. Codefendants may be required to share their strikes, although the court may grant additional strikes to the defendants. Alternates may also be selected, and a verdict of less than twelve is possible under Rule 23(b).

D. Evidence. Governed by the Federal Rules of Evidence, some aspects of which are referred to in this work.

E. Objections. Many evidentiary matters addressed prior to trial may come up again at trial, and care should be taken to preserve all objections to evidence. Rule 103 of the Rules of Evidence governs objections to the admission or exclusion of evidence and the record on the issue.

2. Judgment of Acquittal - Rule 29. Motion discussed previously. The motion is addressed to the evidence itself viewed in the light most favorable to the government. It must be filed within seven days after discharge of a jury or at such later time as the court may set within the seven-day period.

3. New Trial - Rule 33. Except when based on newly discovered evidence, it must be filed within seven days after discharge of a jury or at such later time as the court may set within the seven-day period. Court may grant a new trial to a defendant "if the interests of justice so require." The motion may raise all the grounds that may have been advanced during trial on a motion for a mistrial. Newly discovered evidence motions may be made within two years.

4. In Arrest of Judgement - Rule 34. Made for failure of indictment to charge an offense or for lack of jurisdiction. Pretrial motion to dismiss would often preview the issues. May be made after a plea of guilty or nolo contendere also. Must be filed within seven days after a plea or finding of guilty, or by date set within the seven-day period.

B. Withdraw Plea of Guilty - Rule 32(e). Not a post-trial, but a post-conviction motion. If made before sentencing, may be granted if the defendant shows fair and just reason. Otherwise, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

C. Sentence and Judgement - Rule 32. While this discussion occurs under the post-trial proceedings heading, it obviously includes post-guilty plea without trial. The court will order the preparation of a presentence report by the probation department of the court upon the entry of a judgment of guilt.

1. Presentence Report - Rule 32(b). Such reports are intended to assist the court in determining the applicable guidelines and imposing an appropriate sentence. They can be dispensed with under the rule, only when the sentencing judge finds that she or he can discharge the obligations required by 18 U.S.C. §3553. It has major impact on prison assignment, and sentence.

a. Contents - Rule 33(b)(4). The report will include the probation officer's findings of the offense conduct and any "relevant conduct." It also will include the background of the defendant. The probation officer will conduct an interview of the defendant and will receive information from the defense. The probation department, however, will put great reliance on the government. Some particular contents will be addressed because of their importance.

(1) The Offense Conduct. The probation officer is charged with making an independent investigation into the offense conduct and other matters which will affect the sentencing guidelines. In doing this, the officer will receive information from the assigned Assistant United States Attorney. The officer may interview the investigating agents. In some cases, the officer may conduct interviews of informants or other witnesses. The officer will also conduct an interview of the defendant and receive whatever information counsel provides to the officer. It is extremely important that counsel be present when the defendant is being interviewed. Any false material statement to the probation officer will end the defendant's chances for a reduction in the offense level for acceptance of responsibility and may result in an enhancement for obstruction of justice. If the defendant has

entered a guilty plea, or has gone to trial solely to preserve a legal issue, the defendant will want to "accept responsibility" to get a reduction in the offense level. However, in an effort to be candid, the defendant may admit "relevant conduct" which the probation officer would not otherwise know about. Counsel must be present (and familiar with the guidelines) so she or he can advise the client which questions to answer.

(2) Prior Record. Items will appear as to which there has been no adjudication of guilt or as to which the defendant may not have had counsel. This record is important in parole guidelines determination and the sentencing guidelines. This record affected the salient factor portion of the parole guideline process.

3) Victim Impact. Losses experienced by others, both direct and indirect, will appear. Some may relate to losses occasioned by victims relative to dismissed charges. This statement will provide the basis for orders of restitution which will have the effect of a judgment and be a condition of parole or probation. (See 18 U.S.C. §§ 3663, 3663A, and 3664.)

b. Disclosure and Objections - Rule 32(b) (6). The proposed report must be disclosed to the government, the defendant and counsel at least 35 days before sentencing. The parties have 14 days to submit to the probation officer any factual or legal objections to the report. The probation officer then must respond to the objections. In doing this, the probation officer may require the parties to meet to resolve the objections. At least seven days before the sentencing, the probation officer must submit the presentence report to the court and the parties. If there are any unresolved objections, the report must contain an addendum describing these objections.

c. Motions for Departure. If either side will seek a departure from the sentencing range prescribed by the Guidelines, it must give notice to the other party and the court before the sentencing hearing.

2. Sentencing Hearing - Rule 32(c). At the sentencing hearing, the court will be certain that the parties have received and read the report. If there are unresolved factual objections, it will conduct a hearing to resolve those objections. This can turn into a second trial to determine whether the defendant is guilty of criminal conduct which is not part of the count or counts of conviction, but which the government asserts is "relevant conduct" which will enhance the sentence. The court makes its factual determinations by a preponderance of the evidence. Notice of a right to appeal is given after sentencing.

3. Sentences. After the court has determined the applicable guideline range and conducted a factual hearing as to any motion for a departure, and decided whether there should be a departure, the court will impose a sentence.

a. Incarceration. The court will impose a definite sentence in terms of months. There is no parole. Prisoners may earn "good time" at the rate of 54 day a year on sentences over one year. 18 U.S.C. 3624(b). Generally, prisoners serve the lesser of the last ten percent of their sentence or the last six months in a half-way house. 18 U.S.C. 3624(c). Under the authority of 18 U.S.C. 4246 the Bureau of Prisons has instituted a shock incarceration program. Under this program, the defendant must complete a six month program of strict discipline, drill and hard labor not unlike basic training in the military. If the inmate successfully completes this

program she or he will be allowed to complete the remainder of the sentence half-way house and on home confinement. The defendant must volunteer program. The Bureau will only not allow a defendant to participate in this program unless it is recommended by the sentencing judge. Under Bureau regulations, the defendant may not be convicted of a crime of violence as defined by the Bureau of prisons. A defendant convicted of a drug offense whose sentence has been enhanced under the Guidelines for presence of a firearm is considered by the Bureau to have committed a crime of violence. A defendant who successfully completes a long term residential drug treatment program in the federal prison system and who has been convicted of a non-violent offense may have her or his sentence reduced by up to one year. 18 U.S.C. 3621(e)(2)(B). The Bureau's list of offenses which makes a prisoner ineligible for the reduction is very broad. As with the shock incarceration program any inmate who has been convicted of a drug offense whose sentence was enhanced for possession of a firearm is ineligible for the reduction.

Parole has been replaced by supervised release. See 18 U.S.C. 3583 and 21 U.S.C. 841 (b). The term of supervised release may vary, depending on the nature of the conviction. In most cases it will be between two and five years. In some drug cases, it can be as long as life. The conditions of supervised release are similar to the conditions of probation or parole. If a defendant violates the terms of supervised release, the defendant may be sentenced to serve a term of up to five years if the original offense was a class A felony (maximum of life), three years in prison if the original offense was a class B felony (maximum of twenty-five years or more), two years if the original offense was a class C or D felony (maximum of less than twenty-five years, but at least five), and one year in any other case. If the court imposes a prison term which is less than the maximum it may reimpose a term of supervised release equal to the original term of supervised release less the length of the prison sentence imposed. 18 U.S.C. 3583(h).

b. Probation. The court may impose probation under the applicable statutes if the defendant has been convicted of any offense other than a class A or B felony. Probation is permitted under the Guidelines only if the bottom of the sentencing range is six months or less. If the bottom of the range is more than zero months, a period of home confinement, intermittent confinement, or confinement in a community treatment center must be substituted for the period of incarceration.

c. Fines. Most criminal statutes carry fines. An alternative schedule of fines is found in 18 U.S.C. § 3571. The guidelines also contain a table of fines to be imposed depending on the offense severity level. Inability to pay the fine is a grounds for a departure below the guideline fine.

d. Restitution - 18 U.S.C. § 3663, et seq. An order of restitution is permitted in almost all cases and required most cases were an identifiable victim suffered physical injury or pecuniary loss. If the amount of loss is in dispute the court decides the issue under the procedures set out in 18 U.S.C. 3664.

e. Forfeitures. Forfeitures under the criminal statutes may be ancillary to a criminal prosecution. Many criminal statutes now authorize forfeiture of assets directly or indirectly derived from the criminal conduct or used in connection with the offense. A fee from a criminal defendant paid to a lawyer may not be safe, and

special care should be taken in a drug case.

g. Sentencing Studies - 18 U.S.C. § 3552(b). If the Court desires information in addition to that contained in the presentence report, it can order a study. The statute states a preference for studies performed in the community by qualified consultants. The study may also be conducted at a Bureau of Prisons facility of sixty days duration. Such studies are extremely rare.

D. Post-Sentencing. Post-sentencing here means immediately after, and later, to sentencing. This time period discussion will include situations after sentencing both on a trial conviction and on a guilty plea situation.

1. Self-Reporting. In the event of a sentence to a period of incarceration, it is possible to move the court to allow the defendant to self-report to an institution. Self-reporting would, of course, be rare in the case of the defendant not previously on bond. Defendants who are permitted to self-report have their Bureau of Prisons security level score reduced.

2. Bond pending Appeal - Rule 46(c), 18 U.S.C. § 3143(b). The new bail provisions make bond appeal less likely. The preference is detention. Self-reporting would occur under a continued bond.

3. Stays - Rule 38. A sentence of imprisonment is stayed only if the defendant is released on bond pending appeal. An order of a fine may be stayed by the district court or the court of appeals. The defendant may be required to post a bond as security for the fine. The district court may stay a sentence of probation pending appeal. The district court may also stay orders of forfeiture, notice to victims, and restitution. The district court may require the posting of a bond or issue restraining orders when issuing a stay.

4. Notice of Appeal - Rule 4(b). Notice of appeal must be filed in the district clerk's office within ten days after entry of the order appealed from is entered on the docket of the court. For good cause shown, this period may be extended for up to an additional thirty days. The government has thirty days to notice an appeal. If the government notices an appeal, the defendant has ten additional days to notice a cross appeal.

5. Correction or Reduction of Sentence - Rule 35. The government may file a motion to reduce the sentence defendants who have given "substantial assistance" the government after sentencing. The motion must be filed within one year of sentencing unless the assistance involves information not known to the defendant until one year or more after the sentence was imposed.

F. Limiting Instructions - Evidence Rule 105. If evidence is admissible as to one but not all defendants, or is admissible for limited purposes only, requests should be made for a simultaneous limiting instruction as to the evidence.

G. Conditional Admission - Evidence Rule 104(b). Care should be taken to recall any evidence the court has allowed in conditionally and to make sure the jury then knows that it is coming in conditionally so that a failure to fulfill the condition is answered by a motion to strike the evidence.

H. Motions. Motions for mistrial may be made at any point that counsel deems appropriate, but it should be recalled that a defense acquiescence in such a motion or declaration will waive any objection to a second jeopardy. Other motions relating to some evidentiary aspect of the trial or otherwise may be made or renewed as it seems appropriate. Several are particularly important. Some of them could be considered during trial although not made until after trial.

1. Separation or Exclusion of Witnesses - Evidentiary Rule 615. This motion should be made before the first witness is called, and the defense should seek to apply it to the government case agent also unless the agent testifies first. Consistent with this effort to keep one witness' testimony from affecting others, the defense should ask the court to instruct any witness who is being excused not to discuss their testimony with anyone until the case is concluded.

2. Judgment of Acquittal - Rule 29. The rule does not discuss the motion as follows, but these are the practical considerations and effects of the rule. The motion may be made to any count or counts.

a. At the Close of Government's Case in Chief.

(1) Granted. Terminates the case. Government evidence so lacking that it, together with all reasonable inferences, is insufficient to have evidence on all elements of the crime for the jury to consider.

(2) Reserved. The Court may reserve ruling on a motion for judgment of acquittal made at the close of the government's case. However, it must decide the motion on the basis of the evidence at the time ruling was reserved. Rule 29(b).

(3) Denied. Decide whether to present evidence or not. If not, you may stand on any error in failure to grant the motion. If defense presents evidence, any error will be effectively waived and the reviewing court will look to all of the evidence, prosecution and defense, in deciding the correctness of any succeeding motion for judgment.

b. At the Close of All Evidence. This may he before receipt of the case by the jury or after the verdict or failure to reach one.

(1) Granted. Terminates the case if prior to submission to the jury. If the jury has convicted, the court may grant the motion, but the government may appeal without any double jeopardy problem since a reversal would merely result in a reinstatement of the jury verdict.

(2) Reserved. Before the case is submitted jury, the court may elect to reserve ruling until after a verdict is achieved or it appears that a verdict cannot be reached.

(3) Denied. If before the jury gets the case, can make the motion again if the jury convicts or fails to reach a verdict on any count. Reviewing court will look at all the evidence in the light most favorable to the government.

(4) Time. Any motion as to any count on which the jury has failed to acquit must be filed within seven days of the discharge of the jury or before a later date set within that seven-day period. (Jurisdictional!)

3. Motion in Arrest of Judgment - Rule 34. Motion addresses lack of jurisdiction or sufficiency of the indictment and must be filed within seven days of a finding of guilt, whether after a trial or not.

I. Argument - Rule 29.1. The government gets to open and close the argument . The defense closing is sandwiched in the middle. The court will tell each side how much time they have. This can work a hardship on any one defendant in a multi-defendant case.

J. Instructions - Rule 30. The court must inform the parties of its ruling on requests for charge before the attorneys present their argument to the jury. The court may give its instructions before or after the attorney argue the case, or the court may split the instructions, giving some before closings and the rest after.

XVII. POST-TRIAL OR POST-CONVICTION PROCEEDINGS. If the jury has convicted or failed to reach a verdict on any count, post-trial activity will be necessary. In the event of a conviction on a plea of guilty or on a conviction by the court or jury, a date for disposition or sentencing will normally be set upon the court's finding of guilt. On a conviction after trial, the court may at this time set a date for the filing of post-trial motions.

A . Motions.

1.Bond to Continue - 18 U.S.C. § 3143(a). The person is to be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or present a danger. The bond question will be raised on a plea as well as on a trial conviction. See section VII F. supra.

II. SPECIAL PROVISIONS, MISCELLANEOUS

A. Revocation or Modification of Probation or Supervised Release - Rule 32.1, 18 U.S.C. §§ 3565 and 3583(g). The rule fairly well sets out a simple procedure on revocation. Proof of violation is required to be to the satisfaction of the judge. It may be that a probation officer, not a prosecutor, is the true prosecutor. The Sentencing Commission has issued policy statements setting forth recommended sentencing ranges upon a finding of violation. Unlike guidelines, these are not binding on the court; the court is only required to consider them.

B. Rule 20. Rule 20 provides for the transfer of a case from the charging district to the district of arrest or presence for plea and sentencing. The defendant must plead guilty or nolo contendere, although it is possible that such pleas may be to less than all counts in any indictment or information.

C. Rule 25. If the district judge trying a case becomes disabled during the trial, another district judge upon certifying he has familiarized himself with the case may proceed.

D. Rule 49. Papers are served and filed as provided in the Federal Rules of Civil Procedure and must be served on all parties.

E. Rule 57. Local rules have been promulgated by the district courts and should be referred to for general rules of practice in the district.

F. Pretrial Diversion. Under certain circumstances the United States Attorney may, in his discretion and based on certain recommended guidelines of the Department of Justice, place a potential defendant in a pretrial diversion program. Under the Department of Justice Guidelines, the United States Attorney may divert from prosecution any person, against whom a prosecutable case exists, who voluntarily agrees to submit to the program. Under this program the accused (this plan may he used at any stage of the prosecution but, as a practical matter, it will probably be applied most often between arrest and indictment) must agree to submit to an investigation by the probation office of the court for an evaluation study. If the probation office recommends diversion based upon a suitable program of supervision by the probation office, and the defendant, his counsel, and the United States Attorney agree, the accused may enter the diversion program for a period of not more than twelve months. During the period specified, the accused is supervised; and if he breaches the conditions of the supervision agreement, which decision rests exclusively in the hands of the United States Attorney, he may be prosecuted in the same manner as if the diversion program had not been tried. If the diversion is successful, the United States Attorney at the end of the period will formally decline prosecution of the accused for the offense alleged. Pretrial diversion has no statutory basis and is strictly within the discretion of the United States attorney acting under guidelines promulgated by the Attorney General of the United States. It is mentioned in the Speedy Trial Act, 18 U.S.C. § 3161(h)(2), as a "period of delay . . . for the purpose of allowing the defendant to demonstrate his good conduct." Of course, any delay in prosecution does have speedy trial implications, and a defendant who enters such a program must waive any ultimate objection based on any right to a speedy trial or the statute of limitations in order to enter such a program.

G. Juvenile Delinquency - 18 U.S.C. § 5031, et seq. Juvenile delinquency is defined under the Act as the violation of any law of the United States by a person prior to his eighteenth birthday which would he a crime if committed by an adult. Under the Act, a juvenile shall not be proceeded against in the federal courts unless the Attorney General of the United States certifies

that the courts of the state does not have or refuses to exercise jurisdiction over the case, that the state does not have adequate programs or services to treat the juvenile, or that the offense is a felony crime of violence or a felony drug offense and there is substantial federal interest in the case. Under these circumstances, no analysis of the Act will be undertaken in this text. As a practical matter, the government will not prosecute juveniles. If a defendant is very young, therefore, the date of any offense and the defendant's birth date should be carefully checked. It may be that an adult has been charged with an offense during minority.

I. Release of Material Witnesses - 18 U.S.C. § 3144. A material witness may be placed under the conditions set forth in section 3142 if it appears by affidavit that the person is a material witness in a criminal proceeding and it can be shown that his presence cannot be assured by subpoena. A witness cannot be detained because of inability to meet the conditions of his release if his testimony can be secured by deposition (Rule 15), and further detention is not necessary to prevent a failure of justice.

I. Immunity of Witnesses - 18 U.S.C. § 6001. et seq. Immunity may be granted to a witness who has refused to testify in court or before a federal grand jury on the basis of his privilege against self-incrimination. Such immunity must be court ordered and must be based upon a request by the United States Attorney, with the approval of the Attorney General or other designated official (18 U.S.C. § 6003(b), on the grounds that the testimony sought is (1) in the public interest and (2) the witness invokes self-incrimination. An immunity grant under this section is for use immunity, as opposed to transactional immunity.

Because of the complexity of the procedure, it is more likely that a defense attorney will have to deal with offers of immunity by a letter or agreement from the United States whose purpose is to secure the witness' or the defendant's cooperation.

Immunity letters and statutory immunity may differ in their implications if the person refuses to testify. Statutory immunity secures testimony, not interviews and statements. Immunity letters or agreements containing immunity promises may secure both. On a refusal to give testimony, a person given statutory immunity may be subject to contempt. On a refusal to give testimony or other evidence under an immunity agreement, the government may just back out of any agreement.

XX. FORMS. No forms will be supplied in this work. The practitioner will find an abundance of form books to assist in preparation of court documents. Other practitioners, as well as court clerks. can be extremely helpful.