OVERVIEW OF A FEDERAL CRIMINAL CASE

I. PRACTICAL QUESTIONS

A. WHAT IS THE CRIMINAL JUSTICE ACT?

1. Whether retained or appointed, the Criminal Justice Act, 18 U.S.C. §3006A et seq., applies to the defense in most criminal cases in federal court.

2. The Act provides for the creation of Federal Public Defender offices as well as Community Defender Organizations. See 18 U.S.C. §3006A(g).

3. The Act also provides that private attorneys shall be appointed in a substantial portion of the cases. See 18 U.S.C. §3006A(a)(3).

4. Many federal courts have developed lists of attorneys who are eligible and/or willing to accept federal appointments. These lists of lawyers are typically referred to as “CJA Panel Attorneys.”

5. The local district court clerk’s office should have a copy of the local plan for implementation of the Criminal Justice Act, which will provide details on appointment procedures.

B. HOW DOES APPOINTED COUNSEL GET PAID FOR EXPERT, INVESTIGATIVE AND OTHER SERVICES

1. The Criminal Justice Act provides for payment for services other than counsel, including expert and investigative services. See 18 U.S.C. §3006A(e).

2. The total cost of services obtained without prior authorization may not exceed $1000 and expenses reasonably incurred. 18 U.S.C. §3006A(e)(2).

3. Application for these services should be made ex parte and include the reasons the services are required as well as the projected costs involved.

4. A sample ex parte application for other services is attached.

5. These applications must be accompanied by a CJA Form 21, a copy of which is attached.

6. Expert and other investigative services may also be available under the CJA to clients who have retained counsel. The standard is whether the defendant is able to afford the services. See 18 U.S.C. §3006A(e)(1).
C. ARE TRANSCRIPTS COVERED?

1. Transcripts are also available under the CJA. They can be obtained by the use of CJA Form 24, a copy of which is attached.

D. THE BASIC LIBRARY

1. West Publishing produces the two critical books:

   (1) West’s Federal Criminal Code and Rules and

   (2) the Federal Sentencing Guidelines.


   b. The Federal Sentencing Guidelines are amended yearly (November of each year) and West Publishing produces the new version each year, including the amendments.

2. In addition to these two publications, appointed counsel should have access to:

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

   (2) The Federal and Supreme Court Reporters;

   (3) Devitt and Blackmar on Federal Jury Instructions;

   (4) The Circuit Count’s Pattern Jury Instructions;

   (5) Weinstein’s Evidence by Matthew Bender;

   (6) Imwinkelried’s Evidentiary Foundations by Lexis Law Publishing;

   (6) West’s Federal Practice Digests;

   (7) Wright’s Federal Practice and Procedure by West publication);

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

3. Access to Westlaw or Lexis is extraordinarily helpful and the costs are reimbursable under the Criminal Justice Act.
II. PROCEDURAL QUESTIONS

A. HOW ARE MOST DEFENDANTS ARRESTED AND CHARGED?

1. Many defendants are initially charged by complaint; others make their initial appearance pursuant to an indictment.

2. The United States Attorney may request a summons from the court for the defendant to appear or a warrant for the defendant to be arrested and brought before the court.

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


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

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

B. WHAT DOES THE PRETRIAL SERVICES OFFICE DO?

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

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

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

4. Pretrial services were established under 18 U.S.C. §3152. The statute contains confidentiality requirements as set forth in 18 U.S.C. §3153(c). Except as otherwise provided, information obtained in the course of performing pretrial services functions in
relation to a particular accused is to be used only for the purposes of a bail determination and is otherwise confidential.

a. However, the exceptions may swallow the rule. The exceptions include access by probation officers for the purpose of compiling presentence reports and in limited cases by law enforcement agencies for law enforcement purposes. See 18 U.S.C. §3153(c)(2).

b. Information made confidential is not admissible on the issue of guilt in a criminal judicial proceeding unless the proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failing to appear with respect to which pretrial services were provided. See 18 U.S.C. §3153(c)(3).

c. The bottom line is that the information will make its way into the presentence report and can affect the sentence.

C. WHAT ARE THE BAIL REFORM ACT PROCEDURES?

1. The Bail Reform Act, 18 U.S.C. §3142 et seq. sets forth the procedures for determining whether the defendant will be released or detained pending trial.


4. The judicial officer may not impose a financial condition that results in pretrial detention. 18 U.S.C. §3142(c)(2).

5. If a financial condition is the only condition that will reasonably assure the defendant’s appearance and/or safety of the community, detention may result. See 1984 U.S.C.C.A.N. 19; United States v. Westbrook, 780 F. 2d 1185 (5th Cir. 1986); United States v. Maull, 773 F. 2d 1479 (8th Cir. 1985) (en banc).

6. “Nebbia” hearings to determine the source of collateral (United States v. Nebbia, 357 F. 2d 303 (2d Cir. 1966) have been codified. See 18 U.S.C. §3142(g)(4).

7. In certain circumstances, either the court or the government may move for pretrial detention.

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

9. The court and the government may move for detention where there is a serious risk of flight or a serious risk of obstruction of justice. See 18 U.S.C. §3142(f)(2).

10. There is a presumption that no condition can assure the safety of the community when the defendant has been convicted of an (f)(1) offense committed while on release pending trial and not more than five years have elapsed since the date of conviction or release from imprisonment, whichever is later.

11. There is a second rebuttable presumption that no condition or combination of conditions will reasonably assure appearance and safety if the judicial officer finds there is probable cause to believe that the defendant committed a drug offense punishable by ten years or more or an offense under 18 U.S.C. §924(c) (carrying or using a firearm in the commission of a felony).

12. The presumptions have been interpreted as shifting only the burden of production and not the burden of persuasion to the defendant. United States v. Dillon, 938 F.2d 1412 (1st Cir. 1991); United States v. Martir, 782 F.2d 1141 (2d Cir. 1986); United States v. Dominguez, 783 F.2d 702 (7th Cir. 1986); United States v. Fortna, 769 F.2d 243 (5th Cir. 1985).

   a. This “burden of production” may require the defendant to produce some credible evidence showing reasonable assurance of appearance and/or no danger to the community. United States v. Carbone, 793 F.2d 559 (3d Cir. 1986).

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

   a. The government may seek a three day continuance and the defendant may seek a five day continuance.

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

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

   (2) the weight of the evidence against the person;

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

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

15. The defendant may proceed by proffer and may confront witnesses. See 18 U.S.C. §3142(f).

16. Most circuits permit the government to proceed by proffer. See United States v. Gaviria, 828 F. 2d 667 (11th Cir. 1987); United States v. Martir, 782 F. 2d 1141 (2d Cir. 1986); United States v. Delker, 757 F. 2d 1390 (3d Cir. 1985); United States v. Fortna, 769 F.2d 243 (5th Cir. 1985).

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

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

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

D. WHAT IS THE SPEEDY TRIAL ACT?

1. The Speedy Trial Act, 18 U.S.C. §3161 et. seq., provides for specific time limits in which federal criminal cases are to be prosecuted and brought to trial.

2. In general, the defendant must be indicted within 30 days from the date on which he or she was arrested or served with a summons in connection with federal charges and must be tried within 70 days of the filing date of the information or indictment or the date of appearance on the information or indictment, whichever date is last. See 18 U.S.C. §3161(b) and (c)(1).
3. There is a defense preparation period of 30 days during which the defendant may not be tried absent consent in writing.

   a. The 30 day period runs from the date on which the defendant first appears through counsel. 18 U.S.C. §3161(c)(2).

4. There are certain periods of excludable time which can extend the 70 day arraignment to trial rule. These potential excludable time delays are set forth in 18 U.S.C. §3161(h).

5. Failure to follow the time restrictions of the Speedy Trial Act will result in dismissal of the charges. See 18 U.S.C. §3162(a)(1) and (2).

   a. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere waives the right to dismissal under §3162.

   b. Dismissal can be with or without prejudice and the factors to be considered are set forth in §3162.

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

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

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

8. The federal Speedy Trial Act is to be distinguished from the Speedy Trial Clause of the Sixth Amendment.

   a. The right to a speedy trial is protected by the Sixth Amendment to the United States Constitution. See United States v. MacDonald, 102 S.Ct. 1497 (1982). A defendant moving to dismiss an indictment based on a Sixth Amendment speedy trial claim must show some kind of actual prejudice. United States v. Lovasco, 97 S.Ct. 2044 (1977); United States v. Marion, 92 S.Ct. 455 (1971). A four part test will be applied in determining whether an indictment should be dismissed under
E. WHAT DISCOVERY RULES APPLY TO CRIMINAL CASES?

1. One of the most difficult problems in a federal criminal case is obtaining adequate discovery. Discovery is generally available under Fed. R. Crim. P. 16. However, discovery is limited in most federal cases.

2. Rule 16 provides access generally to statements of the defendant, criminal record of the defendant, physical evidence, scientific reports and summaries of expert testimony as well as the bases for expert opinions.


4. There are also constitutional requirements for discovery.

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

6. There are certain reciprocal obligations on the defendant.
   a. When a Rule 16 request is invoked, the defendant may also have a reciprocal obligation. See Fed. R. Crim. P. 16(b).
   b. The defendant must also provide certain information regarding an alibi defense upon request. See Fed. R. Crim. P. 12.1.
   c. The defendant has an affirmative duty to notify of an insanity or mental condition defense. See Fed. R. Crim. P. 12.2.
d. The defense must give notice of an intent to rely on a public authority defense. Fed. R. Crim. P. 12.3.

e. Fed. R. Crim. P. 26.2 requires the production of defense witness statements, with the exception of the defendant’s statement.

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

F. HOW ARE PRETRIAL ISSUES HANDLED IN CRIMINAL CASES?

1. Most districts have time limitations for the filing of pretrial motions and certain notice requirements.

2. Motions will normally be made to seek specific relief, e.g. suppression, severance, discovery but may also be made to educate the court or cause the prosecutor to more closely evaluate the case.

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

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

5. Witnesses can be subpoenaed to pretrial hearings and trial under Fed. R. Crim. P. 17. Documents are subpoenaed under Fed. R. Crim. P. 17(c).

6. It is probably the rare case where the defendant should testify at a pretrial hearing.
   a. This is so because before a judge alone, the defendant will usually lose the credibility battle against a law enforcement officer.
b. In addition, the prosecution gets a free crack at cross examination.

7. The primary time a defendant may need to testify pretrial (unless an affidavit can be used) is to establish standing to suppress. See United States v. Salvucci, 100 S.Ct. 2547 (1980); Rawlings v. Kentucky, 100 S.Ct. 2556 (1980). In that situation, care must be taken to limit the testimony to the issue of standing.

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

G. IS A PRETRIAL CONFERENCES HELD IN A CRIMINAL CASE?

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

H. WHAT ARE MOTIONS IN LIMINE?

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

I. HOW ARE DEFENSE SUBPOENAS HANDLED IN A CRIMINAL CASE?

1. Witnesses and documents can be subpoenaed to pretrial hearings as well as trial under Fed. R. Crim. P. 17.

   a. Unless the court approves otherwise, subpoenas are to bring witnesses and/or documents to the hearing at which the witness or document has relevancne. See Fed. R. Crim. P. 17(b) and (c).

   b. In order to obtain prehearing production, the moving party must show that

       (1) the documents are evidentiary and irrelevant;

       (2) they are not otherwise procurable reasonably in advance of trial by the exercise of due diligence;
(3) the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend to unreasonably delay the trial; and

(4) the application is made in good faith and is not intended as a general fishing expedition. United States v. Nixon, 94 S.Ct. 3090 (1974).

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

J. HOW IS THE JURY PANEL SELECTED IN A CRIMINAL CASE?

   a. In Test v. United States, 95 S.Ct. 749 (1975), the Supreme Court held that a defendant has the right to inspect juror records in order to file a challenge to the composition of the venire.

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

3. The right to a trial by jury contemplates that an impartial jury will be drawn from a fair cross section of the community. Taylor v. Louisiana, 95 S.Ct. 692 (1975); Thiel v. Southern Pacific Company, 66 S.Ct. 984 (1946).

4. The Jury Selection and Service Act entitles a federal criminal defendant to a jury selected at random from a fair cross section of the community, free from discrimination on the basis of race, color, religion, sex, national origin or economic status. 28 U.S.C. §1861-1862.
   a. To establish a prima facia violation of the fair cross section requirement, the defendant must show that:
      (1) The group alleged to be excluded is a “distinctive group” in the community;
      
      (2) The representation of this group in venires from which juries are selected is not fair and reasonable in relation to a number of such persons in the community; and
      
      (3) This under representation is the result of systematic exclusion of the group in the jury selection process. Duren v. Missouri, 99 S.Ct. 664 (1979).
K. HOW IS JURY SELECTION CONDUCTED IN A CRIMINAL CASE?

1. Most federal courts have basic information on the potential jurors available for a review by counsel. Some courts utilize a jury questionnaire, which may be made more extensive in any given case.

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

L. HOW IS VOIR DIRE CONDUCTED IN A CRIMINAL CASE?

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

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

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

4. Another common federal jury selection method is the “modified struck system” in which only 12 members from the venire are brought forward and questioned.
   a. Both counsel are given an opportunity to exercise challenges for cause and when the 12 are passed for cause, one side is given the opportunity to exercise a peremptory challenge to excuse a prospective juror and another is seated in the excused juror’s place. Once the new juror is questioned, and if passed for cause, another peremptory challenge is exercised. As soon as all of the peremptory challenges are used, the 12 sitting in the box become the jurors for the case. Alternates may be selected in a similar manner.
In a series of cases following Batson v. Kentucky, 106 S.Ct. 1712 (1986), the Supreme Court extended restrictions on race based challenges to gender and also restricted the defense exercise of peremptory challenges.

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

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

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

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

M. HOW IS THE TRIAL CONDUCTED IN A CRIMINAL CASE?

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

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

3. A motion for judgment for acquittal (whether it is realistic or not) must be made at the close of the government’s case and renewed at the close of the defense case. See Fed. R. Crim. P. 29.

   a. Failure to make the Rule 29 motion can result in the waiver of certain issues on appeal. See e.g. United States v. Baxley, 982 F. 2d 1265 (9th Cir. 1992); United States v. Kuball, 976 F. 2d 529 (9th Cir. 1992).

4. Motions for severance must be renewed during trial at the time the severance related problem is presented. If not renewed at trial, a severance motion may be deemed waived.
even if it was properly filed pretrial. See e.g. United States v. Vasquez-Velasco, 15 F. 3d 833 (9th Cir. 1994).

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

N. HOW ARE JURY INSTRUCTIONS SELECTED?

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

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


O. HOW MANY JURORS HEAR A CRIMINAL CASE?

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

2. Under Fed. R. Crim. P. 31 the verdict must be unanimous. If there are two or more
defendants, the jury at any time during deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed.

P. HOW ARE POST TRIAL MOTIONS HANDLED IN A CRIMINAL CASE?

1. Post trial motions are usually made pursuant to Fed. R. Crim. P. 29 or 33.
   a. These motions must be made or renewed within seven days after the jury is discharged or within such further time as the court may fix during the seven day period.
   b. Rule 29 is the motion for judgment of acquittal and Rule 33 is the motion for a new trial.

2. It is a good idea to ask the judge at the time the guilty verdict is returned, to extend the seven day period so that there is sufficient time to investigate and prepare any necessary post trial motions.

Q. HOW IS SENTENCING CONDUCTED IN A CRIMINAL CASE?

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

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

3. The guidelines utilize a sentencing table comprised of 43 offense levels which increase in severity and six criminal history categories which also increase in severity. There are 19 separate sections which cover most federal offenses and assign a base offense level as well as additional levels for certain specific offense characteristics for each crime. The offense level is then subject to various adjustments relating to the victim of the crime, the defendant’s role in the offense, obstruction or reckless endangerment, multiple counts and acceptance of responsibility. The criminal history category is determined by adding points for most prior sentences served by the defendant. There are aggravated offense levels and criminal history categories for career offenders and armed career criminals. Much of the work in federal sentencing today is arguing for a downward departure, once the guideline range is determined. See, e.g. Koon v. United States, 116 S.Ct. 2035 (1996) (explaining authority for departures).
R. WHAT PROCEDURES APPLY TO TAKING AN APPEAL IN A CRIMINAL CASE?

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

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

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