BROOME COUNTY BAR ASSOCIATION
NDNY FEDERAL COURT BAR ASSOCIATION

Continuing Legal Seminar on

FEDERAL PRACTICE OVERVIEW
Civil and Criminal
May 4, 2021 9:00 am - 1:00 pm

SEMINAR MATERIALS

Panelists:
Hon. Thomas J. McAvoy, Senior United States District Judge
Hon. Miroslav Lovric, United States Magistrate Judge
John Domurad, Esq., Clerk, Northern District of New York
Paul Evangelista, Esq., First Assistant Federal Defender, Northern District of New York
Richard Lindstrom, Esq., Law Clerk to Hon. Thomas J. McAvoy
Albert J. Millus, Jr., Esq.
Suzanne Messer, Esq.

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BCBA/NDNY FCBA Seminar

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18 USCS § 3142

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part II. Criminal Procedure (Chs. 201 — 238) > CHAPTER 207. Release and detention pending judicial proceedings (§§ 3141 — 3156)

§ 3142. Release or detention of a defendant pending trial

(a) In general. Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) Released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2)released on a condition or combination of conditions under subsection (c) of this section;

(3)temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4)detained under subsection (e) of this section.

(b) Release on personal recognizance or unsecured appearance bond. The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (*42 U.S.C. 14135a*), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A)subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (*42 U.S.C. 14135a*); and

(B)subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i)remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii)maintain employment, or, if unemployed, actively seek employment;

(iii)maintain or commence an educational program;

(iv)abide by specified restrictions on personal associations, place of abode, or travel;

(v)avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi)report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii)comply with a specified curfew;

(viii)refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix)refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (*21 U.S.C. 802*), without a prescription by a licensed medical practitioner;

(x)undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi)execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii)execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii)return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv)satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [*18 USCS § 1201*, *1591*, *2241*, *2242*, *2244(a)(1)*, *2245*, *2251*, *2251A*, *2252(a)(1)*, (2), (3), 2252A(a)(1), (2), (3), (4), 2260, 2421, 2422, 2423, or 2425], or a failure to register offense under section 2250 of this title [*18 USCS § 2250*], any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion. If the judicial officer determines that—

(1)such person—

(A)is, and was at the time the offense was committed, on—

(i)release pending trial for a felony under Federal, State, or local law;

(ii)release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii)probation or parole for any offense under Federal, State, or local law; or

(B)is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (*8 U.S.C. 1101(a)(20)*); and

(2)the person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, the person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A)the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B)the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C)a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A)an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (*21 U.S.C. 801* et seq.), the Controlled Substances Import and Export Act (*21 U.S.C. 951* et seq.), or chapter 705 of title 46 [*46 USCS § 70501* et seq.];

(B)an offense under section 924(c), 956(a), or 2332b of this title [*18 USCS § 924(c)*, *956(a)*, or *2332b*];

(C)an offense listed in *section 2332b(g)(5)(B) of title 18, United States Code* [*18 USCS § 2332b(g)(5)(B)*], for which a maximum term of imprisonment of 10 years or more is prescribed;

(D)an offense under chapter 77 of this title [*18 USCS §§ 1581* et seq.] for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E)an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [*18 USCS § 1201*, *1591*, *2241*, *2242*,

2244, (a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425].

(f) Detention hearing. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community—

(1)upon motion of the attorney for the Government, in a case that involves—

(A)a crime of violence, a violation of section 1591 [18 USCS § 1591], or an offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] for which a maximum term of imprisonment of 10 years or more is prescribed;

(B)an offense for which the maximum sentence is life imprisonment or death;

(C)an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.];

(D)any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E)any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921 [18 USCS § 921]), or any other dangerous weapon, or involves a failure to register under *section 2250 of title 18, United States Code* [18 USCS § 2250]; or

(2)upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves—

(A)a serious risk that such person will flee; or

(B)a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, the person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

(g) Factors to be considered. The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1)the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591 [*18 USCS § 1591*], a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

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

(3)the history and characteristics of the person, including—

(A)the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B)whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4)the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order. In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1)include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2)advise the person of—

(A)the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B)the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C)sections 1503 of this title [*18 USCS § 1503*] (relating to intimidation of witnesses, jurors, and officers of the court), 1510 [*18 USCS § 1510*] (relating to obstruction of criminal investigations), 1512 [*18 USCS § 1512*] (tampering with a witness, victim, or an informant), and 1513 [*18 USCS § 1513*] (retaliating against a witness, victim, or an informant).

(i) Contents of detention order. In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1)include written findings of fact and a written statement of the reasons for the detention;

(2)direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3)direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4)direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence. Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

History

HISTORY:

Added Oct. 12, 1984, *P. L. 98-473*, Title II, Ch I, § 203(a), 98 Stat. 1976; Nov. 10, 1986, *P. L. 99-646*, §§ 55(a), (c), 72, *100 Stat. 3607*, 3617; Nov. 18, 1988, *P. L. 100-690*, Title VII, Subtitle B, § 7073, *102 Stat. 4405*; Nov. 29, 1990, *P. L. 101-647*, Title X, § 1001(b), Title XXXVI, Subtitle B, §§ 3622–3624, *104 Stat. 4827*, 4965; April 24, 1996, *P. L. 104-132*, Title VII, Subtitle A, § 702(d), Subtitle B, § 729, *110 Stat. 1294*, 1302; April 30, 2003, *P. L. 108-21*, Title II, § 203, *117 Stat. 660*; Dec. 17, 2004, *P. L. 108-458*, Title VI, Subtitle K, § 6952, *118 Stat. 3775*; Jan. 5, 2006, *P. L. 109-162*, Title X, § 1004(b), *119 Stat. 3085*; July 27, 2006, *P. L. 109-248*, Title II, § 216, *120 Stat. 617*; Oct. 6, 2006, *P. L. 109-304*, § 17(d)(7), *120 Stat. 1707*; Dec. 23, 2008, *P. L. 110-457*, Title II, Subtitle C, §§ 222(a), 224(a), *122 Stat. 5067*, 5072.

United States Code Service
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USCS Fed Rules Crim Proc R 11, Part 1 of 3

Current through changes received April 9, 2021.

USCS Federal Rules Annotated > Federal Rules of Criminal Procedure > Title IV. Arraignment and Preparation for Trial

Rule 11. Pleas

(a) Entering a Plea.

(1)*In general.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2)*Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3)*Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4)*Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1)*Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A)the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B)the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C)the right to a jury trial;

(D)the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E)the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F)the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G)the nature of each charge to which the defendant is pleading;

(H)any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I)any mandatory minimum penalty;

(J)any applicable forfeiture;

(K)the court's authority to order restitution;

(L)the court's obligation to impose a special assessment;

(M)in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under *18 U.S.C. § 3553(a)*; and

(N)the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O)that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2)*Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3)*Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1)*In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A)not bring, or will move to dismiss, other charges;

(B)recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C)agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2)*Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3)*Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4)*Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5)*Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A)inform the parties that the court rejects the plea agreement;

(B)advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C)advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea.A defendant may withdraw a plea of guilty or nolo contendere:

(1)before the court accepts the plea, for any reason or no reason; or

(2)after the court accepts the plea, but before it imposes sentence if:

(A)the court rejects a plea agreement under Rule 11(c)(5); or

(B)the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by *Federal Rule of Evidence 410*.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error.A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

History

Amended Feb. 28, 1966, eff. July 1, 1966; April 22, 1974, eff. Dec. 1, 1975; *P. L. 94-64*, §§ 2, 3(5)–(10), *89 Stat. 371*, 372 April 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; April 28, 1982, eff. Aug. 1, 1982; April 28, 1983, eff. Aug. 1, 1983; April 29, 1985, eff. Aug. 1, 1985; March 9, 1987, eff. Aug. 1, 1987; Nov. 18, 1988, *P. L. 100-690*, Title VII, Subtitle B, § 7076, *102 Stat. 4406*; April 25, 1989, eff. Dec. 1, 1989; April 26, 1999, eff. Dec. 1, 1999; April 29, 2002, eff. Dec. 1, 2002; April 30, 2007, eff. Dec. 1, 2007; April 16, 2013, eff. Dec. 1, 2013.

USCS Federal Rules Annotated
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United States Department of Justice

United States Attorney
Northern District of New York

445 Broadway, Room 218
James T. Foley U.S. Courthouse
Albany, New York 12207-2924

Tel. (518) 431-0247
Fax (518) 431-0249

Re:

Dear Mr. :

The purpose of this letter is to provide you with documentary confirmation of conversations between yourself and attorneys of the United States Attorney's Office, Northern District of New York, regarding your client, .

It is understood that your client is willing to make a factual proffer to the Government. Your client has agreed truthfully to disclose all information with respect to the activities of himself and others concerning all matters about which this Office shall inquire of him. It is further understood that your client's statements shall be proffered without derivative use immunity.

The ground rules for this proffer are as follows:

First: No statements made by your client during the proffer will be used against your client in any criminal proceeding, except as provided below. In order that we both are clear as to exactly what statements are included in this assurance, the and or will prepare a e proffer.

Second: The Government may pursue any investigative leads suggested by any statements or other information provided by your client, and such derivative information may be used against your client, should our negotiations fail. This provision is necessary and intended to eliminate the necessity for a Kastigar hearing in the event of a prosecution of your client.

Third: The Government may introduce or use statements or other information provided by your client during his proffer to rebut any contrary testimony, evidence, or argument that he may offer, directly or through other witnesses or counsel, at any future hearing, trial or other proceeding, including a prosecution of your client, should our negotiations fail.

Other than as expressly set forth above, this letter is not intended and shall not be construed to limit in any way the U.S. Attorney's discretion to determine what if any federal criminal charges may be brought against your client or any other person in connection with this investigation.

It is further understood that your client must at all times give complete, truthful, and accurate information during his proffer. Should it be judged by this Office that your client has knowingly given false, incomplete, or misleading information, your client would be subject to prosecution for any applicable federal criminal violations including, but not limited to, false statements, perjury, and obstruction of justice. Any such prosecution could be premised upon any proffer statement or information provided by your client, and such statements and information, and any leads derived therefrom, could then be used against him.

Your client knowingly and voluntarily waives any right he may have under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410, to the extent inconsistent with various provisions above.

Your client's proffer is made in accordance with the understandings set forth herein.

ANTOINETTE T. BACON
Acting United States Attorney

By ______________________

Assistant United States Attorney
Bar Roll No.

I have received a copy of this letter, have read it, reviewed it with my attorney, and understand it. I hereby acknowledge that it fully sets forth my agreement with the Office of the United States Attorney's Office for the Northern District of New York. There have been no additional promises or representations made to me. I have been fully advised of my rights by my attorney. I acknowledge that I fully understand my rights and am entering into this agreement with the United States, freely and voluntarily and upon the advice of counsel.

______________________ ______________________
Date

______________________ ______________________
Attorney for Client Date

Handbook for Criminal Justice Act Lawyers
Northern District of New York

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

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

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Criminal Justice System in theNorthern District of New York[1]

I. Courts and Agencies

A. Judges

1. Magistrate Judges are appointed by the District Court. In criminal cases, magistrate judges have the authority to determine release or detention of defendants; to arraign felonies; to adjudicate misdemeanors by pleas or trials; to impose misdemeanor sentences; to issue discovery orders; and to rule on motions when delegated by district judges. *See* L. R. Cr. P. 58.1. Magistrate judges' decisions may be appealed to district judges who will review the issues *de novo*.

2. District Judges are nominated for life terms by the President of the United States and confirmed by the Senate. District judges have authority to preside over all aspects of federal criminal cases, including trials, pleas, and sentences. Some states have multiple federal districts and others do not. New York has four districts (Northern, Southern, Eastern, and Western). Each district has separate divisions. Northern New York has six divisions within the district. L. R. 47.1.

3. The Second Circuit Court of Appeals is located in New York City and is composed of judges from New York, Connecticut, and Vermont. They are nominated by the President for life terms and confirmed by the Senate. There are eleven other federal courts of appeal. The courts of appeal review cases from the district courts to determine whether there have been errors of law or fact, and whether such errors require a reversal of a defendant's conviction or sentence. There are also instances in which the government may appeal a district court's rulings regarding orders or sentences. Jury acquittals of defendants may not be appealed.

4. The United States Supreme Court is the only judicial authority above federal courts of appeal. The nine Justices are also nominated by the President and confirmed by the Senate for life terms. The Supreme Court reviews federal criminal convictions and sentences at its discretion. Review may be allowed when there is a significant question of either constitutional law or statutory interpretation that is unresolved by the Supreme Court or is in dispute among lower courts.

B. Agencies

1. The United States Attorney (USA) is the prosecutor responsible for federal criminal cases in each federal district. The USA is appointed by the President and assigns Assistant United States Attorneys (AUSAs) to handle cases. Cases may be investigated by federal agents, e.g.,

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

Federal Bureau of Investigation (FBI), Bureau of Alcohol, Tobacco, and Firearms (ATF), Internal Revenue Service (IRS), Bureau of Immigration and Customs Enforcement (ICE); state agencies, e.g., New York State Troopers or Albany Police Department; or task forces of state and federal agents. Prosecutions may begin as the result of arrests or as part of ongoing investigations.

2. The Federal Public Defender (FPD) is appointed by the Second Circuit Court of Appeals for a renewable four-year term. The FPD employs Assistant Federal Public Defenders (AFPDs), investigators, and other support staff. The FPD is assigned by the District Court to represent indigent criminal defendants. *See* NDNY General Order 1. Funding and salaries of FPD employees are appropriated through the Administrative Office of the U.S. Courts, Office of Defender Services.

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

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

5. The United States Marshal takes custody of federal criminal defendants and is responsible for transporting them to and from court. The Marshal's Service is part of the Department of Justice. The Marshal has authority to contract with state and local authorities to house pretrial detainees. They also search for fugitives and serve subpoenas.

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

II. Pretrial Procedure

A. Arrests

When crimes occur outside an officer's presence, a warrant is necessary for arrest. U.S. Const. Amend. IV. Warrants are obtained by sworn testimony establishing probable cause that a crime has occurred. Fed. R. Crim. P. 4 and 9. Police can also arrest persons for crimes committed in their presence without the necessity of warrants. United States v. Watson, 423 U.S. 411, 424 (1976). Judges may allow accused persons to appear in court without arrest by a summons issued and served on the defendants. Fed. R. Crim. P. 4.

Regardless of the jurisdiction in which persons will ultimately be charged, federal law requires arresting officers to bring defendants before a magistrate as soon as possible (*See* Fed. R.

Crim. P. 5 and L. R. Cr. P. 5.1), and the time from arrest is not to exceed 48 hours absent extraordinary circumstances. Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). In federal court, this proceeding is called an initial appearance before a magistrate judge. *See* United States v. Perez, 733 F.2d 1026, 1027 (2d Cir. 1984).

If officers charge a defendant in state court this does not preclude filing federal charges later. In many cases, state authorities will defer prosecutions in lieu of federal charges. *See* Bartkus v. Illinois, 359 U.S. 121, 123 (1959). In other cases, state and federal charges are pursued simultaneously. It is not considered to be a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution for identical conduct to be prosecuted in state and federal courts, *see* Abbate v. United States, 359 U.S. 187 (1959), unless the succession is used as a sham. *See* United States v. Aboumoussallem, 726 F.2d 906, 910 (2d Cir. 1984) . Prosecution of the same charges in different federal districts *is* double jeopardy. United States v. Olmeda, 461 F.3d 271 (2d Cir. 2006).

B. Pretrial Services Reports

Before initial appearances in court, defendants will be interviewed by pretrial services officers (PTSOs). *See* NDNY General Order 7 and L. R. Cr. P. 46.1. In the Northern District of New York, PTSOs are employees of the United States Probation Office (USPO). Defendants' answers are used to complete pretrial services reports to a magistrate judge in order to help determine release or detention. 18 U.S.C. §3154(1).

1. Interview

PTSOs will warn defendants about the potential effect of their answers and their right to counsel. *Pretrial Services Form* 1. Although PTSOs are not allowed to ask defendants about the charged offenses, sometimes their questions overlap -- *e.g.* questions about immigration status in illegal entry cases, or questions about criminal history in recidivist offenses. *See* 18 U.S.C. §3153(c)(1). Those answers may not be used in the government's case-in-chief, but they could be used for impeachment or sentencing. *See* Walder v. United States, 347 U.S. 62, 65 (1954). PTSOs may record incriminating statements whenever they are volunteered by defendants. *Office of Probation and Pretrial Services Monograph 112* ("The Pretrial Services Investigation and Report") (rev. March 2007), at II-3. Those statements may end up in a later presentence report. *Pretrial Services Form* 1.

The PTSO will use the defendant's answers, information gathered from records, and other interviews, to create a report for the Court. A recommendation of release or detention can be based on a nine-point scale called a "Risk Prediction Index." *Office of Probation and Pretrial Services Monograph 112* ("The Pretrial Services Investigation and Report") (rev. March 2007), at IV-7-8. If release is appropriate, the report must recommend the least restrictive conditions of release that assure the defendant's appearance and safety to the community. *Id*, at I-3. The PTSO should not consider the weight of the evidence, or whether a rebuttable presumption applies, nor should the officer address potential penalties, as these are solely for the Court to assess. *Id*, at I-4-5.

2. Legal Advice

PTSOs may not give legal advice. *Office of Probation and Pretrial Services Monograph 112* ("The Pretrial Services Investigation and Report") (rev. March 2007), at II-4. In the Northern District of New York, magistrate judges allow the FPD and CJA counsel to meet with defendants before the interview, and may decline the interview when appropriate. Even when circumstances prevent that private meeting, defense counsel is authorized to attend the interview. *Id*, at II-1. Therefore, whenever possible, counsel should at least attend the interviews. It is also defense counsel's responsibility to complete the financial affidavit with the client. The FPD must be notified whenever a defendant is being interrogated and requests the assistance of counsel. NDNY General Order 1, §IX(A).

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

C. Initial Appearances

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

1. Charges

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

a. Complaint

When defendants are charged by a complaint, no answer or plea is necessary. Therefore, any detailed discussions of the charges between lawyers and defendants can take place after release or where defendants are ultimately detained. Defendants charged by a complaint with felonies must then be indicted by a grand jury within thirty days. 18 U.S.C. §3161(b); NDNY General Order 17. This deadline is subject to certain exceptions. *See* 18 U.S.C. §3161(h).

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

b. Indictment

An Indictment is a written charge signed by a grand jury foreman on behalf of at least 12 members of a grand jury. Fed. R. Crim. P. 6(f). In Northern New York, grand jurors are selected among registered voters and licensed drivers. L. R. 47.1. Defendants should read the charges or have the charges read to them. Defense attorneys should then explain the effect of waiving the reading of the charges in court and what it means to plead "not guilty."

The court appearance for pleading to an indictment is called an arraignment. Fed. R. Crim. P. 10(a).When indicted defendants have been arrested, arraignments can occur simultaneously with initial appearances. In some federal districts, magistrate judges receive felony guilty pleas on behalf of district judges. In the Northern District of New York, magistrate judges typically do not accept guilty pleas to felonies. Magistrate judges will either read the indictments in their entirety, summarize the allegations, or defense lawyers can waive the reading with their defendant's permission. Lawyers may then enter pleas of "not guilty" for defendants. If defendants are indicted after an initial appearance occurs, and it is inconvenient to return to court, arraignments may be waived in writing by defendants. Fed. R. Crim. P. 10(b). Arraignments, or any other uncontested proceedings, may also proceed by video-conferences. Fed. R. Crim. P. 10(c).

c. Information

An Information is only filed at an initial appearance if the case is a misdemeanor, or if it was agreed that the defendant would waive indictment. Fed. R. Crim. P. 7(a)(2),(b). No answer is necessary unless a defendant intends to plead guilty to a misdemeanor. In misdemeanors, when guilt is clearly established, an expedited plea and sentencing may be in a defendant's interest. For instance, in a case of illegal entry into the United States, the government might not oppose a sentence of time served. However, each case must be evaluated by its own circumstances.

2. Appointment of Counsel

a. Eligibility

If a defendant cannot afford counsel, an attorney will be appointed. 18 U.S.C §3006A. A magistrate judge determines if a defendant qualifies for appointed counsel. If there is a question about whether the defendant's assets come from a legitimate source, the court may hold a hearing. United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1985). Interference with the right to representation can even result in dismissal. *See* United States v. Stein, 541 F.3d 130, 141 (2d Cir. 2008). In potential capital cases, the Court must consult the FPD about appointment of counsel, and two lawyers are necessary. 18 U.S.C. §3005.

The determination is based upon defendants' assets, not family or friends. There is a limit to how much the government can interfere with third-party funding. *See* United States v. Stein, 541 F.3d 130 (2d Cir. 2008). Even persons who are employed or own homes may qualify for appointment of counsel if it is unlikely they will be able to obtain adequate representation with their own resources. The government may not use this information in its case against the defendant, except in a separate prosecution for perjury or making a false statement. NDNY General Order 1, IV(E).

b. Appointment

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

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

c. Compensation

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

3. <u>Release and Detention</u>

Defendants have no absolute right to bail. United States v. Salerno, 481 U.S. 739, 749 (1987). The only constitutional restriction on bail is that it not be excessive. U.S. Const. Amend. VIII. The court must hold hearings and make findings in support of its decisions. 18 U.S.C. §3142(f); *See* United States v. Abuhamra, 389 F.3d 309 (2d Cir. 2004). By statute, magistrate judges have four choices regarding release or detention: (1) personal recognizance or unsecured appearance bonds, (2) release subject to conditions, (3) temporary detention of up to 10 days, or (4) detention pending resolution of the case. *See* 18 U.S.C. §§3141-3156 (Bail Reform Act of 1984). In the Northern District of New York cash bonds are not allowed. NDNY General Order 20; *See The Supervision of Federal Defendants*, Monograph 111, Chapt. V, pp.8-20 (Administrative Office of the U.S. Courts, rev. March 2007) (explaining the various options).

a. Options

i. Release Without Conditions

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

ii. Release With Conditions

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

iii. Temporary Detention

Temporary detention is used when there is some uncertainty about a defendant's status. For instance, if it is unclear whether defendants are subject to deportation or to charges in other jurisdictions, this option will allow judges to get definitive answers before proceeding further. It is only detention for up to10 days. 18 U.S.C. §3142(d).

iv. Detention by Findings

Detention pending trial may only be imposed after a hearing or unless a defendant waives the hearing. The government may move for detention hearings if the defendants are charged with crimes of violence, crimes with potential life or death sentences, serious drug crimes, or if they have

two or more prior convictions for specified offenses. The court or the government may move for detention if defendants are serious risks for obstruction of justice, for witness tampering, or for flight. Certain specified crimes raise rebuttable presumptions in favor of detention. 18 U.S.C. §3142(e),(f). *See* United States v. Barnett, 2003 WL 22143710 (N.D.N.Y.) (Sharpe, J.). However, even when there is a serious flight risk, the government must show no conditions would ameliorate the risk. United States v. Sabhnani, 493 F.3d 63 (2d Cir. 2007).

v. Detention by Waiver

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

b. Detention Hearings

i. Time of Hearing

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

ii. Rules

Detention hearings are not subject to the rules of evidence and information may be proffered. 18 U.S.C. §3142(f). Proffering evidence simply means that lawyers represent to the court what information supports their requests. Risk of flight may be proven by a preponderance of evidence, and dangerousness by clear and convincing evidence. United States v. Chimurenga, 760 F.2d 400, 405 (1985). Although defense counsel have the right to cross-examine government witnesses, prosecutors typically call case agents who summarize the government's evidence. *See* United States v. Matir, 782 F.2d 1141, 1145 (2d Cir. 1986).

Unless proof of the charged crime is particularly weak, defendants are best served by focusing on their strong ties to the community and lack of dangerousness. This can be supported by a history of employment, good family relations, a lack of substance abuse, and the absence of a criminal history. Although these attributes may be substantiated in pretrial reports, that is no excuse

to ignore the potential for live witnesses or documentary evidence, which may strengthen the case for release, especially when the charged crimes raise a rebuttable presumption in favor of detention.

c. Removal Hearings

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

d. Results of Release or Detention

If released, defendants will be given written copies of the conditions of release. The Northern District of New York has adopted standard conditions of release. NDNY General Order 23. If all conditions are met, the defendants may be released immediately. In some cases, release may be delayed to obtain surety signatures, post property, or complete booking procedures. Even if a federal court enters a release order, that will not affect detainers from other jurisdictions. Defendants will remain detained in state custody if they appeared in federal court pursuant to a writs of habeas corpus ad prosequendum (writs to bring persons confined in other jurisdictions).

If detained in federal custody, defendants will be the responsibility of the U.S. Marshal's Service. Defendants housed in state facilities, pursuant to contracts with local authorities, will be subject to their internal rules. However, if facilities fail to provide adequate medical care, or attorney access, that should be reported to the Marshal and FPD. Detention orders are appealable. United States, Abuhamra, 389 F.3d 309 (2d Cir. 2004).

D. Criminal Pretrial Orders

In the Northern District of New York, at a felony arraignment, magistrate judges will enter the District's Standard Criminal Pretrial Order. *See* L. R. Cr. P. 14.1. That order is explained in detail in United States v. Elliott, 363 F. Supp. 2d 439 (N.D.N.Y. 2005). The standard order describes all discovery and motion obligations of the government and defendant. The order forbids the filing of boilerplate discovery requests. Each party has a duty to contact the other and attempt to resolve discovery disputes. If either party is still unsatisfied with the state of discovery, they must seek a motion to compel, a motion for a protective order, or a motion to modify the standard order. Elliott, 363 F. Supp. 2d at 445. Those motions must be accompanied by a certificate of conference describing informal attempts to resolve the matters.

1. Government's Discovery

Within fourteen (14) days of an arraignment, the government must comply with the discovery obligations of Fed. R. Crim. P. 16(a) and 12(b)(4), exactly as if the defendants had made formal requests. Those rules list certain documents, objects, and information that are subject to discovery. The government must give notice of any statements or tangible evidence to be offered by the government in its case-in-chief. United States v. Elliott, 363 F.Supp.2d at 443; United States v. Miller, 382 F.Supp.2d 350, 360 (N.D.N.Y. 2005) (Sharpe, J.). A defendant must know he is speaking to a government agent for his statements to be discoverable. United States v. Siraj, 533 F.3d 99 (2d Cir. 2008).

The government must also provide exculpatory evidence, as defined by Brady v. Maryland, 373 U.S. 83 (1963), and its notice of intention to introduce evidence of defendants' prior acts, as defined by F.R.E. 404(b). Failure to turn over exculpatory evidence may be reversible error. Kyles v. Whitley, 514 U.S. 419 (1995); Banks v. Dretke, 540 U.S. 668 (2004); United States v. Rivas, 377 F.3d 195 (2d Cir. 2004).

At least fourteen (14) days before jury selection, the government must disclose promises made to its witnesses, as defined by United States v. Giglio, 405 U.S. 150 (1972), as well as the witnesses' prior convictions. *See* United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997). The government must transcribe all prior testimony of its witnesses, as described in Fed. R. Crim. P. 26.2 and 18 U.S.C. §3500, and it is recommended that they be disclosed to the defense as early as possible. The government shall advise agents and officers to preserve all rough notes. These are all continuing duties. However, late disclosures will not always be punished. *See* United States v. Douglas, 525 F.3d 225 (2d Cir. 2008).

2. Defendant's Discovery

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

E. Pretrial Filing Procedures

1. Method

Except for sealed and pro se filings, all written motions in criminal cases must be filed electronically. See L. R. 5.1.2. Faxing pleadings to the Court is not allowed. L. R. 5.5. All written notices and filings in a case will also be received by each party's attorney electronically. The information about how to register for "Case Management / Electronic Case Files" (CM/ECF) is located on the District's website http://www.nynd.uscourts.gov . The website answers questions about what equipment and software is necessary, how to create documents that may be filed, and how to access previously filed documents. Attorneys who are unfamiliar with electronic filing may also call the FPD for assistance.

2. Dates

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

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

F. Pretrial Motions

Except when made during a trial or hearing, a motion must be in writing, state the grounds on which it is based, and state the relief or order sought. Fed. R. Crim. P. 47. Although motions may be supported by an affidavit, sworn affidavits are not required in the Northern District of New York, except for some motions to suppress (explained below). L. R. Cr. P. 12.1. A certificate of service is required in all cases. Fed. R. Crim. P. 49.

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

1. Discovery

In state court practice, attorneys often file omnibus motions to assure they have requested all potential discovery, and have sought to suppress any illegally seized evidence. In the Northern District of New York, pursuant to L. R. Cr. P. 14.1, discovery motions may only compel, protect, or modify, what is already required by the standard criminal pretrial order. For example, it would be redundant to file a motion requesting the defendant's statements when the standard order already requires the government to provide them. However, if the government has refused to provide them, a motion to compel (explaining the efforts made to obtain those statements), would then be appropriate. If defense counsel wanted discovery that was not specifically described in the order (and the government refused to turn it over), a motion to modify the order would be the proper instrument. Prosecutors have a duty to turn over evidence favorable to the defendant. *See* Drake v. Portuondo, 553 F.3d 230 (2d Cir. 2009); United States v. Triumph Capital Group, 544 F.3d 149 (2d Cir. 2008); United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007).

2. Suppression

Motions to suppress evidence must also be specifically tailored to the facts of the case. Before filing motions to suppress evidence, defense counsel must make sure the government has

complied with the standard criminal pretrial order by giving the defendant notice of the statements and tangible evidence that the government seeks to introduce at trial. It is only then that defense counsel will be able to specifically identify materials that are subject to suppression. If the government refuses to provide such notice, a motion to compel is necessary.

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

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

3. Other

A motion for a bill of particulars may be filed when the indictment or information does not provide adequate notice to the defendants of all facts required for a *prima facie* case. Fed. R. Crim. P. 7(f). Such a pleading may be useful when the government has omitted dates, places, and persons whose identity are necessary to defend a charge. *See* United States v. Allen, 289 F.Supp.2d 230 (N.D.N.Y. 2003)(Munson, J.). Motions to sever are necessary when defendants or offenses are improperly joined. Fed. R. Crim. P. 8.

Not every case requires pretrial motions. Because of the standing pretrial order, discovery motions are unnecessary unless there is a dispute that cannot be informally resolved. Unlike state courts, federal cases may precede without any pending pretrial motions. Sanctions may be imposed for filing frivolous motions. L. R. 7.1(i). However, that does not mean that lawyers should not try to spot pretrial issues and file motions to address them.

4. Notices

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

If requested by the government, alibi defenses require pretrial notice by defendants within

ten (10) days. Fed. R. Crim. P. 12.1(a). The government must make a request in order to trigger a duty for a defendant to provide notice. Once the defendant provides notice, the government has ten (10) days to disclose its rebuttal witnesses. Fed. R. Crim. P. 12.1(b).

Public authority defenses are affirmative defenses alleging that a defendant was acting legally because they were authorized by a government agency. Fed. R. Crim. P. 12.3. The notice is due at the time of pretrial motions and must identify the agency that is the source of the authority to act. If the government has a good faith reason to believe a defendant acted with government authority they are estopped from prosecuting that person. United States v. Abcasis, 45 F.3d 39 (2d Cir. 1995).

G. Speedy Trial

The right to a speedy trial is guaranteed by the Sixth Amendment. Barker v. Wingo, 407 U.S. 514 (1972). The right begins when the defendant is arrested if detained or released on bail. United States v. Hawk, 474 U.S. 302 (1986); Dillingham v. United States, 423 U.S. 64 (1975); United States v. Marion, 404 U.S. 307 (1971). Prejudice to defendants, and reasons for the delays, are considered as factors when defendants move to dismiss their indictments. *See* United States v. Lovasco, 431 U.S. 783 (1977). In some cases, delays of many years may be presumptively prejudicial. *See* Doggett v. United States, 505 U.S. 647 (1992). A pretrial denial of a claim is not an interlocutory appealable order. United States v. MacDonald, 456 U.S. 1 (1982).

1. Deadlines

In federal courts, there are also statutory requirements for speedy trials. 18 U.S.C. §3161 *et seq*. These procedures are also stated in NDNY General Order 17. The government has thirty (30) days from the time a defendant is arrested to bring charges by information or indictment. §3161(a). Those periods do not begin anew upon the filing of superceding indictments. United States v. Rojas-Contreras, 474 U.S. 231 (1985). Trials must commence within seventy (70) days from the time the formal charges are filed or when a defendant first appears in court, or waives appearance, whichever is later. §3161(c)(1). The remedies are dismissal, either with or without prejudice. United States v. Taylor, 487 U.S. 326 (1988). There are many exclusions that toll the 70-day calendar. §3161(h). *See also* United States v. Vanhoesen, 529 F.Supp. 2d 358, 363 (N.D.N.Y. 2008). For instance, the time while pretrial motions are pending may be excluded, Henderson v. United States, 476 U.S. 321 (1986), as may the time used to prepare and file them. United States v. Oberoi, 547 F.3d 436, 450 (2d Cir. 2008).

The Interstate Agreement on Detainers Act also has time limits.18 U.S.C. App.2, §2. Persons held in state or federal custody have the right to a trial in other state or federal jurisdictions that have placed detainers on them within 180 days of their demand. Fex v. Michigan, 507 U.S. 43 (1993). Agreed trial dates beyond the time limits for detainers waive any complaints. New York v. Hill, 528 U.S. 110 (2000). Filing a detainer does not start time limits under the §3161 et seq. United States v. Guevara-Umana, 538 F.3d 139 (2d Cir. 2008).

2. Delays

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

In Zedner v. United States, 547 U.S. 489 (2006), the Supreme Court found that prospective waivers of the speedy trial limits have no value unless the court makes a finding of legitimate statutory exceptions prior to plea or trial. Nor, can a defendant waive speedy trial "for all time." Therefore, unless the District Court makes findings that the delays in the stipulations serve the ends of justice, defendants will retain the ability to move to dismiss the charges, regardless of any prior waiver or agreement. However, failure to object before trial or plea waives even plain error review on appeal. United States v. Abad, 514 F.3d 271 (2d Cir. 2008).

H. Mental Health Issues

1. Competence

Mental incompetence means that a defendant is presently suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. 18 U.S.C. §4241(d); Dusky v. United States, 362 U.S. 402 (1960). Competence to stand trial is the same standard as competence to plead guilty or waive counsel. Godinez v. Moran, 509 U.S. 389 (1993). Competence is determined by a preponderance of evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996). Convicting defendants who are incompetent violates due process. Bishop v. United States, 350 U.S. 961 (1956). Defendants found incompetent will remain hospitalized until they become competent. 18 U.S.C. §4241(e). The length of time they may be involuntarily hospitalized or medicated are subject to interlocutory appeal. United States v. Magassouba, 544 F.3d 387 (2d Cir. 2008).

2. Sanity

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

3. Experts

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

III. Pretrial Practice

A. Client Contact

1. Meetings

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

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

2. Correspondence

Aside from meetings and phone calls, another way to communicate is writing letters. Although lawyers should avoid sending sensitive case materials to jails or prisons (unless they can be kept secure), there is a great deal of basic information that can be put in letters or enclosed as attachments. Lawyers should begin with the assumption that clients know nothing about the federal criminal justice process. Summaries of the charges, outlines of federal procedures, and discussions of potential sentences, can go a long way to convince clients their lawyers care about their cases, understand their cases, and will continue to work on their cases. The FPD has a *Client Fact Sheet* on its website that is suitable for all defendants. Lawyers should also make sure defendants have copies of all public documents.

3. Discovery

In complex cases, with massive discovery, special procedures may be needed. When defendants can assist their lawyers by reviewing documents or recordings, it may be necessary to get permission to have electronic equipment or computers brought inside. Counsel should check

with the FPD about what has been done in the past and what resources are available.

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

B. Assessing a Case

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

Second, lawyers may be wrong in their initial assessments. Even in cases where guilt appears to be overwhelming, the charges should be carefully examined to see if all elements can be proven. There may also be technical issues that will defeat those cases in whole or in part. Procedural victories, such as the suppression of evidence, can cause prosecutors to reevaluate cases. Failure to assess all the potential issues may ultimately be ineffective assistance of counsel. *See e.g.* Glover v. United States, 531 U.S. 198 (2000); United States v. Hansel, 70 F.3d 6 (2d Cir. 1995).

1. The Charges

If an indictment contains a defect of form then a motion to dismiss must be filed prior to trial. F. R. Crim. P. 12(b)(3)(B). For instance, indictments have defects in form if multiple crimes are charged when only a single crime occurred. *e.g.* United States v. Holmes, 44 F.3d 1150 (2d Cir. 1995); United States v. Kerley, 544 F.3d 172 (2d Cir.), *cert. denied*, 129 S.Ct. 1052 (2009). Objections that an indictment entirely failed to state an offense, or that it did not invoke jurisdiction, are never waived. Fed. R. Crim. P. 12(b)(3)(B).

Multiple convictions or punishments may violate the Double Jeopardy Clause of the Fifth Amendment. *See* Rutledge v. United States , 517 U.S. 292 (1996). The Double Jeopardy Clause protects criminal defendants against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. United States v. Olmeda, 461 F.3d 271, 279 (2d Cir. 2006). Crimes that are distinct, and separated by time, may be grounds for severance of the charges. United States v. Sampson, 385 F.3d 183 (2d Cir. 2004).

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

524 U.S. 1 (1998); United States v. Ramirez, 420 F.3d 134 (2d Cir.), *cert. denied*, 546 U.S. 1113 (2006). Venue must be proper as to each count. United States v. Novak, 443 F.3d 150 (2d Cir. 2006). Since not all crimes have federal jurisdiction, some crimes (e.g., robbery and arson), may require additional pleading and proof that the crime affected interstate commerce. *See* Jones v. United States, 529 U.S. 848 (2000); United States v. Lopez, 514 U.S. 549 (1995); United States v. Needham, 604 F.3d 673 (2d Cir. 2010); United States v. Perrotta, 313 F.3d 33 (2d Cir. 2002).

2. Discovery

a. Necessity

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

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

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

b. Methods

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

Informality is the best way to start the discovery process, but it is not always enough. The items that defense counsel will need are specific to each case. Calling and leaving a message requesting "discovery" is not sufficient. Either face-to-face meetings, phone discussions, or letters - detailing exactly what is being requested - must be attempted before pursing remedies through the

District Court. Depositions are rarely allowed except when witnesses are outside the subpoena power of the court. *See* Fed. R. Crim. P. 15.

If any items or statements of defendants are in the government's possession then counsel should be sure to pursue Fed. R. Crim. P.12(b)(4). That provision (incorporated into the *Standard Criminal Pretrial Order*), requires the government to give notice of what evidence it intends to introduce in its case-in-chief, that is discoverable under Fed. R. Crim. P.16, and that could be the subject of a defendant's motion to suppress. *See* Miller, 382 F.Supp.2d at 355. Without knowing what the government will offer at trial, motions to suppress cannot adequately describe the relief requested. However, there is no legal requirement that agents take notes of all interviews of potential witnesses. United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007).

3. Investigation

a. Investigators

Most defense counsel are solo practitioners or members of small firms. They do not employ full-time investigators. Although not every case requires investigators or experts, the need for such assistance should at least be considered. In private practice, the ability to use such resources will depend upon what clients can afford. In appointed cases, counsel can incur up to $500 for such expenses without prior approval. 18 U.S.C. §3006A(e). Whenever possible, provide a detailed justification and get preapproval from the court. Those requests may be *ex parte* and *in camera*, but should be supported by affidavit. NDNY General Order 1, Append. I, II(D).

When attorneys interview potential witnesses (particularly adverse witnesses), there is a possibility that a lawyer's recollection will become material and relevant at trial. This can be a conflict of interest. United States v. Kliti, 156 F.3d 150 (2d Cir. 1998). If that likelihood is strong, requesting the appointment of an investigator should be studied. Similarly, whenever there are issues of diminished capacity, consultation with a mental health expert should be contemplated.

b. Subpoenas

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

c. Other

There are many other resources. Anyone with an Internet connection has access to a wealth of information. Some services cost money, but may also have lower rates for CJA counsel. The FPD is a good place to start and ask about where to look for information on investigative and expert resources.

4. Legal Research

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

5. Resolution

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

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

IV. Guilty Pleas

A. Requirements

A defendant may plead guilty or (with court consent), nolo contendere. Fed. R. Crim. P. 11(a)(1). Either, may be conditional upon reserving the right to appeal an adverse pretrial ruling, if both the government and court consent. Fed. R. Crim. P. 11(a)(2). Jeopardy attaches at unconditional acceptance of a guilty plea. Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001). Until the court unconditionally accepts the plea, it may be withdrawn for any reason. Fed. R. Crim. P. 11(c)(5). Conditional pleas are allowed with the consent of the parties and the Court, usually for the purpose of appealing dispositive pretrial rulings. Fed. R. Crim. P. 11(a)(2).

B. Plea Colloquy

In all cases, judges must admonish defendants of the rights they will give up by waiving a trial, the nature of the charges, the potential penalties, and the terms of any plea agreements; as well as making findings that the pleas are voluntary, and that there are adequate facts supporting them. Fed. R. Crim. P. 11(b). This means there must be a sufficient factual basis to support each guilty plea. United States v. Cruz-Rojas, 101 F.3d 283 (2d Cir. 1996). The factual basis incorporates all elements

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

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

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

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

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

C. Plea Agreements

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

1. Types

There are three forms of plea agreements. Fed. R. Crim. P. 11(c)(1). The first type limit the quality or quantity of charges. Fed. R. Crim. P. 11(c)(1)(A). The second type recommend, or acquiesce to, sentences or sentencing ranges. Fed. R. Crim. P. 11(c)(1)(B). The third type contract for specific sentences or sentencing ranges. Fed. R. Crim. P. 11(c)(1)(C). Only the third type (C) will bind a judge. In order for a judge to be bound by a plea agreement, a judge must accept the plea agreement prior to sentencing. Otherwise, the plea agreement will be treated as deferred until the judge reviews the presentence report. Fed. R. Crim. P. 11(c)(3).

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

viable solutions. However, if the court rejects any plea agreement (binding or not), the parties must be advised in advance of imposing the sentence. Fed. R. Crim. P. 11(c)(5).

Most plea agreements will contain some limited waiver of the right to appeal the sentence. Blanket waivers of appeal are prohibited. United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). In the Northern District of New York, the government will calculate a guideline sentencing range (not including a reduction for acceptance of responsibility), and the defendant will agree to waive an appeal of any sentence below the upper end of that range. *See* Cobb v. United States, 496 F.Supp.2d 215, 218 (N.D.N.Y. 2006). Defendants should only enter into such agreements if they will receive some promised benefit in return. Otherwise, defendants may as well plead guilty without a plea agreement.

2. Effect

Even when judges are not bound by plea agreements, the parties are. If the government has agreed to recommend specific ranges, it must do so. United States v. Lawlor, 168 F.3d 633 (2d Cir. 1999). The government must not seek enhanced sentences when it promised not to. United States v. Palladino, 347 F.3d 29 (2d Cir. 2003). The government cannot argue for different sentences than previously promised, United States v. Vaval, 404 F.3d 144 (2d Cir. 2005); *see also* United States v. Ramsey, 503 F.Supp.2d 554 (N.D.N.Y 2007) (Specific performance was remedy for government breach), or argue against acceptance of responsibility. United States v. Griffin, 510 F.3d 354 (2d Cir. 2007). However, it is permissible to include a provision that the sentencing estimate is not binding on the government or the court. United States v. Habbas, 527 F.3d 266, 270-71 (2d Cir. 2008).

A common basis for plea agreements is a defendant's agreement to cooperate in the prosecution of others, in exchange for the government's promise to make a motion to the court requesting a departure below a mandatory minimum punishment. A district judge may depart below a mandatory minimum only upon the government's request. 18 U.S.C. §3553(e); U.S.S.G. §5K1.1. Typically, this form of plea agreement occurs in drug distribution cases. However, even when the government controls whether a sentence reduction is allowed, a bad faith failure to move for such a departure may require the court to enforce the plea agreement. United States v. Roe, 445 F.3d 202, 207-08 (2d Cir. 2006).

D. Post-Plea Proceedings

After a plea hearing is completed, a sentencing date is issued. It takes at least three months for presentence reports to be completed and reviewed by the parties; any additions or deletions to be made; and any unresolved issues to be addressed by the parties in sentencing memoranda. United States Probation Officers (USPOs) attend plea hearings. Often the same USPO will investigate and write the report in that case. Defense lawyers should find out who the assigned USPOs for their cases are and make appointments to be present with their clients when they are interviewed for the presentence reports. Defendants have a right to have counsel present whenever they are interviewed. Fed. R. Crim. P. 32(c)(2); United States v. Ming He, 94 F.3d 782 (2d Cir. 1996).

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

V. Trials

A. Pretrial Conference.

On a day prior to jury selection, the District Judge presiding over the trial will hold a pretrial conference. Fed. R. Crim. P. 17.1. This is a time for the attorneys to meet with the judge to discuss outstanding issues such as scheduling, witnesses, motions in limine, voir dire, opening statements, and preliminary jury instructions. An extensive list of examples is located in L. R. Cr. P. 17.1.1. A waiver of a jury trial must be knowingly, voluntarily, and intelligently made. United States v. Carmenate, 544 F.3d 105 (2d Cir. 2008).

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

1. Witnesses.

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

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

Although any nonparty at least 18 years old may serve a subpoena, CJA counsel will rely upon the U.S. Marshal for service of subpoenas. L. R. Cr. P. 17.1(c). CJA counsel cannot be reimbursed for using commercial process servers. The Marshal will need a certified order from the court listing the names and addresses of the witnesses to be served, and stating that the costs will be paid by the government; as well as completed subpoenas; and 10 working days notice.

Although it is then the Marshal's responsibility to provide travel and lodging for those witnesses, counsel must be sure to communicate with witnesses to avoid problems regarding reimbursement. Reimbursable travel to court is by the least expensive manner, not the most convenient. Witnesses may prefer to drive their own vehicles, but if bus tickets are cheaper, the Marshal will pay for the bus. Bus and airline tickets are made available at the terminal, so the

travelers will need valid identification to pick them up. Unless special arrangements are made, lodging funds are not advanced, so a credit card is necessary. The travelers or attorneys should make those reservations and check that government rates are obtained. There is a per diem reimbursement that includes meals. Travelers should obtain and keep all receipts, except for meals.

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

2. Motions in Limine.

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

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

3. Voir Dire

The pretrial conference is a good opportunity to discuss what procedures will be allowed during voir dire. In capital cases and complex cases, counsel should propose a written questionnaire for the court to have prospective jurors complete. These are typically completed by the prospective jurors, and copied for the parties by the Clerk's Office, well before the day jury selection begins.

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

B. Jury Selection.

The composition of panels of potential jurors and grand jurors is covered by NDNY General Order 24. If there is to be a challenge to the array, it must occur before voir dire begins or within 7 days of when grounds were discovered. 28 U.S.C. §1867(a) and (b).

1. Strikes

Jurors are then not so much selected, as excluded. They are excluded by challenges for cause

and peremptory strikes. Challenges for cause deal with whether the person is capable of rendering a fair and impartial verdict. Challenges may not be based upon the race or gender of the potential juror. Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1986). A pattern of improper strikes may raise a *prima facie* claim of discrimination. Jones v. West, 555 F.3d 90 (2d Cir. 2009). Exclusion for those reasons is never harmless error. Tankleff v. Senkowski, 135 F.3d 235 (2d Cir. 1998); Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000). The court must make findings to support a ruling that race or gender was not the basis for a challenge. United States v. Thomas, 320 F.3d 315 (2d Cir. 2003).

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

2. Procedures

There are two main forms of jury selection that are used. L. R. 47.2(b). Both types are subject to variations. Attorneys should speak directly to the courtroom deputy clerk to determine exactly what to expect. Many lawyers like to have a seating chart to make notes about each prospective juror. In order to prepare that chart in advance, lawyers need to find out how those persons will be numbered and seated.

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

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

C. The Trial

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

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

A trial begins with the government's opening statement. The defense may then make an opening statement, reserve it until the beginning of the defense proof, or waive the opportunity completely. The latter two choices are rarely appropriate, because the jury will not get to hear the defense until after the government's case-in-chief. However, defense counsel should be careful not to make any statement that could be treated as an admission of a party-opponent, and used to the defendant's disadvantage. *See* United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984).

The government calls its first witness and puts on its case-in-chief. The government must prove each element of the charged offenses beyond a reasonable doubt or the case is subject to a judgement of acquittal. Fed. R. Crim. P. 29(a). The defendant has a Sixth Amendment right to be confronted by the witnesses against him. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009); United States v. Lee, 549 F.3d 84 (2d Cir. 2008). Any fact, that if proven, raises the potential maximum punishment, is an element of the offense. Apprendi v. New Jersey, 530 U.S. 466 (2000). Defense counsel should make a motion for judgement of a acquittal at the close of the government's case, and renew it at the close of all evidence, or else risk facing a higher standard of review if later appealing the sufficiency of the evidence. The motion may be renewed within seven days of discharging the jury. Fed. R. Crim. P. 29(c).

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

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

Unless the parties have not already done so, jury instructions must be provided in writing by the close of evidence. Fed. R. Crim. P. 30. Although the lawyers will have written copies of the Court's final instructions to the jury before beginning their closing arguments, the Court will not read them to the jury until closing arguments are completed. Closing arguments begin with the government, then the defendant(s), following by a government rebuttal. Fed. R. Crim. P. 29.1. Jury verdicts are returned in open court and they must be unanimous. Fed. R. Crim. P. 31. Either side may ask that the jury be polled about their votes in open court. The defendant must be present for all parts of the trial. United States v. Tureseo, 566 F.3d 77 (2d Cir. 2009).

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

VI. Sentencing

The District has a *Uniform Presentence Order* that is entered listing the date and place of the sentencing hearing. The hearing is to occur approximately 120 days from the order, but often is scheduled weeks later. The presentence report is to be available to the parties 45 days before the hearing. Objections to the report are due 14 days after disclosure. Each party must electronically file a sentencing memorandum 14 days before the hearing. A filing date is included in the *Uniform Presentence Order*. Responses are due three days thereafter.

A. Guidelines

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

In United States v. Booker, 543 U.S. 220 (2005), the United States Supreme Court found that a mandatory application of the federal sentencing guidelines violates defendants' Sixth Amendment right to jury trial. The Second Circuit explained the effect of Booker in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). The guidelines are now weighed as one of the statutory sentencing factors under 18 U.S.C. §3553(a). The guidelines are the starting point for determining a sentence. United States v. Robles, 562 F.3d 451 (2d Cir. 2009). A court of appeals may treat a guidelines sentence as presumptively correct *if* the trial court has complied with §3553(a). Rita v. United States, 551 U.S. 338 (2007). The Second Circuit has held that applying the sentencing guidelines, does not alone, make a sentence presumptively correct. United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006).

Therefore, judges do not necessarily have the unfettered discretion they had prior to the sentencing guidelines, but there is no area of mitigation that defense lawyers should treat as prohibited. In other words, lawyers should argue for a fair result regardless of whether the guidelines seem to discourage or prohibit particular factors. Even a judge's gut reaction to the appropriateness of a sentence has been held to be a valid consideration. United States v. Jones, 460 F.3d 191 (2d Cir. 2006). On the other hand, acquitted conduct may also be considered. United States v. Watts, 519 U.S. 148 (1997).

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

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

The best way for lawyers to make sure judges have the inclination and authority to impose requested sentences is help judges give compelling statements of reasons, by filing sentencing memoranda. The reasons should state what mitigating factors are specific to each defendant's case. Factors that apply to all defendants (e.g., the indignity of a criminal conviction), or vaguely stated explanations, may not be upheld as reasonable. *See* United States v. Rattoballi, 452 F.3d 127 (2d Cir. 2006).

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

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

The application of the guidelines is complicated. It is not unusual for the parties to agree to what they believe the offense levels and criminal history categories will be. However, even with the best of intentions, these predictions can be undermined by newly discovered facts, the interpretation of those facts and law by the USPO, or the findings by the Court.

B. Mandatory Minimums

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

For example 21 U.S.C. §841 creates an escalating system of mandatory minimum (and increased maximum) punishments, based upon drug quantity. Pursuant to 18 U.S.C. §3553(e), judges may depart below those mandatory minimums if the government moves that the defendants have provided substantial assistance in the prosecution of others. Another exception is when defendants meet certain criteria based upon their lack of criminal history, lack of violence or injury, lack of role

increase, and truthfulness. 18 U.S.C. §3553(f) (known informally as "the safety valve"). The former exception applies to all types of offenses. The latter applies only to controlled substances cases.

There are mandatory minimum punishments for sexual exploitation of children, 18 U.S.C. §2251et seq.; smuggling of non-citizens, 18 U.S.C. §1324; and the possession of firearms in relation to crimes of violence or drug trafficking crimes, 18 U.S.C. §924(c). In some cases, prior convictions create mandatory minimum sentences, such as when persons charged with being a felon in possession of a firearm have three prior convictions for violent felonies or serious drug crimes, 18 U.S.C. §924(e) (Armed Career Criminal Act); or when persons charged with a serious violent felony have two prior convictions for the same, or one conviction for a serious violent felony and one for a serious drug offense. 18 U.S.C. §3559(c) (Three Strikes Law).

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

C. State and Federal Sentences

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

A judge cannot force another jurisdiction to take possession of a defendant. Ponzi v. Fessenden, 258 U.S. 254, 260-61 (1922). Neither can a judge force another jurisdiction to give a defendant credit for time spent in that judge's jurisdiction. United States v. Wilson, 503 U.S. 329, 333 (1992). Comity requires that when the writ is satisfied, the second sovereign return the prisoner to the first sovereign. Therefore, when a state prisoner comes to federal court on a writ, his custody does not change. United States v. Smith, 812 F. Supp. 368, 371 (E.D.N.Y 1993). It is as if he has been borrowed, subject to return. The only way to change custody is for the primary jurisdiction (generally the state), to release the defendant. *See e.g.* Shumate v. United States, 893 F.Supp. 137, 140-43 (N.D.N.Y. 1995). Therefore, preventing a consecutive sentence has nothing to do with the order in which the sentences of different jurisdictions are imposed. What matters is which jurisdiction has primary custody.

1. Federal Statutes

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

into account the nature and seriousness of the offense, kinds of available sentences, policy statements of the guidelines, potential disparity, and the need for restitution. For instance, a sentence may be partially concurrent. United States v. Stearns, 479 F.3d 175 (2d Cir. 2007).

There are exceptions to the rule allowing discretion. Attempts, and offenses that were the sole objective of the attempts, may not be consecutive. 18 U.S.C. 3584(a). Convictions for possession of a firearm in relation to drug trafficking or violent crime must be consecutive to any other sentence.18 U.S.C. §924(c). A federal sentence may not be consecutive to another sentence that has not yet been imposed. United States v. Donoso, 521 F.3d 144 (2d Cir. 2008).

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

2. Sentencing Guidelines

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

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

3. BOP Regulations

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

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

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

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

D. Presentence Reports

Even without mandatory guidelines, the presentence report is still the most important tool to get sentencing information to the court. This means that not only should counsel be vigilant about assuring that no inaccurate or slanted aggravating information is included, but that all relevant mitigating information is also presented. The information is derived primarily from the files of the Court, the prosecutor, the case agents, and pretrial services. The reports are confidential and may only the disclosed to the defendant, defense counsel, the prosecutor, and BOP. L. R. Cr. P. 32.1(c).

1. Aggravating Information

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

For instance, at the beginning of a drug investigation a defendant may have been viewed as a conspiracy leader responsible for many kilos of illegal controlled substances. However, after discovering contradictions from their confidential informant, the agents may later downgrade the defendant to a minimal participant. This discrepancy is unlikely to be explained in a supplemental

report, because the agents will not want there to be competing versions that could be used against them in another case.

Defendants are also a source of aggravating information. That is why defendants should never be left alone at a presentence interview. For the same reasons that defendants confess to the police, they volunteer information that may increase their sentences. A right against self-incrimination exists even after a guilty plea. Mitchell v. United States, 526 U.S. 3114 (1999). The defendant will be interviewed by a USPO in virtually every case where a presentence report has been ordered. Defense counsel has a right to attend (L. R. Cr. P. 32.1(b)), and counsel *should* always attend. [e.g.,"Officers should never hesitate to question defendants about their financial condition..." *Office of Probation and Pretrial Services Monograph 107* ("The Presentence Investigation Report") (rev. March 2006), at III-14)].

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

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

Neither the presentence report, nor the addendum, will advocate the defendant's position. That is up to the defendant's attorney. A reasoned sentencing memorandum should be filed in every case. This may be filed under seal to protect sensitive information. L. R. Cr. P. 13.1. The mere fact a defendant is cooperating alone is probably insufficient to override public access to those court documents. *See e.g.* Lugosch v. Pyramid Co., 435 F.3d 110, 119 (2d Cir. 2006); United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995); United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995). However, without additional action, all documents in a case may be unsealed 60 days after final judgement or return of mandate. NDNY General Order 29. *See also* United States v. Strevell, 2009 WL 577910 (N.D.N.Y. 2009).

2. Mitigating Information

When the federal sentencing guidelines were considered mandatory, the mitigation evidence considered in a noncapital federal sentencing hearing was limited. Many categories of information were discouraged and some were prohibited. Today, defense counsel should bring the Court's

attention to any mitigating fact that is conceivably covered by 18 U.S.C. §3553(a).

This includes investigating each defendant's background, and the circumstances of the offense, and looking for ways of explaining them. The government's version may be that the defendant's conduct was intentional and remorseless, and that there is nothing about the defendant's history that gives any hope the defendant will change. Absent any mitigating information provided by the defense, this bleak version will likely end up in the presentence report and will ultimately adopted by the court. After Booker, noncapital sentencing hearings should be approached more like those in capital cases, where all mitigating evidence is considered essential to the defendant's representation. *See* Wiggins v. Smith, 539 U.S. 510 (2003).

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

3. Sentencing Hearing

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

However, if the sentencing issues are more complex there may be a need to call witnesses. For instance, after a guilty plea to participating in a large drug conspiracy, a defendant may have to contest the presentence report's assessments of role and the attributable drug quantity. This can require the direct and cross examinations of informants, co-defendants, and law enforcement agents. Hearsay is admissible if it is found to be reliable. United States v. Martinucci, 561 F.3d 533 (2d Cir. 2009). If the court intends to impose a sentence above the recommended range, the defendant should receive advance notice. United States v. Cole, 496 F.3d 188 (2d Cir. 2007). At a sentencing occurring after remand, the defendant is entitled to be present and represented by counsel. United States v. DeMott, 513 F.3d 55 (2d Cir. 2008).

Once all the relevant facts are before the Court, defense counsel should make a record of any sentencing guideline issues that were found against the defendant. Even without mandatory guidelines, a misapplication of the guidelines can be grounds for reversal. United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). Failure to object on the record may waive objections or limit review to a plain error standard. United States v. Espinoza, 514 F.3d 209 (2d Cir. 2008). Counsel must be allowed to argue on defendant's behalf. United States v. Gutierrez, 555 F.3d 105, 109 (2d Cir. 2009).

The defendant's right to address the judge at sentencing is called an allocution. Fed. R. Crim. P. 32(c)(4)(A). Counsel should discuss this option with the defendant well before the day of the

hearing. A sincere statement accepting responsibility, and indicating that the defendant wants to improve, can positively influence a judge. However, evasions and remorseless explanations of their offense conduct will only make matters worse.

4. Types of Sentences

Sentences for individuals can be probation, a fine, or imprisonment. 18 U.S.C. §3551. A defendant cannot get probation for a Class A or B felony, where the statute prohibits probation, or when a sentence of imprisonment is being imposed at the same time. 18 U.S.C. §3561(a). Felony probation may not be less than one year, nor more than five. 18 U.S.C. §3561(c).

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

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

VII. Appeals

Defendants are told of their right to appeal by the court at their sentencing hearing. Fed. R. Crim. P. 32(j). In every case, in which a defendant requests an appeal, defense counsel *must* file an appeal. Failure to do so is ineffective assistance of counsel. Campusano v. United States, 440 F.3d 770 (2d Cir. 2006); Espinal-Martinez v. United States, 499 F.Supp.2d 213 (N.D.N.Y.2007). Claims of ineffective assistance of counsel cannot be waived in plea agreements. Parisi v. United States, 529 F.3d 134 (2d Cir. 2008).

There are cases in which there are no meritorious issues to be appealed. It is acceptable to explain to a defendant that an appeal would be without merit and discourage the client from pursuing the appeal. Often defendants do not understand that the court of appeals will only review legal errors. An appeal is not a new trial or new sentencing hearing. However, if a defendant will not accept his or her lawyer's evaluation, the lawyer must file a notice of appeal no later than 10 days from the entry of the judgement and sentence. Fed. R. App. P. 4(b). Simply ignoring the client's calls and letters is not an option. The 10-day period to file an appeal is not jurisdictional. United States v. Frias, 521 F.3d 229 (2d Cir. 2008).

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

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

In some cases, lawyers will file appeals because their clients demand an appeal, although the claim is frivolous. This is true even when a client signed a plea agreement waiving the appeal of the same sentence the defendant actually received. In those cases, the lawyer will need to file a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The brief examines all aspects of the case and explains why there are no meritorious issues for appeal. If counsel believes the defendant is incapable of understanding his options by letter, there is a duty to speak to the defendant about them. United States v. Santiago, 495 F.3d 27 (2d Cir. 2007). The procedure for such briefs, and their accompanying motions, is not simple. In some cases, they can be more time consuming than a brief on the merits. Examples of such materials can be obtained from the FPD, but each must be specifically tailored to the facts in that case. *See* United States v. Whitley, 503 F.3d 74 (2d Cir. 2007) (Rejecting Anders brief for failing to address all potential issues).

Even when cases are affirmed in the court of appeals, a rehearing before the same panel or a rehearing *en banc*, before the entire court of appeals, may be filed. There is no procedural requirement that they be requested. There also remains the option of filing a petition for a writ of certiorari in the United States Supreme Court within 90 days from a final decision in the court of appeals. Only cases with significant constitutional or statutory questions are likely to receive review. If a defendant demands such a petition, and the lawyer believes it is without merit, the lawyer should ask permission from the Second Circuit to withdraw. *See* Nnebe v. United States, 534 F.3d 87 (2d Cir. 2008).

VIII. Prison

Although there are a handful of lawyers that specialize in the laws and procedures involving prison placement, sentence credit, and release, most criminal defense lawyers know very little about what happens to a defendant once a sentence of imprisonment becomes a final judgement. It is beyond the scope of this handbook to deal with all information affecting a imprisonment. This is only an attempt to cover some recurring issues.

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

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

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

There are a number of common misunderstandings about BOP programs. One area is the Residential Drug and Alcohol Program (RDAP). This program lasts 4 or 5 hours a day, five days a week, for nine months. It is available at about half of BOP facilities. However, many defendants are only interested in getting a year reduced from their sentences for completing the program. 18 U.S.C. §3621(e). While most inmates are allowed to enter the program, there are many exclusions from receiving a reduced sentence, generally concerning the nature of their offenses of conviction. *See* FPSS Nos. 5330.10 and 5162.10. Also, while there is a maximum one-year sentence reduction, the average decrease is significantly less.

Another point of confusion is shock incarceration or boot camp. This was a program of military type training that ultimately resulted in a reduced sentence upon completion. BOP has discontinued the program.

Release to a halfway house by the BOP typically precedes supervised release. BOP took the position that it could uniformly deny this type of community confinement to all inmates except those with six months left, or 10 percent of their sentence remaining. The Second Circuit held that the policy was arbitrary and struck it down. Levine v. Apker, 455 F.3d 71(2d Cir. 2006).

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

IX. Supervised Release

Supervised release is a sentence to a term of community supervision to follow a period of imprisonment. 18 U.S.C. §3583. Unlike parole, it is not a form of early release, but a separate sentence in addition to imprisonment. After release from prison to supervised release, a defendant will be supervised by a probation officer. 18 U.S.C. §3624(e).

Conditions of supervised release may be mandatory, standard, or special. Some examples of mandatory conditions are that the defendant commit no new federal, state, or local crime; that the defendant not unlawfully possess a controlled substance; or that the defendant allow the collection of a DNA sample.18 U.S.C. §3563(b); *see also* United States v. Amerson, 483 F.3d 73 (2d Cir. 2007). Examples of standard conditions are reporting to a probation officer; seeking or maintaining employment; or giving notice of a change of address or a new arrest. Special conditions are specific to the defendant's situation. For example, substance abuse treatment may be ordered for someone with an addiction, or financial counseling for a fraud offender.

Once defendants are on supervised release there is then the opportunity for them to be revoked. Supervision of defendants is based upon the "Risk Prediction Index"(RPI). The more the risk, the more scrutiny they get. Probationers, Parolees, and Supervised Releasees can be subject to suspicionless and warrantless searches by USPOs. Samson v. California, 547 U.S. 843 (2006). Polygraph testing may be used to enforce some conditions of release. United States v. Johnson, 446 F.3d 272 (2d Cir. 2006).

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

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

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

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

The hearing itself is much like a sentencing hearing. It may proceed by proffer or by calling witnesses. No notice is necessary to sentence above the recommended guideline range. United States v. Hargrove, 497 F. 3d 256 (2d Cir. 2007). Often, the petition alleges repeat violations of the terms of release, such as not meeting with the probation officer, avoiding restitution, or failing to attend counseling. In those cases, the issue is usually whether the release should be revoked or modified, and if so, what the punishment or modification will be. When new criminal conduct is alleged, the petition is usually stayed until any other proceedings concerning their proof are resolved. For instance, the USPO may wait until a new state charge has been disposed of before filing a petition based on that conduct.

CJA TRAINING PANEL SECOND CHAIR PROGRAM

The Second Chair Mentor Program is designed to provide a foundation and additional training for a CJA panel applicant who requires more experience in handling federal criminal matters but is otherwise qualified to practice in federal court.

For those applicants recommended for this program, the following requirements must be completed and submitted to the CJA Panel Committee before a candidate is eligible to receive appointments:

Attendance, at minimum, of one CLE program put on by the Federal Defender's Office of the NDNY OR a National Conference.

- Date and Time completed

Attendance at the following federal criminal court proceedings:

- **Two Initial Appearances:**
    - Date and Times:
    - Presiding Judge(s):
    - Name of Cases:
    - Defense Attorney:
- **Two Detention Hearings:**
    - Date and Times:
    - Presiding Judge(s):
    - Name of Cases:
    - Defense Attorney:
- **One Pre-Trial Motion Hearing:**
    - Date and Time:
    - Presiding Judge:
    - Name of Case:
    - Defense Attorney:

- **One Jury Trial:**
    - Name of Case:
    - Presiding Judge:
    - Defense Attorney:
- **Two Change of Pleas:**
    - Date and Times:
    - Presiding Judge(s):
    - Name of Cases:
    - Defense Attorney:
- **Two Sentencing Hearings**:
    - Date and Times
    - Presiding Judge(s):
    - Name of Case:
    - Defense Attorney:
- **Two Supervised Release Hearings:**
    - Date and Times:
    - Presiding Judge(s):

One half day session with the Federal Public Defender for the NDNY.

At this time, you must demonstrate a working knowledge of the Federal Sentencing Guidelines and the Bail Reform Act.

- Name of Case:
- Defense Attorney:

- **Program Completion**

Participants who successfully complete the program will be encouraged to file their application for appointment to the Panel. The Panel Review Committee will solicit the views of the Coordinator as to whether the participant qualifies for appointment or whether more training is needed.

I agree to the rules outlined above and wish to enter the Second Chair Program. I understand that I must complete the requirements within six-months of this agreement unless an extension is granted.

____________________ ____________________

Participant Dated

____________________ ____________________

Lisa Peebles, Esq.,
Federal Public Defender

Dated

OVERVIEW OF FEDERAL PRACTICE
Federal Court Bar Association, Northern District of New York
Broome County Bar Association
Continuing Legal Education Program
May 4, 2021

Albert J. Millus, Jr., Esq.

I. Generally – Establishment and Types of Federal Courts

A. Constitutional Underpinning

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

USCS Const. Art. III, § 1

B. Types of Federal Courts – 28 U.S.C. Part 1 (§§1 *et seq.)*

1. Supreme Court
2. Courts of Appeal
3. District Courts
4. Bankruptcy Courts
5. Court of Federal Claims
6. Court of International Trade

C. District Courts (Trial Courts) – 28 U.S.C. §§81-144

1. District Courts in New York – 28 U.S.C. §112
   a. Northern District
      1. Eastern half of Upstate New York
   b. Southern District
      1. New York City, Westchester, southern Hudson Valley
   c. Eastern District
      1. Brooklyn, Long Island
   d. Western District
      1. Western half of Upstate New York

II. Jurisdiction of District Courts

A. Concept of Limited Jurisdiction

1. Constitutional Underpinnings:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

USCS Const. Art. III, § 2, Cl 1

a. Defense based on lack of subject matter jurisdiction may not be waived.

2. District Court Jurisdiction - Civil

a. Generally - 28 U.S.C. Ch. 85 (§§1330-1369). Common examples:
   1.) Federal Question
   2.) Diversity of Citizenship
   3.) Bankruptcy
   4.) Patent and Trademark
   5.) Civil Rights
   6.) Supplemental Jurisdiction

b. Specifically (examples)
   1.) Antitrust
      a.) 15 U.S.C. §§4
      b.) Exclusive Jurisdiction of Federal Courts
         1.)) Hand v. Kansas City S. R. Co., 55 F.2d 712, 713 (S.D.N.Y., 1931)
   2. ERISA
      a.) 29 U.S.C. §1132(e)
         1.)) Exclusive Jurisdiction over some actions
         2.)) Concurrent Jurisdiction over others
            a.)) E.g., actions to recover benefits due under an employee benefit plan -- 29 U.S.C. §1132(a)(1)(B)

3. District Court Jurisdiction – Criminal

a. The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. 18 U.S.C. §3231.

1. Crimes Against the United States – 18 U.S.C. Part 1 (§§2-2725)

B. Pleading Requirements

1. Rule 8(a), Federal Rules of Civil Procedure

a. Pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it."

b. Failure to plead jurisdiction is basis for dismissal of pleading.

C. Federal Question Jurisdiction

1. 28 U.S.C. §1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

D. Diversity Jurisdiction

1. 28 U.S.C. §1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title as plaintiff and citizens of a State or of different States.

2. Amount in Controversy - $75,000.

3. Citizenship of Individuals: "The term "citizen," as used in the Judiciary Act with reference to the jurisdiction of the federal courts, is substantially synonymous with the term "domicile." It means a citizen of the United States residing permanently in the particular state."

Delaware, L. & W. R. Co. v. Petrowsky, 250 F. 554, 557 (2d Cir., 1918).

4. Citizenship of Corporations: "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. §1332(c)(1).

5. Citizenship of Limited Partnership: is considered to be a citizen of each state of which a member is a citizen. Carden v. Arkoma Assoc., 494 U.S. 185, 195 (U.S., 1990).

   a. Same rule probably applies to limited liability companies.

E. Bankruptcy Cases.

1. 28 U.S.C. §1334:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

2. Delegation of limited jurisdiction to Bankruptcy Courts: 28 U.S.C. §157.

F. Civil Rights Cases.

1. 28 U.S.C. §1343:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

4. To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

G. Supplemental Jurisdiction

1. Formerly "pendent", then "ancillary" jurisdiction.

2. 28 U.S.C. §1367:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

III. Removal

A. Actions Removal – 28 U.S.C. §1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [28 USCS §§ 1441 et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

B. Procedure for Removal – 28 U.S.C. §1446

1. File Notice of Removal in federal District Court -- §1446(a)

a. See attached example of Notice of Removal.

b. Must be filed within thirty days after receipt of initial pleading -- §1446(b)

c. If not initially removable, may be filed within thirty days after receipt of paper making it removable, but diversity cases may not be removed after a year from commencement of action -- §1446(b)

2. Promptly serve copy of Notice of Removal on adverse parties and file copy with clerk of state court to stay state action -- §1446(d).

a. See attached Example of Notice of Filing of Notice of Removal

IV. Personal ("*In personam*") Jurisdiction

A. Distinguished from Subject Matter Jurisdiction

1. "Diversity" does not confer personal jurisdiction.

2. Defense based on lack of personal jurisdiction may be waived. Rule 12(h)(1), Federal Rules of Civil Procedure.

B. Federal Question cases:

In a federal question case, where the defendant resides outside the forum state, federal courts apply the forum state's personal jurisdiction rules if the applicable federal statute does not provide for national service of process. See PDK Labs., Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997). Because the Lanham Act does not provide for national service of process, the New York state long-arm statute governs this inquiry.

Sunward Elecs., Inc. v. McDonald, 362 F.3d 17, 22 (2d Cir., 2004)

1. Nationwide Service of Process: E.g., Bankruptcy Cases

C. Diversity cases: State Law applies. *Arrowsmith v. United Press International*, 320 F.2d 219, 222 (2d Cir. 1963)

D. In other words, look to CPLR §§301, 302.

V. Venue – 28 U.S.C. Ch. 87 (§§1391-1413):

A. Generally -- §1391:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which

a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter [28 USCS §§ 1391 et seq.], a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

B. Change of Venue -- §1404:

§ 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

C. Defense based on improper venue may be waived. Rule 12(h)(1), Federal Rules of Civil Procedure.

VI. Rules of Practice

A. Civil Cases – Federal Rules of Civil Procedure (Table of Contents attached)

1. Compare to New York CPLR

B. Criminal Cases – Federal Rules of Criminal Procedure

1. Compare to New York CPL

C. Evidentiary Rules – Federal Rules of Evidence

1. Compare to New York CPLR Art. 45.

2. Relevancy – Fed. R. Evid. 403:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

D. Local Rules

E. Individual Judges' Rules

VII. Northern District of New York - 28 U.S.C. §112(a)

A. Northern District of New York
1. Formed in 1789 as "District of New York"
a. First District Convened under the sovereignty of the United States
1.) Judge James Duane presiding - November 3, 1789
b. Split into Northern and Southern Districts - 1814
1.) Judge Matthias Burnett Tallmadge became first Judge of Northern District
c. Split into Northern and Western Districts - 1900

2. Covers:

a. 32 Counties

Counties: Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery,

Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Ulster, Warren, and Washington.

b. 30,000 Square Miles
c. 3.5 Million Residents
d. Extensive Border with Canada

3. Divisions - Detailed List Attached
   a. Syracuse
   b. Albany
   c. Binghamton
   d. Utica
   e. Plattsburgh
      1.) Immigration Cases
   f. Watertown
   g. Auburn
   h. Fort Drum

B. Current Judges (25 total in Court's History)
   1. Hon. Glenn T. Suddaby, Chief U.S. District Judge
   2. Hon. David N. Hurd, U.S. District Judge
   3. Hon. Mae A. D'Agostino, U.S. District Judge
   4. Hon. Brenda K. Sannes, U.S. District Judge
   5. Hon. Thomas J. McAvoy, Senior U.S. District Judge
   6. Hon. Frederick J. Scullin, Jr., Senior U.S. District Judge
   7. Hon. Gary L. Sharpe, Senior U.S. District Judge
   6. Hon. Lawrence E. Kahn, Senior U.S. District Judge
   7. Hon. Norman A. Mordue, Senior U.S. District Judge

C. Magistrate Judges
   1. Hon. Andrew T. Baxter, U.S. Magistrate Judge
   2. Hon. Therese Wiley Dancks, U.S. Magistrate Judge
   3. Hon. Christian F. Hummel, U.S. Magistrate Judge
   4. Hon. Daniel J. Stewart, U.S. Magistrate Judge
   5. Hon. Miroslav Lovric, U.S. Magistrate Judge
   6. Hon. Gary L. Falvo, U.S. Magistrate Judge
   7. Hon. David E. Peebles, Recalled U.S. Magistrate Judge
   7. Powers and duties
      a. 28 U.S.C. §636
      b. Limited jurisdiction
      c. *United States v. Raddatz*, 447 U.S. 667 (U.S. 1980):

OVERVIEW: Respondent filed a motion to suppress certain statements made to police. The district court referred the motion to a magistrate pursuant to the Federal Magistrates Act, 28 U.S.C.S. § 636(b)(1)(B). After receiving evidence and hearing testimony, the

magistrate recommended finding against respondent, and the district court accepted the recommendation without conducting its own evidentiary hearing. The court of appeals reversed, holding that respondent's due process rights had been violated. The Court reversed and concluded that the district court was correct. First, the Court held that the Act only required a district court to make a de novo determination of a motion based upon a magistrate's report, but did not require the holding of a de novo hearing. Second, the Court concluded that suppression hearings required less demanding process than what was due at a defendant's trial, and the Act adequately protected due process rights, as it provided district courts with broad discretion to accept or reject a magistrate's findings or to conduct a de novo hearing if deemed necessary. Finally, delegation to a magistrate under the Act did not violate U.S. Const. art. III.

OUTCOME: Decision holding respondent's due process rights had been violated in consideration of his motion to suppress was reversed. Under the Federal Magistrates Act, the district court properly accepted the recommendation of the magistrate to whom the motion was referred without conducting a de novo evidentiary hearing, and the Act adequately protected respondent's due process rights.

D. Acting United States Attorney - Antoinette T. Bacon - http://www.justice.gov/usao/nyn/

1. Main Office - Syracuse

2. Satellite Offices – Binghamton, Albany, Plattsburg

E. Federal Defender – Lisa Peebles
1. http://www.nynd-fpd.org/
2. Established September 29, 1997
3. Representation of Defendants
4. Resource for Criminal Justice Act Counsel
5. Albany and Syracuse Offices

F. Local Rules

G. General Orders

H. Judges' Standing Orders

I. Mandatory Electronic Filing - See Attached General Order 22

J. Priority given to Criminal Cases

K. Court's Web Site: http://www.nynd.uscourts.gov/

VIII. Institution and Prosecution of Civil Cases
A. Filing

B. Issuance of Filing Order

C. Civil Case Management Plan

D. Uniform Pretrial Scheduling Order

E. Discovery
    1. Supervised by Magistrate Judges

F. Motion Practice

G. Trial

FEDERAL CRIMINAL PRACTICE
NDNY Federal Court Bar Association
Broome County Bar Association
Continuing Legal Education Program
May 4, 2021

Albert J. Millus, Jr., Esq.

I. Introduction

II. Federal Jurisdiction

1. Commerce Clause

United States Constitution, Art. I, §8, Cl 3. Power of Congress to regulate commerce.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. Case Law

a. *United States v. Lopez*, 514 U.S. 549 (1995):

After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. § 922(q)(1)(A). The District Court denied his motion to dismiss the indictment, concluding that § 922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that, in light of what it characterized as insufficient congressional findings and legislative history, § 922(q) is invalid as beyond Congress' power under the Commerce Clause.

Held: The Act exceeds Congress' Commerce Clause authority. First, although this Court has upheld a wide variety of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce. Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. Nor is it an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under the Court's cases

upholding regulations of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce. Second, § 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contention that § 922(q) is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States. Pp. 552-568.

* * *

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See supra, at 556-558. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. Gibbons v. Ogden, supra, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. Jones & Laughlin Steel, supra, at 30. This we are unwilling to do.

b. *United States v. Morrison*, 529 U.S. 598 (2000)

PROCEDURAL POSTURE: Petitioner victim appealed the judgment of the United States Court of Appeals for the Fourth Circuit declaring unconstitutional 42 U.S.C.S. § 13981, which provided a civil remedy for the victims of gender-motivated violence, on the ground that Congress lacked the authority to enact the statute under either the Commerce Clause or U.S. Const. amend. XIV, § 5.

OVERVIEW: Petitioner victim brought an action against respondent offender under 42 U.S.C.S. § 13981, which provided a federal civil remedy for the victims of gender-motivated violence. The lower court struck down § 13981 and concluded that Congress lacked constitutional authority to enact the statute under either the Commerce Clause or U.S. Const. amend. XIV, § 5. The court rejected petitioners' argument that §

13981 was a regulation of activity that substantially affected interstate commerce. The court affirmed the decision of the lower court and held that gender-motivated crimes of violence were not considered economic activity, and therefore, the Commerce Clause did not vest Congress with the authority to enact a statute regulating such. Moreover, the court affirmed that the civil remedy contained in § 13981 should be struck down as it was outside Congress's remedial power under U.S. Const. amend. XIV, § 5. The civil remedy was not found to be corrective in its character nor adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers. Instead, the subject statute redressed private discrimination and was outside Congress' power to enact.

OUTCOME: The court affirmed and held that Congress lacked the authority to enact the subject statute under the constitution because the statute did not involve economic activity or interstate commerce.

c. *Gonzales v. Raich*, 545 U.S. 1 (2005)

PROCEDURAL POSTURE: Respondents, claiming a violation of the Commerce Clause, sought injunctive and declaratory relief prohibiting enforcement of the federal Controlled Substances Act (CSA), 21 U.S.C.S. § 801 et seq., to the extent it prevented them from possessing, obtaining, or manufacturing cannabis for their personal medical use. A district court denied a motion for a preliminary injunction, but the United States Court of Appeals for the Ninth Circuit reversed.

OVERVIEW: Respondents were California residents who suffered from a variety of serious medical conditions and had sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act, Cal. Health & Safety Code § 11362.5 (2005). After an investigation, county officials concluded that one respondent's use of marijuana was entirely lawful under California law; nevertheless, federal agents seized and destroyed all six of her cannabis plants. The Court held that the regulation of marijuana under the CSA was squarely within Congress' commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market. Given the enforcement difficulties in distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C.S. § 801(5), and concerns about diversion into illicit channels, the Court had no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Congress was acting well within its authority of the Commerce Clause, U.S. Const., art. I, § 8.

III. Federal Crimes

A. Generally

B. Northern District of New York

Type of Crime	Number of Cases Commenced Calendar Year 2020
Total	374
Homicide	0
Robbery	1
Assault	4
Other Violent Offences	1
Burglary, Larceny, and Theft	14
Embezzlement	2
Fraud	57
Forgery and Counterfeiting	0
Other Property Offenses	1
Marijuana	6
All Other Drugs	87
Firearms and Explosives Offensives	36
Sex Offenses	36
Justice System Offenses	3
Improper Reentry by Alien	28
Other Immigration Offenses	30
General Offenses	19
Regulatory Offenses	3
Traffic Offenses	46

IV. Criminal Justice Act ("CJA") – 18 U.S.C. §§3006A *et seq*.

A. Appointment

1. Application

a. Eligibility

b. "Second Chair" Program

2. Training Requirements

a. CJA Training Sessions

3. Approval Process

4. CJA Panel

a. 24 in Binghamton

B. Fees
1. Currently $125 per hour, in and out of Court
2. Vouchers

V. Procedural Issues
A. Case Schedule – Appendix C
B. Discovery
1. “Open File” Policy

C. Speedy Trial Act

1. 18 U.S.C. §§3161-3174

2. General Requirement:

18 U.S.C. §3161(c)(1):

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate [United States magistrate judge] on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

3. Exclusions of Time

18 U.S.C. §3161(h):

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--
(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;
(B) delay resulting from trial with respect to other charges against the defendant;
(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(I), (J) [Redesignated]

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No

such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) [18 USCS § 3161(b)] or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title [18 USCS § 3292], has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

D. Electronic Filing

1. Court’s Web Site: http://www.nynd.uscourts.gov/cmecf/
2. General Order #22
3. Redaction Requirements
4. Documents Filed Under Seal

VI. Sentencing – Appendix D

A. General Principles

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to providejust punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

B. Statutory Minimums
   1. 18 U.S.C. §841

C. Sentencing Guidelines
   1. Generally
      a. Sentencing Reform Act of 1984
         1.) 18 U.S.C. §§3551, *et seq.*, 28 U.S.C. §§991-998
         2.) Abolished Indeterminate Sentencing and Parole
         3.) Greatly Reduced Judicial Discretion in Sentencing
         4.) Created United States Sentencing Commission to Create Uniform Guidelines
      b. Guidelines - Effective November 1, 1987

   2. Structure of Guidelines – Federal Sentencing Guidelines Manual
      a. Chapter One – Introduction, Authority, and General Application Principles

      b. Chapter Two -- Offense Conduct
         1. Determination of Offense Level
            a.) Example - §2D1.1

      c. Chapter Three – Adjustments
         1. Part A – Victim Related Adjustments
         2. Part B – Role in the Offense
         3. Part C – Obstruction and Related Adjustments
         4. Part D – Multiple Counts
         5. Part E – Acceptance of Responsibility
            a.) 2 Levels
            b.) Additional 1 Level if Offense Level is 16 or Greater
            c.) Acceptance of Responsibility after Trial
               a.) Application Note 2

      d. Chapter Four -- Criminal History
         1. Points for Prior Convictions
            a.) E.g., 3 Points for Each Prior Sentence of Imprisonment Exceeding 1 Year and 1 Month

      e. Chapter Five – Determining the Sentence
         1. Sentencing Table
         2. Imprisonment
         3. Non-Jail Sentences
         4. Supervised Release
         5. Departures

a. 5K1.1 – Substantial Assistance

1.) Cooperation dynamics

2.) Resulting Sentencing Disparities

United States v. Billy Applins Sentencing Results:

Defendant	Status	Sentence (Mos.)
Applins, Andre	Cooperator	37
Applins, Billy	Cooperator	65
Derby, Joseph	Guilty Plea – Non-cooperator	121
Griffin, Gregory	Guilty Plea – Non-cooperator	120
Jones, Dennis	Guilty after Trial	360
Kelly, James	Cooperator	60
Parnell, Ronnie	Cooperator	45
Pierce, Ismail	Guilty after Trial	324
Robinson, Will	Guilty after Trial	Life
Singletary, Charmish	Guilty Plea – Non-cooperator	214
Singletary, Lonnie	Guilty Plea – Non-cooperator	108
Speights, Nathan	Cooperator	45 (Credit for 39)
Thomas, Gregory	Guilty after Trial	360
Thomas, Jerrawn	Guilty after Trial	Life
Willis, Skyler	Guilty Plea – Non-cooperator	57
Willis, Tyler	Guilty Plea – Non-cooperator	57

b. 5K2 – Other Departures

6. Career Offender -- §4B1.1
   a. Third Felony Conviction for Drug Offense or Crime of Violence

2. Non-Mandatory Nature of Sentencing Guidelines

United States v. Booker, 543 U.S. 220 (2005):

PROCEDURAL POSTURE: In separate cases, two defendants were convicted of charges relating to cocaine distribution. The first defendant's sentence under the United States Sentencing Guidelines was reversed by the United States Court of

Appeals for the Seventh Circuit. The government appealed the second defendant's sentence to the United States Court of Appeals for the First Circuit. The Supreme Court granted certiorari review in both cases.

OVERVIEW: The first defendant's sentence was increased under the Guidelines by more than eight years based, inter alia, on the trial judge's finding that defendant possessed a greater quantity of drugs than was found by the jury. In the second defendant's case, the trial judge made findings that would have added ten years to defendant's sentence, but the judge declined to apply the Guidelines' enhancement provisions. The Supreme Court concluded that its Apprendi and Blakely decisions applied to the United States Sentencing Guidelines; under the Sixth Amendment, any fact other than a prior conviction that was necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict had to be admitted by a defendant or proved to a jury beyond a reasonable doubt. Therefore, 18 U.S.C.S. §§ 3553(b)(1) and 3742(e) were unconstitutional. The Guidelines were effectively advisory rather than mandatory; district courts were required to take the Guidelines into account but were not bound to apply them. Review of sentencing decisions was to be subject to an unreasonableness standard. The Court's ruling was applicable to all cases on direct review.

3. Non-Guidelines Sentences

Gall v. United States, 552 U.S. 38 (2007)

PROCEDURAL POSTURE: Petitioner, an individual who pled guilty to conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine (ecstasy), sought certiorari review of a judgment from the United States Court of Appeals for the Eighth Circuit, which reversed and remanded the district court's decision to sentence petitioner to probation for a term of 36 months rather than imprisonment.

OVERVIEW: Petitioner joined an ongoing enterprise distributing ecstasy while in college, but he withdrew from the conspiracy after seven months and ceased all drug activity. Three and one-half years after withdrawing from the conspiracy, petitioner pled guilty to his participation. The court of appeals characterized the difference between the sentence of probation and the bottom of petitioner's advisory Guidelines range of 30 months as "extraordinary," and it held that the variance was not supported by extraordinary circumstances. Although the Court agreed that the court of appeals could take the degree of variance into account and consider the extent of a deviation from the Guidelines, the Court held that the court of appeals erred in requiring "extraordinary" circumstances. The court of appeals' rule requiring "proportional" justifications for departures was not consistent with Booker. Under the deferential abuse-of-discretion standard that applied to review of sentencing decisions, the Court found that the court of appeals failed to give due deference to the district court's reasoned and reasonable

decision that the [18 U.S.C.S. § 3553(a)] factors justified the sentence of probation.

3. Amendments to Sentencing Guidelines - Effective November 1, 2010
   a. http://www.ussc.gov/2010guid/finalamend10.pdf

   b. Redesignation of Zones (Amendment of Sentencing Table)

   c. Specific Offender Characteristics
      1. Age (§5H1.1)
      2. Mental and Emotional Conditions (§5H1.3)
      3. Physical Condition or Appearance (§5H1.4)
      4. Military Service (§5H1.11)

B. Procedure
   1. Uniform Presentence Order

   2. Presentence Investigation
      a. Interview by Probation Officer
         1.) Attendance by Counsel
      b. Issuance of Presentence Investigation Report
      c. Objections

   3. Sentencing Submissions
      a. Sentencing Memoranda
      b. Letters

   4. Sentencing Hearing
      a. Sentence within Sole Province of Judge
         1.) No "Plea Bargaining"
         2.) Attorneys make Recommendations
      b "Factfinding" by Judge
         1.) Drug Weight

         2.) Case Law

Apprendi v. New Jersey, 530 U.S. 466 (2000)

PROCEDURAL POSTURE: Petitioner sought a writ of certiorari to the Supreme Court of New Jersey, which affirmed petitioner's sentence under N.J. Stat. Ann. §§ 2C:43-7(a)(3), 2C:44-3(e) (2000), authorizing an extended term of imprisonment for hate crime.

OVERVIEW: Petitioner pleaded guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of unlawful possession of an antipersonnel bomb. The state trial court enhanced the sentence under N.J. Stat. Ann. §§ 2C:43-7(a)(3), 2C:44-3(e) (2000), finding by a

preponderance of the evidence that petitioner acted with a purpose to intimidate an individual or group of individuals because of race. The sentence was affirmed on appeal. On writ of certiorari, the court reversed the judgment because the procedure was an unacceptable departure from the jury tradition. The Due Process Clause of U.S. Const. amend. XIV required that a jury on the basis of proof beyond a reasonable doubt make the factual determination authorizing an increase in the maximum prison sentence.

OUTCOME: The judgment of the state supreme court was reversed because it was unconstitutional to remove from the jury the assessment of facts that increased the prescribed range of penalties to which petitioner was exposed.

See also, Ring v. Arizona, 536 U.S. 584 (2002) and *Blakely v Washington*, 542 U.S. 296 (2004).

United States v. Doe, 297 F.3d 76 (2d Cir. N.Y. 2002)

PROCEDURAL POSTURE: The United States District Court for the Eastern District of New York entered defendant's conviction, following his guilty plea, of conspiracy to import cocaine into the United States in violation of 21 U.S.C.S. § 963 and sentenced him to 262 months imprisonment, which was 22 months above the statutory maximum for offenses involving indeterminate drug quantities under 21 U.S.C.S. § 960(b)(3). Defendant appealed.

OVERVIEW: On appeal, defendant challenged whether the district court erroneously determined his sentence based on drug quantities not specified in the indictment or found by a jury beyond a reasonable doubt. The instant court held that the drug quantity was not charged in the indictment, proved beyond a reasonable doubt, or supported by evidence sufficiently overwhelming to remove the need for further proceedings to ensure a just and fair sentence. The sentence was imposed in plain error and the error affected defendant's substantial rights. The sentence was above the statutory maximum for an offense involving an indeterminate quantity of drugs based on drug quantities not found beyond a reasonable doubt. Therefore, the sentence required correction to avoid unfairness and damage to the integrity and public reputation of judicial proceedings.

OUTCOME: Defendant's sentence was vacated and remanded for resentencing.

FEDERAL CIVIL TRIAL PRACTICE

NDNY Federal Court bar Association
Broome County Bar Association
Continuing Legal Education Program
Federal Court Primer
May 4, 2021

Albert J. Millus, Jr., Esq.
Hinman, Howard & Kattell, LLP

I. Introduction
  A. Federal court versus state court trial practice generally
    1. Trials are trials
    2. Basic parameters are essentially the same in terms of strategy and ultimate goals
    3. Difference in formalities

II. Pretrial Submittals
  A. State court
    1. Few formal requirements
    2. Varies from Judge to Judge
  B. N.D.N.Y.
    1. Fed. R. Civ. Proc. 26(a)(3):

3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly

file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

2. NDNY Uniform Pretrial Scheduling Order.

III. Courtroom Technology

A. Attachment B

IV. Trial Procedure

A. Pretrial/Settlement Conference

1. Uniform Pretrial Scheduling Order ¶9

2. Fed. R. Civ. Proc. 16:

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;
(K) disposing of pending motions;
(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
(O) establishing a reasonable limit on the time allowed to present evidence; and
(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

B. Jury Selection

1. N.D.N.Y. General Order 24 ("Jury Plan for the Random Selection of Grand and Petit Jurors")(Attachment C)
2. Local Rules 47.1 - 51.1 (Attachment D)
3. Handbook For Trials Jurors Serving in the United States District Courts (published by Administrative Office of the United States Courts)(Attachment E)
4. Individual Judge's Practices - Vary
   a. Judge McAvoy
   b. Judge Mordue
   c. Magistrate Judge Peebles
   d. Judge Munson (for historical perspective)
5. Important to discuss with Judge beforehand
6. Challenges

Fed. R. Civ. Proc: 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the

jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

28 U.S.C. §1870:

§ 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

C. Opening Statements
   1. Local Rule 39.1: "The Court will determine the time to be allotted for opening and closing arguments."
      a. Order of opening statements

D. Proof
   1. Plaintiff's case
   2. Defendant's case
   3. Rebuttal

E. Closing Statements
   1. Local Rule 39.1: "The Court will determine the time to be allotted for opening and closing arguments."
   2. Order of closing statements
      1. Civil cases
         a. Judge McAvoy
         b. Magistrate Judge Peebles
      2. Criminal cases

F. Jury Instructions
   1. Pretrial submittal

2. Charge conference

G. Jury Deliberations

H. Post-Trial Submittals in Non-Jury Trials

I. Post-Trial Contact with Jurors
1. Immediately after trial
2. Thereafter
a. Local Rule 47.5:

47.5 Jury Contact Prohibition
The following rules apply in connection with contact between attorneys or parties and jurors.
1. At any time after the Court has called a jury panel from which jurors shall be selected to try cases
for a term of Court fixed by the presiding judge or otherwise impaneled, no party or attorney, or
anyone associated with the party or the attorney, shall have any communication or contact by any
means or manner with any juror until such time as the panel of jurors has been excused and the
term of court ended.
2. This prohibition is designed to prevent all unauthorized contact between attorneys or parties and
jurors and does not apply when authorized by the judge while court is in session or when otherwise
authorized by the presiding judge.

b. *Cf.*:

Finally, the court "has the power, and sometimes the duty," to order that post-verdict questioning of the jury be under its supervision. United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978). At a minimum, notice to the court and opposing counsel is required before any such inquiries may be made. Id. at 665-66. Such court supervision is particularly required where the jury is anonymous. See United States v. Ianniello, 866 F.2d 540, 544 (2d Cir. 1989).

It makes no difference that the three jurors contacted the defendant's attorney. As the Second Circuit has observed: Human nature is such that some jurors, instead of feeling harassed by post-trial interviewing, might rather enjoy it, particularly when it involves the disclosure of secrets or provides an opportunity to express misgivings and lingering doubts. A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts. Moten, 582 F.2d at 665.

The communication and discussion with the three jurors by Schwarz's attorney about their deliberations without prior notice to the court and opposing counsel was improper. As a result, on July 14, 1999 the court issued an order prohibiting any further contact with jurors by any defendant without first obtaining authorization of the court.

The sanctity of jury deliberations is a "basic tenet of our system of criminal justice." United States v. Abcasis, 811 F. Supp. 828, 832 (E.D.N.Y. 1992). Courts thus admit post-verdict evidence of a jury's deliberations only with "great caution." Mattox v. United States, 146 U.S. 140, 148, 13 S. Ct. 50, 52, 36 L. Ed. 917 (1892).

The Second Circuit has warned of the following "evil consequences" of post-verdict inquiries: "subjecting juries to harassment, inhibiting jury room deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." Ianniello, 866 F.2d at 543.

To protect the sanctity and finality of jury verdicts the movant must show just cause why a post-verdict inquiry is necessary.

United States v. Volpe, 62 F. Supp. 2d 887, 892-893 (E.D.N.Y. 1999)

One reason given by the district court below for declining to hold an evidentiary hearing was its view that, notwithstanding the fact that the jurors initiated the contact with Schwarz's attorney, Schwarz's attorney had acted improperly in discussing the case with the jurors without first giving notice to the court and opposing counsel. See Volpe, 62 F. Supp. 2d at 892. We have long recognized that the proper functioning of the jury system requires that the courts protect jurors from being 'harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.'" Moten, 582 F.2d at 664 (quoting McDonald v. Pless, 238 U.S. 264, 267, 59 L. Ed. 1300, 35 S. Ct. 783 (1915)); see also United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961). As the court in Moten observed: Human nature is such that some jurors, instead of feeling harassed by post-trial interviewing, might rather enjoy it, particularly when it involves the disclosure of secrets or provides an opportunity to express misgivings and lingering doubts. A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would serve only to decrease public confidence in verdicts. Moten, 582 F.2d at 665. In light of these concerns, HN14we have established the requirement that "at a minimum, . . . notice to opposing counsel and the court should be given in all cases" before engaging in any post-verdict inquiry of jurors. Id. 582 F.2d at 665-66; see also United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir. 1975) ("Post-trial questioning of jurors must only be conducted under the strict supervision and control of the court . . . ." (internal quotation marks omitted)).

United States v. Schwarz, 283 F.3d 76, 97-98 (2d Cir. N.Y. 2002)

V. Federal Rules of Evidence (+/- 70 Rules):

FEDERAL RULES OF EVIDENCE
(As amended to December 1, 2011)

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope; Definitions
Rule 102. Purpose
Rule 103. Rulings on Evidence
Rule 104. Preliminary Questions
Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
Rule 106. Remainder of or Related Writings or Recorded Statements

ARTICLE II. JUDICIAL NOTICE
Rule 201. Judicial Notice of Adjudicative Facts

ARTICLE III. PRESUMPTIONS IN CIVIL CASES
Rule 301. Presumptions in Civil Cases Generally
Rule 302. Applying State Law to Presumptions in Civil Cases

ARTICLE IV. RELEVANCE AND ITS LIMITS
Rule 401. Test for Relevant Evidence
Rule 402. General Admissibility of Relevant Evidence
Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Rule 404. Character Evidence; Crimes or Other Acts
Rule 405. Methods of Proving Character
Rule 406. Habit; Routine Practice
Rule 407. Subsequent Remedial Measures
Rule 408. Compromise Offers and Negotiations
Rule 409. Offers to Pay Medical and Similar Expenses
Rule 410. Pleas, Plea Discussions, and Related Statements
Rule 411. Liability Insurance
Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
Rule 413. Similar Crimes in Sexual-Assault Cases
Rule 414. Similar Crimes in Child Molestation Cases
Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

ARTICLE V. PRIVILEGES
Rule 501. Privilege in General
Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

ARTICLE VI. WITNESSES
Rule 601. Competency to Testify in General
Rule 602. Need for Personal Knowledge
Rule 603. Oath or Affirmation to Testify Truthfully
Rule 604. Interpreter
Rule 605. Judge's Competency as a Witness
Rule 606. Juror's Competency as a Witness
Rule 607. Who May Impeach a Witness
Rule 608. A Witness's Character for Truthfulness or Untruthfulness
Rule 609. Impeachment by Evidence of a Criminal Conviction
Rule 610. Religious Beliefs or Opinions
Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
Rule 612. Writing Used to Refresh a Witness's Memory
Rule 613. Witness's Prior Statement
Rule 614. Court's Calling or Examining a Witness
Rule 615. Excluding Witnesses

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY
Rule 701. Opinion Testimony by Lay Witnesses
Rule 702. Testimony by Expert Witnesses
Rule 703. Bases of an Expert's Opinion Testimony
Rule 704. Opinion on an Ultimate Issue
Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
Rule 706. Court-Appointed Expert Witnesses

ARTICLE VIII. HEARSAY
Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay
Rule 802. The Rule Against Hearsay
Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness
Rule 804. Hearsay Exceptions; Declarant Unavailable
Rule 805. Hearsay Within Hearsay
Rule 806. Attacking and Supporting the Declarant's Credibility
Rule 807. Residual Exception

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION
Rule 901. Authenticating or Identifying Evidence
Rule 902. Evidence That Is Self-Authenticating
Rule 903. Subscribing Witness's Testimony

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS
Rule 1001. Definitions That Apply to This Article
Rule 1002. Requirement of the Original
Rule 1003. Admissibility of Duplicates
Rule 1004. Admissibility of Other Evidence of Content
Rule 1005. Copies of Public Records to Prove Content

Rule 1006. Summaries to Prove Content
Rule 1007. Testimony or Statement of a Party to Prove Content
Rule 1008. Functions of the Court and Jury

ARTICLE XI. MISCELLANEOUS RULES
Rule 1101. Applicability of the Rules
Rule 1102. Amendments
Rule 1103. Title

B. Particular Rules

1. Relevance and Prejudice

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

NOTE: Much relevant evidence is prejudicial.

The task of assessing potential prejudice is one for which the trial judge, considering his familiarity with the full array of evidence in a case, is particularly suited. As noted in the Advisory Committee's commentary on Rule 403, "situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission." The practical problems inherent in this balancing of intangibles -- of probative worth against the danger of prejudice or confusion -- call for the vesting of a generous measure of discretion in the trial judge. n16 Were we sitting as the trial judge in this case, we might well have concluded that the potentially prejudicial nature of the evidence of profits outweighed its probative worth. However, we cannot say that the trial judge abused his discretion in reaching the contrary conclusion.

Construction, Ltd. v. Brooks-Skinner Bldg. Co., 488 F.2d 427, 431 (3d Cir. N.J. 1973)

The phrasing of Rule 403 comports also with the traditional understanding, recognized by this court, that the weighing of probative value and prejudicial effect is a matter generally left within the wide, and wise, discretion of the trial court. United States v. Harvey, 526 F.2d 529, 536 (2d Cir. 1975), cert. denied, 424 U.S. 956, 96 S. Ct. 1432, 47 L. Ed. 2d 362 (1976); United States v. Ravich, supra, 421 F.2d at 1204-05. Here, however, we hold that the admission of the evidence constituted serious and reversible error. The testimony regarding the.38 established only a very weak inference at best that appellant was one of the bank robbers; it was likely to have had a significant prejudicial impact on the minds of the jurors; and, in the circumstances of this exceedingly close case, may be treated as sufficiently affecting the verdict that its admission requires reversal.

United States v. Robinson, 544 F.2d 611, 616 (2nd Cir. 1976)

Evidence is unduly prejudicial if it creates a genuine risk that the emotions of the jury will be excited to irrational behavior, and the risk is disproportionate to the probative value of the offered evidence

United States v. Loughry, 660 F.3d 965, 974 (7th Cir. Ind. 2011)

Cf. “nuke him and go direct” e-mail

2. Hearsay

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(C) identifies a person as someone the declarant perceived earlier.
(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:
(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:
. a federal statute;
. these rules; or
. other rules prescribed by the Supreme Court.

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness [Caution: For amendments effective December 1, 2013, see prospective amendment note to this rule.]

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event,

condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony

or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo

contendere plea;
(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
(C) the evidence is admitted to prove any fact essential to the judgment; and
(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
The pendency of an appeal may be shown but does not affect admissibility.
(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
(A) was essential to the judgment; and
(B) could be proved by evidence of reputation.

D. Raising evidentiary issues
   1. Pretrial motions *in limine*
   2. For the first time during presentation of evidence
      a. *E.g.*, hearsay objections
   3. By written submission during trial

VI. *Daubert* and *Kuhmo Tire* (Attachment F)

Daubert Turning 20: Junk Science Replaced By Junk Rulings?
http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/18-2_daubert_turning.authcheckdam.pdf

VII. Appeals
   A. Rule 4, Fed. R. App. Proc.:

      1. Civil Cases: File Notice of Appeal with District Court Clerk within 30 days after entry of judgment. Fed. R. App. Proc. 4(a)(1)(A)

         a. 60 days when United States, US Agency, US Officer or Employee sued in official capacity or sued in individual capacity for actions performed on behalf of US. Fed. R. App. Proc. 4(a)(1)(B)

      2. Criminal Cases: File Notice of Appeal with District Court Clerk within 14 days after the later of the entry of judgment or the filing of Notice of Appeal by the Government. Fed. R. App. Proc. 4(b)(1)(A).

         b. 30 days when Government appeals. Fed. R. App. Proc. 4(b)(1)(B).

      3. Payment of Filing Fee. Fed. R. App. Proc. 3(e).

a. Currently $455. See Fee Schedule on Second Circuit Web Site.

B. Interlocutory Appeals not generally allowed as of right

1. Appeals by permission. Fed. R. App. Proc. 5.

2. Exceptions:

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

C. Clerk serves Notice of Appeal. Fed. R. App. Proc. 3.

D. Procedure in Court of Appeals. See Local Rules on Court’s Web Site.

FEDERAL CIVIL and CRIMINAL PRACTICE

NDNY Federal Court bar Association
Broome County Bar Association
Continuing Legal Education Program
Federal Court Primer
May 4, 2021

Hon. Miroslav Lovric
United States Magistrate Judge
Northern District of New York

I. Properly Alleging Federal Jurisdiction in Federal Court via Diversity of Parties

a. Whether filing a Complaint pursuant to FRCP 8 or removing an action from state court by way of a Notice of Removal pursuant to 28 USC 1446, 1332 & FRCP 11, diversity between Plaintiff and Defendant must be correctly pled.
   i. In a Rule 8 Complaint, Plaintiff must correctly plead diversity in the complaint.
   ii. In a Notice of Removal action, Defendant must correctly plead diversity in the Notice of Removal.

b. The "citizenship" or "domicile" of the party is what matters. "Residency or residence" of a party is irrelevant.
   i. A Complaint does not adequately allege diversity jurisdiction where although it identifies a party as residing in state X, but fails to identify her/his "citizenship" or "domicile".
   ii. An allegation of "an individual party's residence is insufficient to establish their domicile or citizenship." *IndyMac Venture, LLC v. Mulligan*, 15-CV-7057, 2019 WL 4648419, at *3 (E.D.N.Y. Aug. 30, 2019) (citing *White v. Abney*, 17-CV-4286, 2019 WL 1298452, at *3 (E.D.N.Y. Mar. 21, 2019)); see *Caren v. Collines*, 689 F. App'x 75, 75 (2d Cir. 2017) ("Although the individual plaintiff and individual defendants are alleged to be residents of certain States, such an allegation is insufficient to plead citizenship"). Notably, "one may have more than one residence in different parts of this country or world, but a person may have only one domicile." *Reich v. Lopez*, 858 F.3d 55, 63 (2d Cir. 2017). "Where there is evidence indicating that a party has more than one residence, or the residence is unclear, the Court should look to the party's intent." Chen v. Sun, 13-CV-0280, 2016 WL 270869, at *2 (S.D.N.Y. Jan. 21, 2016) (citing Nat'l Artists Mgmt. Co. v. Weaving, 769 F. Supp. 1224, 1227 (S.D.N.Y. 1991)). In determining a party's intent, courts consider many factors including: current residence; voting registration; driver's license and automobile registration; location of brokerage and bank accounts; membership in fraternal organizations, churches, and other associations; places of employment or business; payment of taxes; whether a person owns or rents his place of residence; the nature of the residence (i.e., how permanent the living arrangement appears); and the location of a person's

physician, lawyer, accountant, dentist, stockbroker, etc. Kennedy v. Trs. of Testamentary Tr. of Will of Kennedy, 633 F. Supp. 2d 77, 81 (S.D.N.Y. 2009).

c. The "citizenship or domicile" of an LLC is determined by the citizenship or domicile of its "members". An LLC's location of doing business in X state or its address is irrelevant.
    i. First, determine who are all the members of the LLC.
    ii. Second, allege the "citizenship or domicile" of each member of the LLC.
    iii. Not sufficient to allege the state where the LLC is doing business or the headquarters of the LLC
    iv. See 250 Lake Ave. Assocs., LLC v. Erie Ins. Co., 281 F. Supp. 3d 335, 341 (W.D.N.Y. 2017) (quoting Alvarez & Marshal Glob. Forensic & Dispute Servs., LLC, 14-CV-0290, 2014 WL 641440, at *2 (S.D.N.Y. Feb. 19, 2014)) ("Since Plaintiff is an LLC, the proper inquiry for determining the existence of complete diversity is whether Defendant is diverse from all of Plaintiff's members 'because an LLC has the citizenship of each of its members for diversity jurisdiction.'"); Traffas v. Biomet, Inc., No. 19-2115, 2020 WL 1467313 (D. Kansas March 26, 2020).

d. Corporations
    i. Citizens of state where incorporated and primary headquarters

e. Unincorporated Business Entity
    i. See, Boergers v. Miami Dolphins, Ltd., 17-CV-0401S, 2019 WL 6297203, at *1 (W.D.N.Y. Nov. 25, 2019) (citing Zambelli Fireworks Mfg. Co. v. Wood, 529 F.3d 412, 420 (3d Cir. 2010); Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC, 692 F.3d 42, 49 (2d Cir. 2012)) (holding that unincorporated business entities are to be treated as a partnership for purposes of establishing citizenship and thus take the citizenship of each of its members).

II. <u>Parties Seeking a Protective Order Pursuant to FRCP 26(c) to Designate Materials as Confidential or Highly Confidential</u>

a. Sealing procedure or protocol in the proposed Protective Order submitted to the Court must comply with and not be in conflict with NDNY Local Rule 5.3 (LR sealing procedures).

b. The standard to obtain a Protective Order designating materials as Confidential or Highly Confidential is NOT the same as the standard applicable to having materials sealed. See LR 5.3.
    i. Just because materials are designated as confidential during the discovery process does not mean that they will also automatically qualify to be sealed.

III. <u>General Order (GO) 25 Order Issued to Plaintiff Along with Summonses After a Complaint Filed</u>

a. Read the GO 25 Order

b. Must be served by Plaintiff(s) on all Defendants along with the summons and complaint.

c. GO 25 Order modifies FRCP rules including service of process deadlines and procedures.

IV. In all Criminal Matters Before Magistrate Judge Lovric

a. Government (USAO) is required to complete a 4 questions form and share that information with the Defense and the U.S. Probation Office prior to any Initial Appearance or Detention Hearing.
b. See attached form and questions.
c. These questions/answers and areas implicate safety issues of U.S. Probation Officers who will be conducting supervision of a Defendant while on pre-trial supervision and release.
d. They also implicate important jail/incarceration time credit issues for a Defendant who has both state and federal charges pending and is incarcerated on both.
e. They also implicate "primary custody" issues and whether Defendant will serve any incarceration first in state versus federal prison -----and concurrent versus consecutive imprisonment issues.

Case Name: U.S. v ______________________

Case #: __________________________________

Prior to any Initial Appearance or Detention Hearing being held before Magistrate Judge Miroslav Lovric, the U.S. Attorney's Office is directed to complete this form by providing answers to the below questions and thereafter emailing this completed form to CRD Jennifer Painter, defense counsel (defendant's attorney), and the U.S. Probation Officer/Pre-Trial Services Officer. If this form is completed and disseminated prior to the Initial Appearance but circumstances change such that the below answers change and a Detention Hearing is scheduled to take place, the U.S. Attorney's Office is directed to complete an updated form and disseminate it accordingly to the same recipients prior to any Detention Hearing being held.

1) Is Defendant cooperating or proffering in any way with any law enforcement agency or any prosecutors office?

    a. And will his/her cooperation or proffer continue after the IA or Detention Hearing? [This information is critical for the Court to know if it decides to release Defendant and also impose supervision by U.S. Probation pre-trial services. U.S Probation Officer safety is implicated in such a scenario.]

2) Is Defendant in "Primary State Custody"?
    a. If yes, the U.S. Attorney's Office and defense counsel are directed to confer, prior to any Initial Appearance and/or Detention Hearing, with the state prosecutor, state defense counsel, and state court to determine the "primary custody" issues, credit allocation for incarceration time, and "physical custody" issues (determine in whose physical custody defendant will remain).
    b. The Court will hold a separate conference prior to the proceeding to discuss these issues.

3) Is Defendant appearing by way of a writ?

4) Does Defendant have any detainers or warrants from any other jurisdiction?

THE LOCAL CIVIL RULES IN THE NORTHERN DISTRICT OF NEW YORK: HIGHLIGHTS AND TIPS

The Local Rules for the United States District Court for the Northern District of New York are available on-line at https://www.nynd.uscourts.gov/content/current-local-rules.

PURPOSE OF THE RULES

The first thing to remember about the Local Rules (and the Federal Rules of Civil Procedure) is that the Rules are there to promote the orderly process of litigation through the courts. As Rule 1 states: the federal rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

The Rules are not designed to advantage a particular party or reward clever lawyers who note their opponents' technical mistakes. Rule 8(e) provides that "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 8(e). As a widely used federal practice guide puts it: "[t]he application of orderly rules of procedure does not require the sacrifice of fundamental justice, but rather the Rules must be construed to promote justice for both parties, not to defeat it. This mandate is met if substantial justice is accomplished between the parties." 1 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE, p.21[1][a] (3d ed. 2001).

Though recent decisions on pleading by the Supreme Court have introduced more technical requirements and, arguably, moved practice away from the original purpose of the Rules, federal courts still operate by the principle stated in Conley v. Gibson: "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive in the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." 355 U.S. 41, 48 (1957); see Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic v. Twombly, 550 U.S. 544 (2007).[1]

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[1] **Error! Main Document Only.**"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). While this stricter standard has led to substantial litigation, decisions that grant a motion to dismiss often permit repleading, since a failure to allege sufficient facts is often a failing that can be solved by adding more facts. **Error! Main Document Only.**As the Second Circuit Court of Appeals has stated, "the facts a plaintiff alleges in a complaint may turn out to be self-serving and untrue. But a court at the motion-to-dismiss "stage . . . is not engaged in an effort to determine the true facts." Doe v. Columbia Univ., 831 F.3d 46, 48 (2d Cir. 2016). In deciding a Rule 12(b)(6) motion, "[t]he issue is simply whether the facts the plaintiff alleges,

Judges enforce the rules, but they also operate by these principles and have as their guiding principle that litigation should achieve substantial justice. Judges would rather dispose of the case on the merits than hand a victory to an undeserving side who used the rules to their advantage.

Most judges are far more likely to grant a motion for relief from a procedural failing than to enforce a rule in manner that allows a party to win simply because they notice the other side's error.

None of this means, of course, that the Rules are unimportant, or that following them is optional. The Rules are meant to smooth the process of resolving disputes, to set clear standards, and to set dates and deadlines so that cases resolved on the merits in an appropriate amount of time.

Parties should use the rules to move the case through the court, file the papers required by the rules at the times they demand, and obtain judgment when judgment is appropriate.

HIGHLIGHTS OF THE LOCAL RULES

A. L.R. 3.1

A party who files a civil case will shortly know which Judge and which Magistrate Judge will be assigned the action. Local Rule 3.1 provides that:

> Immediately upon the filing of a civil action or proceeding, the Clerk shall assign the action or proceeding to a District Judge and may also assign the action or proceeding to Magistrate Judge pursuant to the Court's Assignment Plan

Each Judge has their own rules, which may require specific forms or content for papers or set particular deadlines. Be aware of those rules and the deadlines set following the Rule 16 conference.

B. L.R. 4.1(b)

You should notice the difference between the Local Rules and the Federal Rules of Civil Procedure. Local Rule 4.1(b) is important in this respect. Federal Rule of Civil Procedure 4(m) provides that "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or

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if true, are plausibly sufficient to state a legal claim." Id. After all, "[i]f the complaint is found sufficient to state a legal claim, the opposing party will then have ample opportunity to contest the truth of the plaintiff's allegations and to offer its own version." Id.

order that service be made within a specified time." Fed. R. Civ. P. 4(m). Local Rule 4.1(b) shortens that timeline:

> Upon filing of a complaint, the Clerk shall issue to the plaintiff General Order 25 which requires, among other things, service of process upon all defendants within sixty (60) days of the filing of the complaint. This expedited service requirement is necessary to ensure adequate time for pretrial discovery and motion practice. In no even shall service of process be completed after the time specified in Fed. R. Civ. P. 4.

L.R. 4.1(b).

There are two things to notice about this rule. First, the Northern District has a preference for keeping things moving. Judges do not want to wait around for a complaint to be served. Second, you should also recognize the rule is not inflexible. A party that makes a diligent effort to serve a complaint but cannot do so within the required time can seek relief for the Court. A motion seeking an extension of time for service that has a reasonable explanation for delays will rarely be denied. The shorter time span in the Local Rules is simply an attempt to keep cases moving and to get matters resolved on the merits without undue delay.

C. L.R. 4.1(c)

The Local Rules also provide that specific information must be served along with the complaint. When a party serves the complaint, the party must also provide:

> 1. Judicial Case Assignment Form;
> 2. Joint Civil Case Management Plan Containing Notice of Initial Pretrial Conference;
> 3. Notice and Consent Form to Proceed Before a United States Magistrate Judge.
>
> The Clerk shall furnish these material to the party seeking to invoke the jurisdiction of the Court at the time the complaint or notice of removal is filed.

Here is another example of the court attempting to move matters along expeditiously. It is also an example of the importance of consulting the local rules before serving any papers.

D. L.R. 5.2

The Local Rules limit how some parties may be identified.

> **(a) Personal Identifiers:** Except as to documents in social security proceedings, pursuant to General Order 22 §§ 11.1 and 11.2, parties shall refrain from including, or shall redact where inclusion is

necessary, the following personal identifiers from all filings with the Court, including exhibits thereto, whether filed electronically or in paper form, unless the Court orders otherwise.

1. **Social security numbers and taxpayer identification number**. If an individual's social security number or taxpayer identification number must be included in a document, use only the last four digits of that number.
2. **Names of minor children**. If the involvement of a minor child must be mentioned, use only the initials of that child.
3. **Dates of Birth**. If an individual's date of birth must be included in a document, use only the year.
4. **Financial account numbers**. If the financial account numbers are relevant, use only the last four digits of those numbers.
5. **Home Addresses**. If a home address must be used, use only the City and State.
6. **Names of Sexual Assault Victims**. If the involvement of a sexual assault victim must be mentioned, use only information that does not tend to identify the victim(s) of sexual assault and redact the name to "Victim 1," "Victim 2," etc.

In addition, caution shall be exercised when filing documents that contain the following:

1. personal identifying number, such as a driver's license number.
2. medical records, treatment and diagnosis;
3. employment history;
4. individual financial information; and
5. proprietary or trade secret information.

(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the person data identifiers listed above may:

1. file an unredacted version of the document under seal in compliance with Local Rule 5.3, or
2. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.

Counsel is strongly urged to discuss this issue with all their clients so that they can make an informed decision about the inclusion of certain information. The

responsibility for reacting these personal identifiers **rests solely with counsel and the parties**. The Clerk will not review filings for compliance with this Rule. Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to the Court's full disciplinary power.

Courts have a broad power to sanction parties and counsel for contumacious conduct, and a court that finds "clear and convincing evidence" that "abuse conduct occurred" could theoretically dismiss a complaint and could certainly impose other sanctions. McMunn v. Mem'l Sloan-Kettering Cancer Ctr., 191 F.Supp.2d 440, 445 (S.D.N.Y. 2002). Failure to redact would not usually be the sort of failing that would draw a severe sanction, particularly if the failure was unintentional and an oversight. Purposeful disregard of the rules, especially if that disregard exposes private information in a malicious way, however, could cause the court to exercise such power.

E. Rule 5.3

Sealing information filed to the Court is an important and delicate matter. Courts in general have an obligation to inform the public of the bases for their decisions and are instructed to seal only that material necessary to protect important rights.

"The notion that the public should have access to the proceedings and documents of courts is integral to our system of government." United States v. Erie County, 763 F.3d 235, 238-239 (2d Cir. 2014). That system of government, founded on the rights and input of the people, requires "that the people themselves have the ability to learn of, monitor, and respond to the actions of their representatives and their representative institutions." Id. at 239. The idea is an old one, "[i]ndeed, the common law right of public access to judicial documents is said to predate even the Constitution itself." Id.

There is a common-law right to access court information, but there is also a constitutional one. "[O]ur Constitution, and specifically the First Amendment to the Constitution, also protects the public's right to have access to judicial documents." Id. at 239. That right is "stronger than its common law ancestor and counterpart." Id. Two tests exist to determine whether the First Amendment right to access applies. Under the first approach, the First Amendment right attaches when "'experience and logic' support making the document available to the public." Id. (quoting Logusch v. Pyramid Co., 435 F.3d 110, 120 (2d Cir. 2006)). The court is to "consider (a) whether the documents 'have historically been open to the press and general public' (experience) and (b) whether 'public access plays a significant positive role in the functioning of the particular process in question.' (logic)." Id. (quoting Logusch, 435 F.3d at 120). If the First Amendment applies, "documents 'may be sealed [only] if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" Id. The court's findings cannot be "'broad and general.'" Id.

While narrower, the common-law right of access to the courts is also important. Courts have been clear that "[t]he common law right of public access to judicial documents is firmly rooted in our nation's history." Logusch v. Pyramid Co., 435 F.3d 110, 119 (2d Cir. 2006). This right exists because:

> The presumption of access is based on the need for federal courts, although independent–indeed, particularly because they are independent–to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such an appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public would have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

Id. (quoting United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995)).

The common-law right attaches when the court finds "that the documents at issue are indeed 'judicial documents.'" Id. Not all papers filed with the court qualify; "[i]n order to be designated a judicial document, 'the item filed must be relevant to the performance of the judicial function and useful in the judicial process.'" Id. If such documents are jducial documents, "a common law presumption of access attaches[.]" Id. The court still must, however, "determine the weight of the presumption." In doing so, a court is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on the continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance.'" Id. (quoting Amodeo, 71 F.3d at 1049). The final step for the court is to "'balance competing considerations'" against access. Id. (quoting Amodeo, 71 F.3d at 1050). "Such countervailing factors include but are not limited to 'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'" Id. (quoting Amodeo, 71 F.3d at 1050).

The local rule provides that:

5.3 Sealed Matters (formerly L.R. 83.13)

(a) A party seeking to have a document, a portion of a document, a party or an entire case sealed bears the burden of filing an application setting forth the reason(s) that the referenced material should be sealed under the governing legal standard. *See Lugosch v. Pyramid Co. of Onondaga County*, 435 F.3d 110, 119-27 (2d Cir. 2006). (The provisions of Local Rule 83.13 shall not apply to actions for which sealing is required by statute, e.g., 31 U.S.C. § 3730(b)(2), or to personal identifiers that are required to be redacted under Local Rule 8.1.) The application shall be filed on ECF. The party should also attach to the application or file separately a redacted version of any document that is to contain the sealed material (unless the party seeks to seal the entire document). When the party seeks to seal an entire document, the party shall attach or file that document with a blank page marked appropriately (e.g., as "Sealed Affidavit" or "Sealed Exhibit Number ") for each requested sealed document. The application shall also attach a proposed order (which shall not be filed under seal unless the Court deems doing so to be appropriate) containing specific findings justifying the sealing under the governing legal standard for the assigned judge's approval. The proposed order shall include an "ORDERED" paragraph stating the referenced material to be sealed. All material sought to be sealed shall be submitted to the Court, for its in camera consideration, as an attachment (in .pdf format) to an email sent to the assigned judge's email address listed in Section 8.2 of General Order 22, and shall be served on all counsel.

(b) Upon the assigned judge's approval of the sealing order, the sealing order shall be filed on the public docket (unless the Court deems sealing all or a portion of it to be appropriate), and the redacted or sealed document shall be filed as directed by the Court. A complaint presented for filing with an application to seal and a proposed order shall be treated as a sealed case, pending approval of the proposed order. A document, a portion of a document, a party or an entire case may be sealed when the case is initiated, or at various stages of the proceeding. The Court may on its own motion enter an order directing that a document, a portion of a document, a party or an entire case be sealed.

(c) Once the Court seals a document, a portion of a document, a party or an entire case, the material shall remain under seal for the duration of the sealing order or until a subsequent order is entered directing that the sealed material be unsealed. A party or third-party
unsealing must do so by motion on notice.

(d) Should an application to seal be denied, the documents sought to be sealed will be treated as withdrawn and will not be considered by the Court. The documents will be returned to the party advancing the request. The requesting party shall retain all submitted documents for a period of not less than sixty days after all dates for appellate review have expired.

Parties are often unclear about how to file matters they seek to have sealed. While chambers cannot provide legal advice, clerk's office staff can help with technical matters such as these. A judge's courtroom deputy can often be very helpful in this process. Note, too, that the parties should not assume that matters will be sealed because they request that the judge seal them. The parties should file a motion and explain to the judge why the material should be sealed, why the redactions are as narrow as possible, and how the public's interest in the matter can still be met even with the sealing.

F. L.R. 7.1

Local Rule 7.1 addresses motions of all sorts. The Rule explains how papers should be filed, when, the length permitted, and how supporting documentation should be attached to the motion.

Some practical hints for filing such motions:

1. File all your documents related to the motion as a single docket entry on the court's Electronic Case Filing ("ECF") system. Don't file the motion as one document, the brief as another, and the exhibits as a third. Judges find it easier to work from a single docket entry.
2. Make your arguments in your brief. A motion paper that is not a brief that is filled with legal arguments may be ignored by the court.
3. Include a proposed order that tells the court exactly what you want the court to do (i.e., grant summary judgment to the defendant, order the defendant to produce x, y, and z, provide ten more pages for your brief).
4. Give the court a reason to do what you want, even in a brief, non-controversial motion. If you need extra time to file a response, explain to the court why you need that time.
5. Follow the rules for what you need to include in your moving papers, particularly for motions for summary judgment.
6. Don't include unnecessary papers that the court cannot consider. If you're filing a motion to dismiss, do not include documents that you contend disprove the facts alleged in the complaint. A court generally cannot consider such papers.

The Northern District has recently eliminated regular motion calendars. Rule 7.1 now provides that:

7.1 Motion Practice (amended January 1, 2021)

(a) Briefing Schedule. Motions are decided without oral argument unless scheduled by the Court. Parties may make a written request for oral argument, which is subject to the discretion of the presiding judge. In any such requests for oral argument, the parties should specify the ground(s) for the request (e.g., the need to respond to arguments presented in the last- filed brief, the need to advise the Court of recently occurring events or arguments regarding new controlling or persuasive case law, the need to re-familiarize the Court with the complicated facts and/or procedural history of the case given the length of time that has passed since the Court last reviewed the case, **the need of an inexperienced lawyer to gain experience in the courtroom, etc.**).

Note that the court wants to provide a place for young lawyers to get experience, and will consider oral argument solely for that purpose.

The Court provides separate briefing schedules for dispositive and non-dispositive motions. The Court considers a "dispositive motion" to be one that, if granted, would dispose of the case or a claim in the case. Such motions are usually motions to dismiss or motions for summary judgment.

Unless the court orders otherwise, the opposing party must file and serve opposition papers not more than 21 days after being served with the motion. The moving party is permitted a reply brief of not more than ten pages, and must file that reply within seven days. The courts counts weekends. L.R. 7.1(a)(1).

For non-dispositive motions made before a Magistrate Judge, parties are first required to "make **good faith efforts among themselves to resolve or reduce all differences relating to the non-dispositive issue"** and then contact the Magistrate Judge to request a conference. L.R. 7.1(a)(2). A party who files such a motion must confirm in the motion that such a conference occurred or the court will reject the motion. Id. The opposing party has twenty-one days to respond. **A reply is not permitted without leave of court.** Id.

"The Court shall not consider any papers required under this Rule that are not timely filed or are otherwise not in compliance with this Rule unless good cause is shown." L.R. 7.1(a)(3). Failure to respond will generally cause the court to grant the motion as unopposed. Id. A party who does not intend to oppose a motion should inform the court "at the earliest practicable" time, but no more than fourteen days after service of the motion.

Papers Required—L.R. 7.1(b)

Consult this Rule for a general statement of what papers are required with the motion. Attorneys should also examine the specific Rule for more particular information on the required papers (i.e., Rule 12 for motions to dismiss and Rule 56 for motions for

summary judgment). “The parties need not provide a courtesy copy of their motion papers to the assigned judge unless the assigned judge requests a copy.”

The judge’s law clerks probably would prefer to just look at them electronically.

Rule 7.1(b) provides the rules for memoranda of law:

1. No more than 25 pages in length without advance leave of court.
2. Contains a table of contents
3. If the opposing party is *pro se*, the other party must provide hard copies of any unpublished sources. “Although copies of authorities published only on electronic databases are not required to be filed, copies shall be provided upon request to opposing counsel who lack access to electronic databases.”
4. If the motion is based on a rule or statute (i.e. F.R.C.P 12(b)(6)), the movant must state specifically in the papers the rule or statute.
5. Not all motions require a memorandum of law. (see the Rule)
6. Affidavits should not contain legal arguments “but must contain factual and procedural background that is relevant to the affidavit supports.” They are not required on all motions, including Rule 12(b)(6) motions to dismiss, Rule 12(c) motions for judgment on the pleadings, and rule 12(f) motions to strike
7. If the motion is one for leave to file an amended complaint, the motion must contain a copy of the proposed amended pleading, unsigned. See also L.R. 15.1 for specific rules on filing an amended complaint.
8. Rule 7.1(b)(5) sets out the rules for what should be filed with the notice of motion. The rules require that the Notice of Motion contain specific information, and that any supporting materials, including a brief, should be filed as attachments to that Notice. The motion should also state whether oral argument is requested.

Attorneys often have difficulties filings **Orders to Show** cause properly. Rule 7.1(e) provides specific procedures. Follow this rule or the Judge may decide to send it back tell you to do it over. The Rule is designed to recognize the speed and temporary nature of such orders and asks for specific information:

> e) Order to Show Cause. All motions that a party brings by Order to Show Cause shall conform to the requirements set forth in L.R. 7.1(b)(1) and (2). Immediately after filing an Order to Show Cause, the moving party must telephone the Chambers of the presiding judicial officer and inform Chambers staff that it has filed an Order to Show Cause. Parties may obtain the telephone numbers for all Chambers from the Clerk's office or at the Court’s webpage at “www.nynd.uscourts.gov.” The Court shall determine the briefing schedule and return date applicable to motions brought by Order to Show Cause. In addition to

the requirements set forth in Local Rule 7.1(b)(1) and (2), a motion brought by Order to Show Cause must include an affidavit clearly and specifically showing good and sufficient cause why the standard Notice of Motion procedure cannot be used. The moving party must give reasonable advance notice of the application for an Order to Show Cause to the other parties, except in those circumstances where the movant can demonstrate, in a detailed and specific affidavit, good cause and substantial prejudice that would result from the requirement of reasonable notice. An Order to Show Cause must contain a space for the assigned judge to set forth (a) the deadline for filing and serving supporting papers, (b) the deadline for filing and serving opposing papers, and (c) the date and time for the hearing.

G. Civil Rico Statement

L.R. 9.2 requires parties seeking to file a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., to file a statement that lays out the nature of their claims within 30 days of filing the claim. Make sure to file a statement that comports with the requirements stated in General Order #14, available at ww.nynd.uscourts.gov or a claim could be dismissed without prejudice. "The Court shall construe the RICO Statement as an amendment to the pleadings." L.R. 9.2.

H. Form of Papers—L.R. 10.1

The rules require that papers be filed in a certain format, including font size, margin width, spacing, and use of references. The rules also explain information that needs to be on each document filed.

As a general rule, judges prefer a motion for leave to file an oversized brief to efforts to make an oversized brief seem smaller. If you need to file a longer brief, explain to the court why in a motion. Such motions are usually granted. Legal writers should of course remember that length does not equate to persuasiveness. Short, direct sentences and clear argument are preferred to four-page statements about the controlling legal standard.

This rule also contains the requirement that all attorneys and pro se litigants notify the clerk's office immediately upon a change of address. While electronic filing makes this rule less urgent, the Clerk's Office still needs the information, and Judge's chambers will always need current contact information, particularly phone numbers and e-mails.

I. Appearances and Withdrawals—L.R. 11.1

Follow these procedures and keep the court updated about your status in the case. Judges are cautious about letting an attorney out of a case without knowing that another attorney will take over. This caution comes from the court's desire to keep matters moving through the courts.

J. Rules 16.1 and 16.2

These rules are vital. Rule 16.1 covers the initial conference that sets the process of the case moving through the Court, provides for the papers that lawyers need to supply, and gives attorneys an outline of what to expect. Magistrate Judges conduct these conferences and they are vital to keeping the case moving. Prepare all the documents required and be ready to participate fully. Such conferences are often scheduled and then postponed while a motion to dismiss is pending. Rule 16.2 is a reminder to attorneys to keep discovery moving, underscoring that the discovery deadline is meant to be the date by which discovery is completed.

16.1 Civil Case Management

This Court has found that the interests of justice are most effectively served by adopting a systematic, differential case management system that tailors the level of individualized and case- specific management to such criteria as case complexity, time required to prepare a case for trial, and availability of judicial and other resources.

(a) Filing of Complaint/Service of Process. Upon the filing of a complaint, the Clerk shall issue to the plaintiff General Order 25, which requires, among other things, service of process upon all defendants within sixty (60) days of the filing of the complaint. This expedited service requirement is necessary to ensure adequate time for pretrial discovery and motion practice.

(b) Assignment of District Judge/Magistrate Judge. Immediately upon the filing of a civil action, the Clerk shall assign the action or proceeding to a District Judge and may also assign the action or proceeding to a Magistrate Judge pursuant to the Court's assignment plan. When a civil action is assigned to a Magistrate Judge, the Magistrate Judge shall conduct proceedings in accordance with these Rules and 28 U.S.C. § 636 as directed by the District Judge. Once assigned, either judicial officer shall have authority to design and issue a case management order.

(c) Initial Pretrial Conference. Except for cases excluded under section II of General Order 25, an initial pretrial conference shall be scheduled in accordance with the time set forth in Fed. R. Civ. P. 16. The Clerk shall set the date of this conference upon the filing of the complaint. The purpose of this conference will be to prepare and adopt a case-specific management plan which will be memorialized in a case management order. See subsection (d) below. In order to facilitate the adoption of such a plan, prior to the scheduled conference, counsel for all parties shall confer among themselves as Fed. R. Civ. P. 26(f) requires and shall use the Civil Case Management Plan form contained in the General Order 25 filing packet. The parties shall file their jointly-proposed plan, or if they cannot reach consensus, each party shall file its own proposed plan with the Clerk at least fourteen (14) business days prior to the scheduled pretrial conference.

(d) Subject Matter of Initial Pretrial Conference. At the initial pretrial conference, the Court shall consider, and the parties shall be prepared to discuss, the following:

1. Deadlines for joinder of parties, amendment of pleadings, completion of discovery, and filing of dispositive motions;
2. Trial date;
3. Requests for jury trial;
4. Subject matter and personal jurisdiction;
5. Factual and legal bases for claims and defenses;
6. Factual and legal issues in dispute;
7. Factual and legal issues upon which the parties can agree or which they can narrow through motion practice and which will expedite resolution of the dispute;
8. Specific relief requested, including method for computing damages;
9. Intended discovery and proposed methods to limit and/or decrease time and expense thereof;
10. Suitability of case for mandatory mediation;
11. Measures for reducing length of trial;
12. Related cases pending before this or other U.S. District Courts;
13. Procedures for certifying class actions, if appropriate;
14. Settlement prospects; and
15. If the case is in the mediation track, the estimated time for completion of mediation.

(e) Uniform Pretrial Scheduling Order. Upon completion of the initial pretrial conference, the presiding judge may issue a Uniform Pretrial Scheduling Order setting forth deadlines for joinder of parties, amendment of pleadings, production of expert reports, completion of discovery, and filing of motions; a trial ready date; the requirements for all trial submissions; and if an mediation track case, the deadline for completion of mediation.

(f) Enforcement of Deadlines. The Court shall strictly enforce any deadlines that it establishes in any case management order, and the Court shall not modify these, even upon stipulation of the parties, except upon a showing of good cause.

16.2 Discovery Cut-Off

The “discovery cut-off” is that date by which all responses to written discovery, including requests for admissions, shall be due according to the Federal Rules of Civil Procedure and by which all depositions shall be concluded. Counsel are advised to initiate discovery requests and notice depositions sufficiently in advance of the cut-off date to comply with this Rule. Discovery requests that call for responses or scheduled depositions after the discovery cut-off will not be enforceable except by order of the Court for good cause shown. Parties shall file and serve motions to compel discovery no later than fourteen (14) days after the discovery cut-off. See Local Rule 37.1(h).

K. Actions by or on Behalf of Infants and/or Incompetents—Rule 17.1

This rule follows the principle that actions cannot be settled or compromised without court supervision if the action is undertaken on behalf of a minor or someone who cannot handle their own affairs. As a general matter, the court does not approve or supervise settlements—if you settle your case, just inform the court and the case will be closed. Look to this rule when the settlement involves a party who needs special protection.

L. Class Actions—Rules 23.1 and 23.2

Look to Federal Rule of Civil Procedure 23 for an understanding of when a case qualifies as a class action. This is a matter of dispute, and one often litigated. For administrative purposes, the Local Rules require the plaintiff to state in the caption that the case is intended as a class action, and to file a motion to certify a class action "[a]s soon as practicable." L.R. 23.2.

M. Discovery Rules—L.R.s 26.1-26.4

As a general matter, consult Federal Rule of Civil Procedure 26 for the general outline of discovery. The Federal Rules are very clear about who can be deposed, when, and for what purpose. The Local Rules provide rules for the form of discovery requests and responses (L.R. 26.1), what discovery needs to be provided to the court (L.R. 26.2), the identification and production of expert testimony (L.R. 26.3), and special procedures for discovery with incarcerated parties (L.R. 26.4).

Be especially careful to follow the procedures related to expert witnesses. As part of moving cases expeditiously through the courts, the Local Rules and the Federal Rules require the early disclosure of experts and expert testimony as a means of defining the issues in the case. "Failure to comply with these deadlines may result in the imposition of sanctions, including the preclusion of testimony, pursuant to Fed. R. Civ. P. 16(f)." L.R. 26.3

N. Discovery Motions—L.R. 37.1

The Local Rules set up specific procedures for addressing discovery disputes. The court seeks to move matters quickly and avoid court intervention in disputes that responsible professionals can handle. Do not rush to the court without first trying to work out disputes and do not play games with discovery. Provide the information required by the rules, and come to the court only when requests are unreasonable, unduly burdensome, or implicate information subject to a privilege. The purpose of the Federal Rules is to facilitate discovery, not to provide an avenue for strategic disputes.

The entire Local Rule is important to understand, and is reproduced here:

Rule 37.1 Discovery Motions (formerly L.R. 7.1(d))(amended January 1, 2021)

The following steps are required prior to making any discovery motion pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure.

a. Parties must make good faith efforts among themselves to resolve or reduce all differences relating to discovery prior to seeking court intervention.

b. The moving party must confer in detail with the opposing party concerning the discovery issues between them in a good faith effort to eliminate or reduce the area of controversy and to arrive at a mutually satisfactory resolution. Failure to do so may result in denial of a motion to compel discovery and/or imposition of sanctions.

c. If the parties' conference does not fully resolve the discovery issues, the party seeking relief must then request a court conference with the assigned Magistrate Judge. Incarcerated, pro se parties are not subject to the court conference requirement prior to filing a motion to compel discovery. The assigned Magistrate Judge may direct the party making the request for a court conference to file an affidavit setting forth the date(s) and mode(s) of the consultation(s) with the opposing party and a letter that concisely sets forth the nature of the dispute and a specific listing of each of the items of discovery sought or opposed. Immediately following each disputed item, the party must set forth the reason why the Court should allow or disallow that item.

d. Following a request for a discovery conference, the Court may schedule a conference and advise all parties of a date and time. The assigned Magistrate Judge may, in his or her discretion, conduct the discovery conference by telephone conference call, initiated by the party making the request for the conference, by video conference, or by personal appearance.

e. Following a discovery conference, the Court may direct the prevailing party to submit a proposed order on notice to the other parties.

f. If a party fails or refuses to confer in good faith with the requesting party, thus requiring the request for a discovery conference, the Court, at its discretion, may subject the resisting party to the sanction of the imposition of costs, including the attorney’s fees of opposing party in accordance with Fed. R. Civ. P. 37.

g. A party claiming privilege with respect to a communication or other item must specifically identify the privilege and the grounds for the claimed privilege. The parties may not make any generalized claims of privilege.

h. The parties shall file any motion to compel discovery that these Rules authorize no later than FOURTEEN DAYS after the discovery cut-off date. See L.R. 16.2. A party shall accompany any motion that it files pursuant to Fed. R. Civ. P. 37 with the discovery materials to which the motion relates if the parties have not previously filed those materials with the Court.

O. Dismissals--:L.R. 41.3

Follow the procedures outlined in Rule 41.3 if you settle an action. After notifying the Court of settlement, file the proper stipulation of dismissal within 30 days, or 90 days if the case includes a municipal defendant. Make sure to follow Rule 17.1 if those sort of defendants apply.

P. Entry of Default and Default Judgment—L.R. 55.2

Parties often have difficulty with the default judgment rules. The process has two-parts: if a defendant fails to answer within the time required by the rules, the plaintiff must take action to obtain an entry of default from the clerk. The clerk enters default and considers only whether the deadline to answer has passed. Once the clerk enters default, then the party seeking default judgment files a motion for default judgment. If the amount sought is a sum certain, the judge will often just examine the proof in support of the motion and award the amount. If the amount is not a sum certain, the Court will schedule a hearing and listen to evidence, and then enter an order. Make sure to follow the procedures outlined in this rule, or the Court will dismiss the motion with leave to renew when filed in proper form. Parties often fail to obtain an entry of default before seeking default judgment.

Q. Summary Judgment—L.R. 56.1

Summary judgment often ends or clarifies the issues in the case. Deciding such motion is the most time-intensive job for the district court before trial, and the task for which judges are most particular about the types of information required in the filings. Most useful to the judges in deciding motions for summary judgment are the statements of undisputed material facts each party is required to file. Those statements point the judges to the relevant evidence and the evidence over which there are factual disputes. Parties should take care in filing those statements and should clearly reference the exact part of the record that supports their factual contentions. While judges read all documents submitted, pointing to specific parts of the documents supplied helps identify for the court where the disputes are. The parties should also include such documents in their filings.

Local Rules 56.1 and 56.2 lay out what is required and should be followed carefully. Make sure to follow the rules discussed above for any material that should be filed under seal.

56.1 Summary Judgment Procedure(formerly L.R. 7.1(a)(3)) (amended January 1, 2021)

(a)Statement of Material Facts:

Any motion for summary judgment shall contain a separate Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, a short and concise statement of each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion. The moving party shall also advise pro se litigants about the consequences of their failure to respond to a motion for summary judgment. See also L.R. 56.2. For the recommended Notification of the Consequences of Failing to Respond to a Summary Judgment Motion, visit the District's webpage at Notification of Consequences.

(b)Response to Statement of Material Facts:

The opposing party shall file a separate Response to the Statement of Material Facts. The opposing party response shall mirror the movant's Statement of Material Facts by admitting and/or denying each of the movant's assertions in a short and concise statement, in matching numbered paragraphs. Each denial shall set forth a specific citation to the record where the factual issue arises. The Court may deem admitted any properly supported facts set forth in the Statement of Material Facts that the opposing party does not specifically controvert. In addition, the opposing party's Response may set forth any assertions that the opposing party contends are in dispute in a short and concise Statement of Additional Material Facts in Dispute, containing separately numbered paragraphs, followed by a specific citation to the record where the fact is established. The moving party may reply to the opposing party's contended assertions in a separate Reply Statement and/or its Reply Memorandum of Law.

56.2 Notice to Pro Se Litigants of the Consequences of Failing to Respond to a Summary Judgment Motion

When moving for summary judgment against a pro se litigant, the moving party shall inform the pro se litigant of the consequences of failing to respond to the summary judgment motion. Counsel for the moving party shall send a notice to the pro se litigant that a motion for summary judgment seeks dismissal of some or all of the claims or defenses asserted in their complaint or answer and that the pro se litigant's failure to respond to the motion may result in the Court entering a judgment against the pro se litigant. Parties can obtain a sample notice from the Court's webpage at "www.nynd.uscourts.gov."

Hon. Miroslav Lovric
U.S. Magistrate Judge

United States Magistrate Judge Miroslav Lovric was selected by the Board of Judges of the United States District Court for the Northern District of New York to serve as a Magistrate Judge in Binghamton, New York. Magistrate Judge Lovric took the oath of office on July 1, 2019.

Magistrate Judge Lovric received his Bachelor of Arts degree from Columbia University and his Juris Doctorate degree from Hofstra University School of Law. He served as an Assistant District Attorney for New York County for 8 years and as an Assistant United States Attorney with the U.S. Department of Justice for the Northern District of New York in the Binghamton Office for 26 years.

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John M. Domurad

Clerk of Court- District Court

Northern District of New York

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John Domurad has been the Clerk of Court for the District Court for the Northern District of New York since August of 2018. Prior to becoming Clerk, John served as the Chief Deputy for almost 20 years. Before joining the Clerk's Office, John was in private practice specializing in complex federal environmental litigation. He also served as a law clerk to the Hon. Thomas J. McAvoy, then Chief Judge of the Northern District of New York.
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A native of upstate New York, John graduated from Hamilton College with a double major (Geology/History) and from the Dickinson School of Law in Carlisle, PA. During his time with the Judiciary, John has received the Director's Award for Outstanding Leadership (June, 2006), the Director's Award for Excellence in Court Operations (September, 2015) and was a Supreme Court Fellow assigned to the Administrative Office during the 2006-2007 term.

Suzanne's clients turn to her for experience in handling complex litigation matters in areas critical to their success. She represents and counsels a wide variety of clients throughout New York State as both plaintiffs and defendants, including:

- Colleges and universities
- Health care providers
- Manufacturers
- Small business owners and individuals
- Corporations
- Not-for-profit organizations
- Municipalities
- Professionals

Suzanne counsels and litigates cases for these clients on issues concerning:

- Breach of contract
- Complex collective and class actions under FLSA and ERISA
- Group Self-Insured Workers' Compensation Trusts (GSITs) formed under the New York State Workers' Compensation Law
- Trade secret matters
- Complex environmental litigation
- Violations of restrictive covenants and confidentiality provisions of employment contracts

In addition, Suzanne counsels and litigates cases and proceedings for a variety of higher education institutions concerning claims brought under Title IX of the Education Amendments of 1972 and New York State's Enough is Enough law. Suzanne also has significant experience handling proceedings that arise under Article 78 of the New York Civil Practice Laws and Rules for organizations, municipalities and higher education institutions. In addition to trying suits in diverse venues in New York federal and state courts, Suzanne has extensive experience resolving disputes through alternative dispute resolution procedures, including mediations and arbitrations.

PAUL EVANGELISTA is the First Assistant Defender for the Office of the Federal Public Defender for the Northern District of New York. Paul graduated from the University of Rhode Island in 1991with a BA Political Science. He earned his J.D. in 1994 from Union University, Albany School of Law. After law school Paul went into private practice, reaching partner with the local Albany firm of Ackerman, Wachs, and Finton, P.C. In 2000 he became a full time Assistant Federal Public Defender and in 2012 was elevated to First Assistant. Paul has successfully tried a number of cases throughout the Northern District and has argued before the Second Circuit Court of Appeals. He has presented at numerous CLE seminars on topics including the Bail Reform Act, Plea Bargaining and Sentencing. He is the former Chairperson of the Albany County Bar Association
H.S. Mock Trial Tournament, a mentor and presenter for the Bethlehem Youth Court, and has been a trial team coach for both the ATLA and National Trial Teams for Albany Law School. Paul lives in Slingerlands with his wife, Tara and their three children.

Richard Lindstrom, Esq. Since graduating from Northwestern Law School in 2006, Richard Lindstrom has spent most of his career as a law clerk in the Federal District Court. He began by clerking for the late Hon. James M. Munley in the United States District Court for the Middle District of Pennsylvania. He has served as a law clerk to the Hon. Thomas J. McAvoy in the United States District Court for the Northern District of New York for the past seven years.

ALBERT J. MILLUS, JR. is a partner in Hinman, Howard & Kattell, LLP. He joined the Firm in 1983 after clerking for Hon. James C. Turk, Chief United States District Judge for the Western District of Virginia. In January 1979, Mr. Millus graduated from the School of Industrial and Labor Relations at Cornell University, and in 1982 received his Doctor of Law degree, *magna cum laude*, from Cornell Law School. Mr. Millus is admitted to practice in New York, the Northern, Western, Southern, and Eastern Districts of New York, the United States Courts of Appeal for the Second, Third, Sixth, and Federal Circuits, and the United States Supreme Court. Mr. Millus' primary areas of practice are commercial litigation, municipal law, and federal criminal defense. Mr. Millus is a member of the American Bar Association, the New York State Bar Association, the Broome County Bar Association, and is a member and trustee of the Federal Court Bar Association for the Northern District of New York. He is also the Town Attorney for the Town of Fenton, New York, and the Binghamton Division representative on the standing Criminal Justice Act Committee for the Northern District of New York.