

**INTRODUCTION TO FEDERAL CRIMINAL
DEFENSE PRACTICE: Procedures, Pointers and
Pitfalls**

Trial Techniques for the Criminal Case in Texas
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Marlo P. Cadeddu, P.C.

INTRODUCTION TO FEDERAL CRIMINAL DEFENSE
PRACTICE: Procedures, Pointers and Pitfalls

I. IMPORTANT CONSIDERATIONS

A. Keep your eye on the sentencing ball

1. Statistics

a) In the Northern District, 97.6% of all convictions result from a plea while only 2.4% are guilty trial verdicts.¹

b) Nationally, of the cases that go to trial, 74.1% result in a guilty verdict.²

2. Timing

a) Consideration of sentencing issues should come first, not last when evaluating a case. All federal sentences since November 1, 1987 are governed by the United States Sentencing Guidelines (“Guidelines” or “USSG”). The Guidelines impact every aspect of federal criminal practice:

(1) Pre-indictment case management and negotiation

(2) Detention and probable cause determinations

(3) Plea v. trial decision

(4) Plea negotiations

(5) Trial

(6) Presentence investigation and Presentence Report (“PSR”)

(7) Sentencing

¹ United States Sentencing Commission, Office of Policy Analysis, 2001 Datafile, OPAFY01 available at <http://www.ussc.gov/LINKTOJP.HTM> (Federal Sentencing Statistics).

² U.S. Department of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2000*, NCJ 194067 (Washington, D.C.: U.S. Department of Justice, 2002), p. 56 available at www.albany.edu/sourcebook/1995/.

3. How to use the Guidelines

a) Helpful materials

(1) USSG Chapter 1 of the Guidelines explains the background and development of the Guidelines and is very helpful in understanding how the Guidelines operate.

(2) General overview of USSG §1B1.1 provides steps to follow to determine Guideline sentence range.

(3) Sentencing Worksheets are found in USSG Appendix A. Sentencing Worksheets are especially useful for complex cases requiring grouping of counts or for a defendant with an extensive criminal history.

II. PROGRESSION OF A FEDERAL CRIMINAL CASE

A. Pre-indictment Investigation

1. Determine status of client

2. Evaluate likely focus of prosecution (i.e. potential charges, victims, loss amount)

3. Investigate case and evaluate potential defenses

4. Consider cooperation

a) If client provides proffer, obtain proffer letter with following provisions:

(1) USSG § 1B1.8 prohibits Government from using information provided by the Defendant during the proffer to determine the Guideline range subject to certain limitations.

(2) Fed.R.Evid. 410 provides general rule that Defendant's statements made during plea discussions are inadmissible against him.

5. Options for early disposition/case management

a) Declined prosecution

b) Pretrial diversion

- c) Misdemeanor plea
- d) Waiver of Indictment and agreed plea under Fed.R.Crim.P. 11(c)(1)(C)
- e) “Management” of charges filed

B. Case Filed

1. Charging document

- a) Generally by indictment – Fed.R.Crim.P. 7.
- b) May be charged by information for misdemeanor or if Defendant waives indictment.
- c) May be by criminal complaint – Fed.R.Crim.P. 3, 4, 5(b).
 - (1) If by complaint, Defendant is entitled to preliminary hearing AKA “probable cause hearing” – Fed.R.Crim.P. 5.1.
 - (2) At preliminary hearing, Defendant is entitled to cross-examine witnesses and present evidence. The Defendant cannot move to suppress evidence as unlawfully obtained.
 - (3) Defendant may waive the preliminary hearing. Even if counsel believes probable cause exists, it is possible to obtain useful information at the preliminary hearing:
 - (a) Use the hearing to determine role/relative culpability of Defendant.
 - (b) Try to lock Government in on loss amount/drug amount etc.

2. Initial Appearance/Arrest/Detention Hearing

- a) Upon arrest, a Defendant must be taken “without unnecessary delay” before a Magistrate Judge who will:
 - (1) Advise Defendant of his rights – Fed.R.Crim.P. 5.
 - (2) Ensure that Defendant knows the charge(s) and ask for a plea – Fed.R.Crim.P. 10.

(3) Determine whether Defendant should be detained or released.

(a) Standard

(i) Detention determination is governed by 18 U.S.C. § 3142. Defendant can may examine witnesses and present own witnesses.

(ii) Two issues for determination at detention hearing are:

(a) Risk of flight

(b) Safety of others and community at large

(iii) Generally the least restrictive bond or conditions of release that “will reasonably assure” Defendant’s appearance and the safety of others and the community should be imposed first.

(iv) There is a rebuttable presumption that for certain types of cases, no condition or combination of conditions will reasonably assure the Defendant’s appearance and the safety of others and the community:

(a) Crime of violence

(b) Offense with statutory maximum of life imprisonment or death

(c) Drug offense with a ten year or more mandatory minimum

(d) Any third felony offense if Defendant has at least two priors qualifying as one of the above

(b) As with preliminary hearing, the defense can also obtain useful discovery at the detention hearing.

3. Pretrial Discovery/Motions Practice

a) Discovery Motions (Rule 16, *Brady*, Jencks Act) – to file or not to file

(1) There is a difference of opinion among lawyers about whether to file boilerplate discovery motions/discovery letter. Some lawyers view motions for discovery as superfluous given that Courts normally order the Government to provide discovery in the pretrial scheduling order.

(a) Considerations

(i) Fed.R.Crim.P. 16 provides that “defendant’s request” triggers right to obtain certain discovery.

(ii) Court normally issues pre-trial scheduling order requiring the Government to provide discovery and setting forth schedule. Failure to produce discovery will subject Government (or Defendant) to sanctions by Court for violation of the order.

(iii) Defendant’s discovery request sometimes triggers reciprocal discovery obligations including:

(a) Discovery of documents or objects, reports of examinations or tests, notice and summary of expert reports – Fed.R.Crim.P. 16(b).

(iv) Defendant has other discovery obligations including:

(a) Upon request of Government, must give notice of alibi – Fed.R.Crim.P. 12.1.

(b) Must give notice of insanity defense. Duty to disclose not triggered by Government request – Fed.R.Crim.P. 12.2.

(c) Must provide statements of defense witnesses other than Defendant after witness testifies. Requires motion by the party who did not call the witness – Fed.R.Crim.P. 26.2. Judges prefer that parties provide disclosure of Jencks Act materials in advance of witness testimony.

b) Discovery Review - even if client is certain to plead, review of discovery serves several important functions:

(1) Helps lawyer and client determine if defenses exist and what the potential sentencing exposure is so that the client can make an informed decision whether to plead or go to trial.

(2) Helps attorney determine how best to structure a plea so as to minimize sentencing exposure.

(3) Provides ammunition to attack factual determinations in PSR for which USPO may provide no justification other than “review of the documents” or “discussions with agents.”

c) Suppression Motions

(1) Issues to consider for motions to suppress tangible evidence and/or statements:

(a) Illegally obtained evidence subject to exclusion may still be used:

(i) In revocation proceedings

(ii) At sentencing

(iii) To impeach Defendant

(b) Prosecutors sometimes take the position that a Defendant who files a motion to suppress is not entitled to a third point for acceptance of responsibility under USSG § 3E1.1(b).

d) Other Pre-trial Motions to Consider:

(1) Limitations - always look at limitations issues and file a motion to dismiss if prosecution is time-barred on any count. Sometimes agents participate in drafting indictments or indictments are superseded and a limitations bar may be overlooked.

(2) Severance

(a) Rule governing joinder of offenses - Fed.R.Crim.P. 8 provides that offenses may be joined in a single indictment or information if they are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Move to sever offenses if totally unrelated, e.g. it is a favorite tactic of prosecutors to try to encourage a plea by superseding indictment and adding offenses unrelated to the original charges.

(c) Fed.R.Crim.P. 14 provides for relief from prejudicial joinder. Commonly used when there exists a possibility that a codefendant's statements that are prejudicial to Defendant may be admitted in a joint trial.

C. Trial

1. Comparison of federal to state court practice

a) Lawyer comportment

(1) Generally applicable rules:

(a) Lawyer should stand to address the court.

(b) Lawyer must remain at the podium to conduct examinations and argument.

(c) Lawyer may approach the witness, bench and jurors only with Court permission.

(2) Judge-specific trial rules: As in state court, federal judges each have their own rules governing lawyer conduct

at trial. Some judges will issue an order governing conduct at trial. Others have “unwritten” rules like women lawyers may only wear skirts or lawyers can only approach a witness once during examination. Ask questions of other attorneys who have appeared before that judge or the judge’s law clerk if he or she permits clerks to talk to attorneys.

b) Stipulations – it is a common practice in federal court to file joint stipulations. Often parties will stipulate as to foundation, reserving only relevance objections for trial. Sometimes parties will stipulate to certain undisputed testimony. Judges like this practice as it streamlines trial.

c) Voir Dire – generally judges do voir dire in federal court. Some judges may conduct the bulk of voir dire but may permit limited attorney voir dire and/or jury questionnaires. Do not expect more than 15 or 20 minutes of voir dire if any.

d) Federal conspiracy law

(1) Fifth Circuit Pattern Jury Instruction 1.14 provides that a jury may convict a Defendant solely on the basis of uncorroborated testimony of a co-conspirator if it believes such testimony beyond a reasonable doubt.³

(2) The Defendant is liable as a conspirator for all the offenses committed by a co-conspirator if the Defendant was a member of the conspiracy when the offense was committed and the offense was committed in furtherance of the conspiracy.⁴

e) Other issues to keep in mind

(1) Fed.R.Evid. 404(b)

(a) Purpose of admitting such evidence -
Government can introduce evidence of other crimes, wrongs or acts to show motive, intent,

³ Fifth Circuit Criminal Pattern Jury Instructions are available at http://www.lb5.uscourts.gov/juryinstructions/cf_Jury.cfm

⁴ This principle is known as Pinkerton liability after *Pinkerton v. United States*, 328 U.S. 640 (1946). Fifth Circuit Pattern Criminal Patter Jury Instruction 2.22 sets forth this principle.

opportunity, preparation, plan, knowledge, identity or absence of mistake or accident.

(b) Notice Requirement - under Rule, Government must provide notice of intent to use such evidence in advance of trial unless it shows good cause for its failure to do so. Prosecutors sometimes try to introduce such evidence without giving notice and defense counsel should object on this basis.

(2) Motion for Judgment of Acquittal – Fed.R.Crim.P. 29

(a) Prosecutors sometimes forget to prove up the jurisdictional element e.g. interstate commerce nexus or “in furtherance” requirement. Keep list of elements handy and check it at close of Government’s case

(b) Timing of motion

(i) At close of Government’s case. If Court reserves ruling then Defendant may present evidence but Court must still decide motion based solely on evidence in the record when the Government closed its case.

(ii) At close of all evidence.

(iii) Within 7 days after jury verdict or within any period the court sets during 7 day period. Remember that Court is without jurisdiction to consider a motion filed after 7 day period has run if the Defendant did not obtain an extension of time to file within the 7 day period.

(c) Important consideration

(i) Beware of *United States v. Herrera*, 313 F.3d 882, 884-85 (5th Cir. 2002)(holding that when a defendant asserts specific grounds for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count.)

D. Plea Negotiations and Sentencing

1. Important terms and concepts:

a) The critical concept to remember for plea negotiations and sentencing is relevant conduct. It is defined at USSG § 1B1.3. Relevant conduct includes:

(1) All conduct by defendant that occurred during offense, in preparation for offense or after offense while attempting to avoid detection.

(2) All reasonably foreseeable conduct by co-conspirators, whether charged as a conspiracy or not that was undertaken in furtherance of conspiracy.

(3) All acts or omissions by Defendant or co-conspirators based on the same course of conduct, common scheme or plan.

(4) All harm that arose or was intended from above.

b) Offense level under Guidelines is not calculated based solely upon charged conduct but is based upon relevant conduct. Government has the burden of proving relevant conduct by a preponderance. Implications:

(1) Acquitted conduct can be included as relevant conduct. The justification is that for sentencing purposes, the Court may find certain acts by a preponderance even though a jury did not find the same acts beyond a reasonable doubt.

(2) The indictment does not limit the conduct for which the Defendant may be held accountable. Thus, the defense cannot rely upon the conduct alleged in the indictment to determine the Guideline range.

(3) With certain exceptions, “charge” bargaining does not work. Thus, generally speaking, whether the Defendant pleads to one count or multiple counts, the sentence will be the same. Examples of exceptions to this general rule:

(a) A plea to a single count may limit the Defendant’s Guidelines exposure by operation of the statutory maximum.

(b) 18 U.S.C. § 924(c) provides for a mandatory additional consecutive sentence for using or carrying a firearm in relation to a crime of violence or drug trafficking crime or in furtherance of such a crime, possessing a firearm. Bargaining for dismissal of a 924(c) count can save Defendant five years or more.

2. Structuring a plea

a) As discussed above, it is possible to bargain for dismissal of counts that will affect the Guideline range or limit exposure through operation of statutory maximums.

b) Fed.R.Crim.P. 11(c)(1)(B) provides for recommendation of particular sentence or application of a Guideline provision. It is important to remember that a plea agreement under this provision does not bind Probation or the Court to the agreement. Sample 11(c)(1)(B) plea provisions:

(1) That Government will request the low end of the Guideline range.

(2) That a particular loss amount or drug amount is “readily provable” by the Government.

(3) That a gun that was present was not possessed by the Defendant.

(4) That certain specific offense characteristics do not apply (e.g. number of victims, more than minimal planning).

(5) That Defendant had minimal or minor role in the offense.

c) Fed.R.Crim.P. 11(c)(1)(C) is an agreed plea to a particular sentence or sentencing range. An agreed plea binds the Court if accepted. The Court may reject an agreed plea and may do so if it finds that the sentence undermines the purposes of the Guidelines.

d) Plea agreements should contain a reference to the possibility of a Government motion for downward departure for substantial assistance under USSG § 5K1.1. Plea agreements should also

contain commitment that Government will move for third point for acceptance of responsibility under USSG § 3E1.1.

e) Consider pleading to the indictment without a plea agreement. Plea agreements nearly always contain a waiver of appellate rights provision. If plea agreement provides no benefit to the Defendant, it may make sense to plead to the indictment to preserve these rights. Counsel will generally still need to execute a factual resume.

3. Sentencing

a) Rearrangement

(1) Once Defendant makes decision to plead, Court will schedule rearrangement. At rearrangement, Court will set scheduling order for sentencing including deadlines for completion of PSR, submission of objections to PSR, addendum, objections to addendum and departure motions and other pretrial submissions as well as a sentencing date.

(a) At rearrangement, the Court will review the plea agreement and factual resume with the Defendant and will question and advise him about such issues as:

(i) Whether he is competent to plead guilty.

(ii) The rights he is giving up by pleading guilty.

(iii) Maximum penalties.

(iv) Inability to withdraw plea if Defendant is unhappy with outcome.

(v) Abolition of parole in federal system.

b) Sentencing Procedure

(1) For privacy reasons, sentencing material is not filed in the case file in the clerk's office but must be delivered to Probation, the Court and the prosecutor.

(2) If there are safety or confidentiality concerns, file departure motions and sentencing memoranda under seal.

(3) Defense attorney must make arrangements with USPO to schedule presentence interview within three days of arraignment if attorney desires to be present. All though not mandatory, counsel should attend presentence interview. Failure to do so is viewed unfavorably by most judges.

c) Presentence Report

(1) The PSR gives information about the offense conduct, personal characteristics of Defendant, calculates sentence range under Guidelines and provides the Court with a sentencing recommendation.

(a) Objections to PSR

(i) Timing – under Fed.R.Crim.P. 32(f)(1), objections to PSR or statement of non-objection is due within 14 days after receipt of PSR. Scheduling order for sentencing may also set out the deadline.

(ii) Areas for objection

(a) Mathematical or other such mistakes.

(b) Criminal history calculation.

(c) Grouping of counts

(d) Choice of Guideline version. USSG §1B1.11 provides that the version in effect at time of sentencing should be used unless it creates an *ex post facto* issue. In that case the version in effect when the offense was concluded should be used.

(e) Applicability of specific offense characteristics e.g. more than minimal planning, degree of bodily injury, weapon possessed,

“brandished” or “otherwise used,”
etc.

(f) Application of chapter 3
adjustments (victim, role,
obstruction).

(g) Use of relevant conduct. Factors
to consider in objecting to relevant
conduct include:

(i) Objecting to relevant
conduct is dangerous because
it puts acceptance of
responsibility at risk to do so.

(ii) The Government has the
burden of proving relevant
conduct by a preponderance
and facts in the PSR must
have an “adequate
evidentiary basis” with
“sufficient indicia of
reliability.”⁵

(iii) Objections to relevant
conduct should be clearly
legal, not factual.

(h) The Court need not rule on
objections that do not change
Guideline range. Counsel should
consider objecting to factual errors
that do not change the Guideline
range in a separate section of the
objections.

d) Departure motions

(1) Substantial assistance in the investigation or
prosecution of another:

⁵ *United States v. Huerta*, 182 F.3d 361 (5th Cir. 1999).

(a) For substantial assistance provided before sentencing, the Government only may move for downward departure under USSG § 5K1.1.

(i) Once the Government moves for downward departure under USSG § 5K1.1, the Court is not limited to number of levels requested by Government.

(ii) If a 5K1.1 motion invokes 18 U.S.C. §3553(e), the Court can depart below the statutory mandatory minimum.

(b) For assistance provided after sentencing, Government only may move for downward departure under Fed.R.Crim.P. 35(b). Time limits apply.

(2) A Factor not adequately taken into consideration in the Guidelines that takes the case out of the “heartland” of the Guidelines may be a basis for departure under USSG §5K2.0.⁶ In the Northern District of Texas, only 6.5% of all Defendants receive 5K2.0 downward departures.⁷

(a) Defendant may move for departure under USSG § 5K2.0 but the Court may not depart below the mandatory minimum.

(b) USSG § 5K2.1-5K2.21 define proscribed, encouraged and discouraged bases for departure.

e) Hearing practice pointers:

(1) A defendant who receives a sentence of twelve months is not eligible for good time credit. Request twelve months and a day to ensure eligibility.

(2) Judges will often signal at the beginning of the sentencing hearing how they will rule on objections or

⁶ *Koon v. United States*, 518 U.S. 81 (1996)(recognizing the discretion of the district courts to depart on the basis of any factor not proscribed in the Guidelines).

⁷ United States Sentencing Commission, Office of Policy Analysis, 2001 Datafile, OPAFY01 available at <http://www.ussc.gov/LINKTOJP.HTM> (Federal Sentencing Statistics).

departure motions. Do not waste time arguing an objection or departure motion that the judge plans to grant.

(3) Minimize witness testimony – both numbers of witnesses and duration of testimony. Judges like letters in lieu of testimony, but limit the number of letters as well.

(4) Allocution is important and the Defendant should review his planned statement with counsel in advance. Judges in the Northern District of Texas have denied acceptance of responsibility to Defendants who are equivocal about their conduct, e.g. “I didn’t mean to break the law.” Certain judges have been known to give a Defendant a higher sentence if he does not allocute.

(5) Do not forget to request recommendations for programs for which the Defendant qualifies (e.g. boot camp, 500 hour drug treatment program). The BOP has a practice of limiting access to certain popular programs to Defendants who receive a recommendation for that program at sentencing.

(6) Defendant may request a recommendation for designation to a particular institution, but the BOP is not bound by the judge’s recommendation.

4. Filing of Notice of Appeal

a) Fed.R.App.P. 4(b) gives the general rule that notice of appeal must be filed within 10 days after entry of the judgment. Even if not handling the appeal, trial counsel should make sure that notice of appeal is filed if Defendant wishes to appeal.

5. Self-reporting for service of sentence

a) Defense counsel should obtain information about the institution designated for service of the Defendant’s sentence from the United States Marshall’s Office 48 hours prior to the report deadline.

III. REFERENCES AND RESOURCES

A. Reference Materials

1. Federal Sentencing Law and Practice, Thomas W. Hutchison, West Criminal Practice Series.

2. Federal Sentencing Guidelines Manual, United States Sentencing Commission, West Group Publication, Highlights of Amendments section
3. Defending a Federal Case, Federal Defenders of San Diego Inc. (Available on CD-Rom from the Dallas FPD's office)
4. Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues, Federal Judicial Center
5. The Georgetown Law Journal Annual Review of Criminal Procedure
6. Eighty-Eight Easy Departures, Michael R. Levine, available from MichaelLevineESQ@aol.com, Pioneer Tower, Suite 650, 888 S.W. Fifth Avenue, Portland, Oregon, 97204

B. Web Sites

1. www.ussc.gov – Sentencing Commission home page. Contains all versions of the Guidelines since 1987 and includes free download of most recent versions of Guidelines in palm format.
2. <http://www.ca5.uscourts.gov/> - Fifth Circuit home page.
3. <http://www.txnd.uscourts.gov/> - Northern District home page.
4. <http://www.txed.uscourts.gov/> - Eastern District home page.
5. <http://www.usdoj.gov/usao/txn/> - U.S. Attorney's Office, Northern District of Texas home page.
6. <http://www.uscourts.gov/rules/newrules4.html> - Federal rules currently in effect.
7. <http://www.bop.gov/> - BOP home page.
8. <http://www.fd.org/> - Federal Defender Training Branch web site.
9. <http://homepages.waymark.net/~fpd/> - Federal Public Defender, Northern District of Dallas home page. Telephone number for Dallas FPD is (214) 767-2746.
10. <http://www.albany.edu/sourcebook/1995/> is a link to the Department of Justice's federal criminal justice statistics.
11. <http://fpd.home.texas.net> Federal Public Defender, Western District of

Texas. Contains excellent overview of Guidelines sentencing under “Publications.”

C. Other

1. Sentencing Commission Helpline (202) 502-4545 – service to attorneys with questions about Guidelines issues.