

HOW A CRIMINAL CASE WORKS THROUGH THE FEDERAL SYSTEM

PART I – INITIAL STAGES

Introduction

In order to perform the court reporting task effectively in criminal cases, the court reporter should understand how the adversary system works. Obvious, of course, is the need to have a clear meaning of the legal terms commonly used by the parties. The court reporter should have an awareness of how federal and local court rules apply in criminal cases as well as the purpose of the statutes frequently referred to by the parties in criminal cases.

The purpose of this article is to give the court reporter an introduction to the Federal Rules of Criminal Procedure and the major players in the adversary system. What constitutes a federal crime and how federal crimes are investigated and prosecuted are discussed. A glossary is included where you will locate definitions of terms highlighted terms. Also, a few sample forms are included.

Federal Rules Of Criminal Procedure

Federal Rules of Criminal Procedure govern procedures in all criminal cases in the U.S. district courts. They take effect only after review by Congress and have the same force as any law passed by Congress. They recognize that some procedures are best governed by local rules and allow district courts to make local procedural rules. Local district rules, however, cannot be inconsistent with the Federal Rules and must comply with the requirements of the United States Constitution.

The Adversary System. In criminal cases before a district court, the adversaries are the government and the defendant. Before a defendant can be found guilty, the government must prove its case beyond a reasonable doubt. The defendant can contest the government's accusations by presenting a defense in order to seek acquittal. The adversary system is based on the idea that the truth is most likely to be revealed if each adversary has a full opportunity to present its side of the case in court.

U.S. magistrate judges see that the courts administer justice by ensuring that the adversaries act fairly and by the established rules of procedure and that the criminal cases move through the court system in a timely manner.

Judges And Magistrate Judges

U.S. district court judges are appointed by the President of the United States with the advice and consent of the Senate pursuant to Article III of the Constitution. Once appointed, they may hold office for life and the Congress may not thereafter reduce their pay. U.S. magistrate judges are

appointed by U.S. district court judges and serve an eight-year term on either a full or part-time basis. Magistrate judges assist the district court judges by performing a variety of tasks in civil and criminal cases. They may issue search warrants and arrest warrants. They are empowered to issue orders releasing or detaining defendants before trial and, with the consent of the defendant, may conduct trials of misdemeanors. U.S. magistrate judges cannot conduct trials in felony matters, which carry a potential sentence of more than one year in prison, nor may they make final rulings on motions to suppress evidence or to dismiss a criminal case.

The Federal System. Because our system of government assigns separate powers to state and federal governments, there is a separation of state and federal court systems and there are both state and federal courts in the United States. State and federal court systems are separate, which means that a criminal law passed by a state cannot be applied in the federal courts. Violations of federal criminal laws can only be prosecuted in federal courts.

The jurisdiction of federal courts in criminal cases is the authority of the court to hear a certain kind of case. Federal court jurisdiction in criminal cases is limited to those offenses Congress gives the courts the authority to hear. Most of the offenses Congress has authorized the federal courts to hear are defined in Titles 18 and 21 of the U.S. Code.

Federal Crimes

A federal crime must have some connection with the interest of the nation as a whole and not with just a particular state. The crime must be a violation of a criminal law passed by Congress. There are various categories of federal crimes. There are those crimes which affect certain areas that the federal government has the power to regulate under the Constitution such as banking practices, interstate commerce, and imports and exports. There are crimes which affect agencies of the federal government such as the Department of Transportation and crimes which occur on federal government property. In the latter instance, the Assimilative Crimes Act provides for federal prosecution of some crimes that would ordinarily be prosecuted in state court.

Prosecution Of Federal Criminal Cases

The executive branch of the federal government is responsible for investigating alleged criminal conduct and deciding whether to file charges. Federal courts do not decide what constitutes a federal offense. That decision is made by congressional legislation. The President, as head of the executive branch, appoints a U.S. Attorney to represent the U.S. in each federal judicial district. The U.S. Attorney's Office decides what alleged criminal conduct to prosecute. There are separate federal law enforcement agencies that investigate alleged criminal conduct. Examples of federal law enforcement agencies include the Federal Bureau of Investigation (FBI); Drug Enforcement Administration (DEA); Bureau of Alcohol, Tobacco, and Firearms (ATF); U.S. Secret Service; Criminal Investigation Division of the Internal Revenue Service (IRS); and U.S. Postal Inspectors.

The U.S. Attorney's Office does not investigate cases, nor does it develop evidence. If investigators conclude a federal crime may have been committed, they recommend that the U.S. Attorney's Office prosecute the case. The U.S. Attorney's Office reviews evidence that has been developed by the law enforcement agency and decides whether to prosecute.

In certain cases, the alleged criminal conduct could be a violation of both federal and state laws. On the federal level, the Constitution gives Congress the power to regulate illegal activity affecting interstate commerce. Congress has determined that illegal drug traffic has an effect on interstate commerce and has made possession or sale of illegal drugs a federal crime in Title 21 of the U.S. Code. Since state governments also have the power to enforce their state laws, illegal drug activity occurring within their borders could be prosecuted in state court. As a rule, federal agents become involved in larger cases involving widespread drug activity.

Complaint And Affidavit Alleging Probable Cause

Federal Rules of Criminal Procedure require an arresting officer to take the arrested person before the nearest available magistrate judge "without unnecessary delay" for an initial appearance. Under those Federal Rules, a complaint must be filed against each person brought before a magistrate judge for an initial appearance. The complaint is a written statement of the essential facts of the charged offense. The complaint must be supported by an affidavit alleging probable cause to believe that an offense has been committed and that the person arrested committed it. An affidavit is a sworn statement and the investigating agent involved in the case prepares the affidavit. Probable cause is the legal standard justifying an arrest.

Pretrial Services Officer

Pretrial services officers assist the court by gathering information about the financial status, community ties, and the criminal record of defendants prior to their initial appearance. This information is obtained through an interview with the defendant, usually in the U.S. Marshal's lockup (holding cell) prior to appearing in court. The pretrial services officer incorporates this information in a prepared written report that is submitted to the magistrate judge to assist him/her in deciding whether to release or detain the defendant pending the date of trial. If the defendant does not speak English, the pretrial services officer will require the assistance of an interpreter in order to carry out the interview. Before beginning the interview, the pretrial services officer explains that the interview will not delve into the facts of the case and also advises the defendant as to how the information that is provided by the defendant could be used against him/her at the time of sentencing, should there be a conviction. The defendant is also advised of his/her right to speak to an attorney before being interviewed. The defendant may be interviewed after signing a written consent form. The defendant is asked whether he/she wishes to hire a private attorney or have an attorney appointed by the court to represent him/her. In some districts, probation officers act as pretrial services officers.

Appointment Of Defense Counsel

A defendant who can afford to may retain a private attorney to represent him/her at the initial appearance. A defendant who wishes to be represented by an attorney but cannot afford to hire one (indigent defendant) must first fill out a financial affidavit form. The magistrate judge will review the financial affidavit form during the initial appearance and will decide whether the defendant qualifies for the services and representation of a court-appointed attorney at government expense. If the defendant does qualify for a court-appointed attorney, the magistrate judge then appoints an attorney to represent the defendant under the Criminal Justice Act (CJA).

Criminal Justice Act (CJA)

The Criminal Justice Act implements the Sixth Amendment right to counsel in federal courts by providing free legal counsel to criminal defendants who cannot afford to hire an attorney. It permits appointment of counsel in felony and misdemeanor cases and in other situations in which the accused may be imprisoned if convicted. The Criminal Justice Act allows U.S. district courts to set up different plans for appointing lawyers. These plans must provide for appointment of a substantial number of panel attorneys in private practice. The court must conclude that an attorney is qualified under the Act to represent criminal defendants before placing the attorney on the panel list. The Act allows two kinds of defender organizations: community defender organizations--nonprofit defense counsel services organized by groups of attorneys in private practice and federal public defender organizations--headed by a public defender appointed by the district court and staffed by assistant public defenders who specialize in criminal cases and who work full time for the public defender.

Representation By Defense Counsel

The responsibility of any defense counsel, privately retained or appointed, is to represent his or her client vigorously within the bounds of the law. Defense counsel have a duty to keep information confidential about the case revealed to him or her by the defendant. The judge fully expects defense counsel to object to certain court rulings, attempt to persuade the court that the defendant's rights have been violated, and, if the case goes to trial, to seek a verdict of not guilty. A defendant can voluntarily give up the right to counsel and represent himself or herself, which is known as proceeding pro se.

PART II - PRETRIAL PROCEEDINGS

In a criminal case, the events that take place between the time that the defendant first appears before a magistrate in court and the time that the trial would occur are called pretrial proceedings. The vast majority of criminal cases are resolved during the pretrial period and thus never reach the trial stage.

The Initial Appearance

The defendant's first appearance in court is called the initial appearance. At the initial appearance, the defendant is informed of the charges filed against him/her by the government and is also advised of certain important rights, the right to remain silent, the right to the services of an attorney and, in a felony case, the right to a preliminary hearing. The court then will decide whether to release or detain the defendant.

Pretrial Release and Detention

The court applies the provisions of the Bail Reform Act of 1984 in deciding whether to release or detain the defendant. The Bail Reform Act requires that the defendant be released prior to the trial, without special conditions, unless the court concludes that the defendant is likely to flee, or is likely to endanger the safety of another person or the community. Those defendants who are found likely to flee, endanger others, or endanger the community may be released subject to special conditions. The pretrial release conditions are designed to reduce the likelihood that a released defendant will flee, endanger others, or endanger the community. The court may detain a defendant pretrial when it concludes that no condition(s) will ensure the appearance of the defendant or the safety of any other person or the community. Detention hearings are held to decide whether to detain defendants charged with crimes of violence or defendants who have a serious record of prior convictions, pose a serious risk of flight or obstruction of justice, or face a maximum sentence of 10 years or more in a drug case.

Arrest Warrant

An arrest warrant is issued when a complaint and its accompanying affidavit establish probable cause to believe that an offense has been committed and that the defendant named in the warrant committed it. The arrest warrant must be approved and signed by a judge before it is issued since issuance may result in loss of liberty for the defendant. The law enforcement officer seeking the issuance of the warrant must present the warrant along with the supporting complaint and affidavit to a judge for review. The law enforcement officer must swear that the facts in the complaint and affidavit are true. If the judge finds probable cause exists, the warrant is issued. The warrant is then executed by an appropriate law enforcement officer.

Preliminary Examination

A defendant is entitled to a preliminary examination in a felony case within 10 days of the initial appearance, if detained, or within 20 days if released. The purpose of the preliminary examination is to determine if there is probable cause to justify holding the defendant for further court proceedings. If the government's evidence does not establish probable cause, the complaint is dismissed and the detained defendant is released. If a grand jury decides the issue of probable cause by returning an indictment prior to the scheduled preliminary examination date, the preliminary examination is not held.

Grand Jury, Indictment, and Information

A grand jury is a group of citizens charged by the court with deciding if there is probable cause to require a defendant to stand trial. If the grand jury finds that probable cause does exist, it then returns an indictment against the defendant. An indictment is a formal written document charging one or more persons with the commission of a crime. A defendant must respond to that indictment by entering a plea of guilty or not guilty. The Fifth Amendment to the Constitution requires an indictment by a grand jury before a defendant can be brought to trial for capital or infamous crimes.

The Federal Rules of Criminal Procedure embodies the Fifth Amendment by requiring a felony offense punishable by more than one year in prison to be prosecuted by an indictment. This Fifth Amendment requirement protects citizens from improperly motivated prosecutions. A grand jury is independent of the prosecutor's office and of the court and need not grant a prosecutor's request that it return an indictment.

Under the Federal Rules of Criminal Procedure, a grand jury is assembled by the court when required by the public interest. A grand jury consists of 16 to 23 members and serves until discharged by the court, but not longer than a period of 18 months. The proceedings of the grand jury are conducted in secret, and an indictment may be returned if at least 12 members vote to do so. The indictment must be signed by the grand jury fore person as well as by the prosecutor and must list each charge or count separately and each statute involved. The indictment must clearly state the essential facts of the charged offense so that the accused may know what to defend against.

An information is ordinarily filed in cases with a potential penalty of one year or less in prison, a misdemeanor. It must be signed by the prosecutor.

The Arraignment

In felony cases, an arraignment is held after an indictment is returned by the grand jury. In misdemeanor cases, the initial appearance and the arraignment are usually held at the same time.

At the arraignment, the indictment is read to the defendant, unless the defendant waives the reading. The defendant then enters a plea in response to the charges in the indictment. The court, at this time, may set deadlines for the completion of other pretrial proceedings and may also set the date of the trial itself.

Judicial Summons

The Federal Rules of Criminal Procedure permit the court to issue a summons requiring a defendant to appear in court at a designated future time. When requested to do so by the government, the court may issue a summons rather than an arrest warrant. A summons, like an

arrest warrant, must be supported by probable cause. A defendant served by a summons is expected to appear in court voluntarily on the appointed day.

The Speedy Trial Act

The Speedy Trial Act imposes a series of time deadlines on the courts and the prosecutors in order to minimize delays in bringing cases to trial. The Act requires that federal defendants be indicted within 30 days of their arrest date and to be brought to trial within 70 days of the filing of the indictment or the information or within 70 days from their first appearance in the district on the charges at issue, whichever date is later.

The Act recognizes that events may occur that will make it impossible to begin the defendant's trial within the time limits established by the Act. These events are referred to as excludables. Any delay resulting from an excludable events stops the running of the speedy trial clock. For example, the period of delay caused by a psychiatric examination to determine the defendant's mental competency to stand trial is considered excludable time under the Act. The Act provides for penalties as severe as dismissal of the charges when a case does not proceed to trial within the required time limits. The Act further requires that the trial of a defendant in custody be given priority over a trial of a defendant who is not detained.

Discovery

During discovery, the defense attorney meets with the prosecutor and requests disclosure of certain evidence in the government's possession. This discovery process is also governed by the Federal Rules of Criminal Procedure. Not all evidence is discoverable before the trial. However, the defense is entitled to discovery and inspection of all statements made by the defendant to law enforcement offices, the results of scientific tests and experiments conducted by the government, the particulars of the defendant's prior criminal record, if any, and finally, certain tangible or physical evidence in the government's possession.

After responding to the defendant's legitimate discovery requests, the government is entitled to reciprocal discovery of tangible evidence in the defendant's possession as well as the results of scientific tests and experiments conducted by the defendant. The defendant is not required to disclose the nature of the defense prior to the trial unless that defense will be in the form of an alibi or a not guilty plea for reason of insanity.

Brady material, derived from a U.S. Supreme Court case, *Brady v. Maryland*, includes evidence that is in the government's possession and is favorable to the defendant on the issues of guilt or punishment. Brady material must be disclosed by the government in a timely manner upon timely request by the defendant. If either party refuses to give discovery of a requested item, the parties must first try to resolve the matter informally themselves. If the matter cannot be resolved informally, the requesting party may file a motion asking the court to order discovery of the item in dispute.

Pretrial Motions

A motion is a request by the government or the defense for a ruling by the court on a matter in dispute. The Federal Rules of Criminal Procedure require that a motion state the law on which it is based, the nature of the court ruling it seeks, and it must be made in writing. The following motions may be made during pretrial proceedings: a discovery motion; a motion to suppress evidence; a motion to sever a matter; a motion based on defects in the indictment or information; a motion to dismiss the case. If the court must resolve questions of fact in order to rule on the motion, it will hold an evidentiary hearing in order to determine those facts.

Pretrial Conference

The Federal Rules of Criminal Procedure allow the court to schedule one or more pretrial conferences to consider motions or matters that will promote a fair and speedy trial as well as matters related to the conduct of the trial itself.

Disclosure Of Prior Statements Of Witnesses

The Jencks Act requires the government to give the defense the prior statements or reports of its witnesses after they testify on direct examination. The statements or reports must relate to the testimony of the witness on direct examination and may be used by defense counsel in cross-examining the witness.

PART III – TRIALS AND GUILTY PLEAS

Dismissal Of Charges

The Federal Rules of Criminal Procedure allow the government or the defendant to move for dismissal of an indictment, information, or complaint. Only the court, however, may decide whether or not to dismiss the charges. If a decision is made to dismiss the charges, the dismissal may be "with prejudice" or "without prejudice." Dismissal "with prejudice" bars the government from prosecuting the defendant again on the same charge or charges. Dismissal "without prejudice" allows the government to prosecute the defendant again on the same charge(s) should it elect to do so at some future point.

Guilty Pleas.

A defendant may enter a guilty plea admitting the commission of one or more of the alleged criminal offense(s). If the court accepts the plea of guilty, there will be no trial. The defendant is then given a date to return to court for the imposition of the sentence.

The Federal Rules of Criminal Procedure allow the prosecutor and the defense attorney to negotiate a plea agreement. It should be noted that the judge or magistrate judge handling the

case is not involved in any plea negotiations. If such negotiations lead to a plea agreement, the agreement must be disclosed in open court. Once this disclosure has taken place, the judge or magistrate judge then decides whether or not to accept the plea agreement. Under a plea agreement, the defendant must enter a guilty plea to a charged offense or to a lesser, related offense.

In exchange for the defendant's plea, the government may agree to move to dismiss or reduce other charges pending against the defendant, or to recommend a particular sentence to the court, or to not oppose a sentence the defendant recommends to the court. The government may also agree with the defendant that a specific sentence is the appropriate disposition of the case. The court, however, is not bound by any agreement or recommendation this is made between the defendant and the government. If the plea agreement is rejected by the court, the defendant is allowed to withdraw the plea and go to trial. If the court accepts a plea agreement containing a recommended sentence but rejects the recommended sentence, the defendant does not have an absolute right to withdraw the plea.

Voluntariness And Guilty Pleas.

The defendant's guilty plea must be entered voluntarily. In order for the plea to be voluntary, the defendant must be aware of the terms of the plea agreement and be mentally competent to enter the plea. The defendant must understand the nature of the pending charges and know what penalties may be imposed by the court at sentencing if the plea is accepted. This includes an awareness of the maximum term of imprisonment which can be imposed under the applicable statute and any mandatory minimum term of imprisonment required by the applicable statute. The defendant must indicate that he/she is exercising his/her own free will in choosing to enter the plea rather than go on to trial.

Waiver Of Rights Before Guilty Plea

In order to enter a guilty plea, a defendant must give up or waive certain constitutional rights. The court must be certain the defendant is knowingly, intelligently, and voluntarily waiving these rights. A defendant who enters a guilty plea must waive the right to a trial by jury (or in some cases trial by the court). The defendant is informed that, at trial, the defendant has the right to counsel, the right to confront and cross-examine the witnesses, the right to present a defense, the right to subpoena witnesses, and the right to remain silent. A defendant who enters a guilty plea retains the right to appeal the sentence imposed by the court.

Factual Basis For Guilty Plea

The Federal Rules of Criminal Procedure require the court to determine that there exists a factual basis for any guilty plea accepted by the court. The court must make certain that the defendant committed the offense(s) specified in the plea agreement. If the court's questioning reveals that the defendant did not violate the law, the court cannot accept the plea. Similarly, if the court's

questioning reveals that the defendant has a valid defense, the court cannot accept the plea.

Transfer From District For Plea Or Sentencing.

The prosecution and the trial of defendants ordinarily takes place in the federal judicial district where the offense was committed. Frequently, however, some defendants are arrested and held in one district on charges filed against them in another district. In such situations, the defendant may request permission to plead guilty to the charges in the district where the arrest occurred. The defendant must state in writing a wish to plead guilty, waive trial in the district where the charges are pending, and consent to disposition of the case in the district where the arrest occurred.

If the U.S. Attorney for each district approves, the clerk of the district court in which the charges are pending transmits the charging papers to the clerk of the court for the district in which the arrest occurred. The defendant then enters a guilty plea in the district where the arrest occurred. This procedure may be followed when an indictment, information, or a complaint has been lodged against the defendant.

Trial By Jury Or By The Court

The Sixth Amendment guarantees the accused the right to a trial by jury for all criminal offenses except petty offenses. The Federal Rules of Criminal Procedure state that cases required to be tried by a jury "shall be so tried unless the defendant waives a jury trial in writing." All jury trial waivers must be approved by the court and consented to by the government. A defendant who waives the right to a jury trial is tried by a judge or magistrate judge sitting without a jury. If the defendant is tried by a jury, the jury is composed of twelve citizens who hear the evidence in the case and decide whether the defendant is guilty.

Voir Dire And Jury Selection. When a case is ready for trial, the deputy clerk calls the jury room and asks that a panel of prospective jurors be sent to the courtroom. After the panel members arrive and the judge makes introductory comments, the judge or the lawyers begin asking the prospective jurors a series of questions. The questioning of prospective jurors is called voir dire ("to speak the truth"). During voir dire questioning, the prospective jurors are asked questions designed to reveal whether they are impartial and whether they are willing to base their verdict on the evidence alone. The questions are also designed to reveal how they will respond to sensitive issues in the case.

The lawyers then select the trial jury by exercising challenges for cause and peremptory challenges. If a prospective juror's answers on voir dire indicate an inability to decide the case impartially, the juror may be challenged for cause. If a prospective juror's answers on voir dire indicate to one of the lawyers that the juror will not respond favorably to the lawyer's case, the lawyer may choose to challenge the juror peremptorily. A lawyer making a peremptory challenge does not have to have a reason for the challenge and may even base the peremptory challenge on

a hunch or "gut feeling" about the juror in question. A prospective juror who is successfully challenged cannot be a juror in the particular trial. The trial jury, then, is composed of twelve panel members who are not removed from the case by the exercise of challenges.

The Federal Rules of Criminal Procedure govern the selection of trial jurors and give the court discretion to ask voir dire questions itself or let the lawyers handle the questioning. The Federal Rules set limits on the number of peremptory challenges available to each side and provide for the selection of alternate jurors who may be used to replace regular jurors unable to continue.

Opening Statements. During opening statements, attorneys for each side explain to the jury what they expect the evidence to reveal at the trial. The defense has several options with regard to its opening statement.

It can make its opening statement immediately after the government's opening, or it can reserve its opening statement until after the government has presented its case. The defense may even elect not to make an opening statement.

Presentation Of Evidence, Direct Examination And Cross-Examination. The presentation of evidence begins after the opening statements are made. The law presumes that the defendant is innocent, and the burden of the government is to try to overcome the presumption of innocence and to convince the jury that the defendant is guilty. The government must convince the jury of the defendant's guilt by proof beyond a reasonable doubt. Because it bears the burden of proof, the government presents its evidence first.

The defense presents its case after the government but, in fact, has no obligation to present any evidence whatsoever. The defendant's Fifth Amendment privilege applies at trial (the privilege against self-incrimination). Thus the defendant is not required to testify. If the defense elects not to present any evidence, it may still argue that the defendant should be acquitted because the government has not proved its case beyond a reasonable doubt.

The questioning of a witness by the attorney who calls the witness to the stand is called direct examination. The Sixth Amendment allows the defendant to confront and cross-examine government witnesses after their direct examination is completed. Questions on cross-examination usually highlight evidence favorable to the cross-examining party, or attempt to show that the testimony the witness gave on direct examination was not true. Both the government and the defense have the right to cross-examine adverse witnesses.

The Federal Rules of Criminal Procedure allow the defendant to move for a judgment of acquittal either after the government has presented its case or after the defense has presented its case. The defendant may even move for a judgment of acquittal after the trial is over. In order to grant a judgment of acquittal, the court must conclude that, based on the evidence presented by the government, no reasonable juror could find that the charges had been proven beyond a reasonable doubt.

Jury Instructions

The prosecuting and defense attorneys are both allowed to file requests for specific jury instructions with the court. The court must tell the attorneys which instructions it intends to give the jury before the attorneys give their closing arguments. The court may instruct the jury on the applicable principles of law before or after the closing arguments are completed or at both times.

Closing Argument And Deliberation

In the closing argument, each side summarizes the evidence and attempts to persuade the jury to return the verdict it wants. The government presents its closing argument first and is then followed by that of the defense. Bearing the burden of proof, the government is then permitted to give a rebuttal argument. The jury begins its deliberations after it is instructed by the court.

PART IV – SENTENCING

The Jury Verdict

After having deliberated and arrived at a finding, the jury delivers its verdict in open court. The verdict of the jury must be unanimous, and, in order to ensure that such is the case, the jury may be polled at the request of any party. If the poll reveals that there is not unanimous agreement on the verdict, the jury may be directed to retire for further deliberations or may be discharged. After deliberating, a jury may return a verdict of guilty or a verdict of not guilty, also called an acquittal. A defendant who is acquitted of criminal charges cannot subsequently be tried again on those same charges. In the event that a deliberating jury is unable to arrive at a decision and fails to agree on a verdict, that jury is called a hung jury and the court must declare a mistrial. In the event of a mistrial, the defendant may be tried again on the same charges.

Sentencing Procedures

A sentence is a judgment of the court imposing a punishment upon a defendant found guilty of a crime. Prior to the date of the imposition of the sentence, a probation officer prepares a presentence report for submission to the judge or magistrate judge. The presentence report contains information about the offender and characteristics of the offense and also contains the probation officer's recommendations on how the U.S. Sentencing Commission guidelines apply to the case.

Overview Of Sentencing Guidelines. All defendants found guilty of federal crimes are sentenced under statutes passed by Congress. The U.S. Sentencing Commission was established by Congress and given the task of determining sentencing policies and practices for use in federal courts. These sentencing guidelines have been issued in the Commission's Guidelines Manual for judges and magistrate judges to use in fashioning sentences for crimes committed on or after

November 1, 1987. All district court judges and magistrate judges are required by statute to use the U.S. Sentencing Commission's guidelines in sentencing federal offenders.

The Sentencing Reform Act of 1984 and the U.S. Sentencing Commission's guidelines are designed to help the courts decide what kind of sentence to impose, the length of the sentence, the amount of a fine, the requirements for any supervised release, and the administration of multiple sentences. The guidelines are designed also to promote honesty in sentencing by abolishing parole and by requiring offenders to serve the actual sentence that is imposed on them. It was the intent of the guidelines to promote uniformity in sentencing by setting sentencing ranges which ensure similar sentences for similar offenders who commit similar crimes. Finally, the guidelines are designed to promote proportionality in sentencing by ensuring that an offense twice as serious as another offense will receive a penalty twice as serious.

Fact-Specific Sentencing

Under guidelines sentencing, the sentencing judge applies the guidelines to the facts of the specific case. In order to apply the guidelines properly, the sentencing judge must have a full and accurate understanding of the facts of the offense. The probation officer therefore conducts an investigation into the facts of the case and reports them to the judge in a presentence report. The sentencing judge usually adopts the probation officer's conclusions about the facts of the case. It is not unusual, however, for one of the lawyers in the case to convince the judge that the probation officer's version of the facts is incorrect.

U.S. Sentencing Commission Guidelines Manual

The guidelines manual contains the guidelines and, in addition, a set of policy statements which are nonbinding recommendations on how to apply the guidelines. There is also a commentary to assist the court in correctly interpreting the guidelines. Finally, the manual contains a sentencing table to be used in determining the sentencing range which applies to each case.

Sentencing Ranges

The Sentencing Reform Act directs the U.S. Sentencing Commission to establish sentencing range rather than specific prison terms. In each case, the probation officer's presentence report specifies a recommended guideline sentencing range expressed in months; for example, 63-78 months. In each case, it is the judge who ultimately makes the final decision on what sentencing range is appropriate and where to sentence the offender within that range; for example, 65 months.

Sentencing Options

The Sentencing Reform Act provides the judge with a variety of options at sentencing, including: probation, a sentence which allows the offender to remain in the community, under the

supervision of a probation officer; supervised release, a sentence which requires supervision of the offender in the community after the offender completes a prison term; restitution, a sentence which requires payment of money or services to the victim of a crime for losses suffered as a result of the offense; payment of a fine within the appropriate guideline sentencing range; a term of imprisonment within the appropriate guideline sentencing range.

Departures. The sentencing judge departs from the sentencing guidelines when it imposes a sentence above or below the guideline sentencing range which would otherwise apply to the case. The judge may depart from the guidelines only if aggravating or mitigating circumstances are found in the case that the U.S. Sentencing Commission did not consider in formulating the guidelines.

A policy statement in the guidelines also allows the judge to depart from the guidelines in sentencing a defendant who has provided substantial assistance to the government in the investigation or prosecution of another person who has committed an offense. The policy statement requires the government to file a motion with the judge detailing the defendant's assistance to the government. The judge then evaluates the significance of the defendant's assistance and decides how much to reduce the defendant's sentence.

Applying The Guidelines. In the preparation of the presentence reports, probation officers apply the guidelines to the facts of the case by determining the total offense level for the offense and by determining the defendant's criminal history category. They also select the sentencing range appropriate for the offense level and the criminal history category. They review the available sentencing options and consider whether a departure may be justified in the case.

The court makes the final sentencing decisions after reviewing all of the recommendations in the presentence report and after considering the arguments of the prosecutor and defense counsel regarding the proper sentence.

Disclosure Of Presentence Reports

Presentence reports are not public documents and disclosure is limited to the defendant, the defendant's attorney, and the prosecutor. The defendant and defense counsel must be given a copy of the presentence report at least ten days before sentence is imposed in order to give the defendant and counsel an opportunity to comment on the report before the actual sentencing. If the defendant or the government objects to certain facts asserted in the report, counsel and the probation officer can meet and attempt to resolve the matter prior to sentencing. After considering counsel's objections, the probation officer may prepare an addendum to the report, recommending to the judge how the disputed matters should be resolved.

The judge makes all final decision resolving any contested issues of fact at the sentencing hearing.

The Sentencing Hearing

For the imposition of the sentence, the defendant, the defense counsel, and the prosecutor appear before the judge. The probation officer who prepared the presentence report may be present. The judge reviews the presentence report and any materials submitted by counsel prior to the hearing and, finally, imposes sentence at the end of the hearing.

The Federal Rules of Criminal Procedure permit the judge to allow the defendant to introduce evidence relating to any alleged inaccuracies in the presentence report and requires the judge to resolve any disputed issues after reviewing the evidence and materials submitted by counsel.

The judge ensures that the defendant and counsel have reviewed the presentence report and gives the defendant and counsel an opportunity to comment on the probation officer's findings in the presentence report. The court allows defense counsel an opportunity to speak on behalf of the defendant and even addresses the defendant personally to determine if the defendant wishes to make a statement.

The judge then allows the prosecutor an opportunity to speak on the matter of the defendant's sentence and finally, imposes sentence and states for the record the reasons for the sentence imposed. After sentence is imposed, the court loses jurisdiction of the case. The defendant is subsequently delivered into the custody of the Bureau of Prisons.