

# **Benchbook**

**for U.S. District  
Court Judges**

**FOURTH EDITION**

**Federal Judicial Center**

**1996**

The Federal Judicial Center produced this *Benchbook for U.S. District Court Judges* in furtherance of its mission to develop and conduct education programs for the judicial branch. This *Benchbook* is not a statement of official Federal Judicial Center policy. Rather, it was prepared by, and it represents, the considered views of the Center's Benchbook Committee, a group of experienced district judges appointed by the Chief Justice of the United States in his capacity as chair of the Center's Board. The committee was assisted by Federal Judicial Center staff.

## Foreword

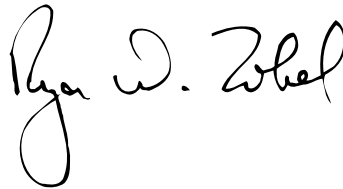
The Federal Judicial Center released its first *Benchbook for U.S. District Court Judges* in 1969. Second and third editions, in 1979 and 1986, consisted of materials prepared by experienced judges and reviewed by the Center's Benchbook Committee, which also approved staff-prepared revisions and expansions necessary to keep the book current and responsive. Because many bankruptcy and magistrate judges reported that they found the *Benchbook* useful, the Center expanded the book's audience to include them.

In 1995, at the suggestion of my predecessor, Judge William W. Schwarzer, the Committee decided to take a fresh look at the book, not only to update material but also to consolidate information located in different sections, to delete material that was no longer timely or was available from other sources, to organize the contents into a more accessible format, and to expand cross-references to other Center reference manuals and publications. This fourth edition of the *Benchbook* is the product of that effort.

The Center is indebted to the members of its Benchbook Committee, who are appointed by the Chief Justice. The Committee is chaired by Judge A. David Mazzone (D. Mass.) and consists of Chief Judge William O. Bertelsman (E.D. Ky.), Judge William B. Enright (S.D. Cal.), Judge Aubrey E. Robinson, Jr. (D.D.C.), and Judge Louis L. Stanton (S.D.N.Y.). Chief Judge Richard P. Matsch (D. Colo.) is the Center Board's liaison to the Committee.

I am pleased to express the Center's appreciation also to other judges who contributed suggestions, including members of the Judicial Conference's Criminal Law Committee, and to staffs of the Administrative Office of the U.S. Courts and the U.S. Sentencing Commission, with whom we have consulted about particular parts of this revision.

We hope this edition of the *Benchbook* serves you well and we invite your continued comments and suggestions for making it better.



Rya W. Zobel  
Director, Federal Judicial Center



## Preface

When we began to prepare this new edition of the *Benchbook*, our first task was to agree on the book's purpose. We reached consensus quickly. The *Benchbook* is, and always has been, a quick, practical guide to help trial judges deal with situations they are likely to encounter on the bench. It is intended to be a how-to manual—that is, a source from which judges can obtain immediate guidance on how to proceed—rather than an exhaustive treatise or authority. While new judges are the primary audience for the book, experienced judges may also find it useful as a refresher and as a starting point when they face particular situations for the first time.

We have tried to adhere to this vision of the *Benchbook* in preparing the fourth edition; therefore, much of it will be familiar to users of earlier editions. It still consists largely of material prepared or adapted by experienced judges. Most of the material is presented in outline form, so judges can refer to it easily while on the bench. And it is still published in loose-leaf form (though now in a standard-size binder), to accommodate revisions and to permit judges to customize it with their own outlines, annotations, and other materials. (The Center is also distributing the *Benchbook* in electronic form so that judges can have computer access to the book.) Previous *Benchbook* readers will, however, observe many changes, the most obvious of which is that it now consists of one volume instead of two. At the advice of the Committee, the book has been substantially streamlined. For example, in reviewing the material section by section, we concluded that references to sentencing under the law that predated guideline sentencing were no longer necessary and should be deleted. Judges who receive old-law cases may wish to consult another Center publication, *Sentencing Federal Offenders for Crimes Committed Before November 1, 1987* (1991). We also determined that the Judgment in a Criminal Case form developed by the Criminal Law Committee of the Judicial Conference of the United States had obviated the need for the Model Sentencing Forms that had appeared in previous editions of the *Benchbook*; therefore, the sentencing forms have been deleted.

The book contains some new material. For example, at the suggestion of several judges, we have expanded the discussion in sections 2.05 and 6.03 of procedures for handling *Batson* motions. Section 3.01 on death penalty cases has been supplemented with information the Center obtained from the first judges to handle capital cases under recently enacted death penalty statutes. The book also contains new sections on

dealing with disruptive defendants and on motions for mistrial by criminal defendants, both included in a new section 5 on special trial problems.

The book has also been reorganized and redesigned to increase its utility. For example, the more than thirty sections that had previously been contained in one large section on criminal proceedings are now distributed among three sections on criminal pretrial, criminal trial, and sentencing. In addition, we have expanded cross-references to other Center manuals, such as the *Manual for Complex Litigation, Third* (1995), the *Manual on Recurring Problems in Criminal Trials* (1996), and the *Manual for Litigation Management and Cost and Delay Reduction* (1992). We have also added a list of other publications and resource material available from the Center. In response to a suggestion made by several judges, the text displays a different typeface to highlight “scripted” language for various proceedings.

It is important to emphasize that the scripts mentioned above—and indeed most of the material in the book—represent only the Committee’s suggested approaches for dealing with specific situations. While the information in the book is responsible and valuable, it is not intended to serve as authority. And of course, judges should always check the requirements of their circuit’s law and court rules and procedures.

*The Benchbook Committee*

Judge A. David Mazzone (D. Mass.), Chair

Chief Judge William O. Bertelsman (E.D. Ky.)

Judge William B. Enright (S.D. Cal.)

Judge Aubrey E. Robinson, Jr. (D.D.C.)

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## 1.01 Initial appearance

Fed. R. Crim. P. 5

The first appearance of defendant after arrest is usually before a magistrate judge but may be in the district court.

- A. If the arrest was made without a warrant, require that a complaint be prepared and filed pursuant to Fed. R. Crim. P. 3 and 4.
- B. Inform defendant:
  1. of the nature of the complaint against him or her and of any affidavit filed therewith;
  2. of defendant's right to employ counsel or to request the assignment of counsel if he or she is unable to employ counsel (see 1.02: Assignment of counsel or pro se representation);
  3. of defendant's right to have a preliminary examination (Fed. R. Crim. P. 5(c) and 5.1; 18 U.S.C. § 3060);
  4. that defendant is not required to make any statement;
  5. that if defendant has made a statement, he or she need say no more;
  6. that if defendant starts to make a statement, he or she may stop at any time (*Miranda v. Arizona*, 384 U.S. 436 (1966)); and
  7. that any statement made by defendant may be used against him or her.
- C. Allow defendant a reasonable opportunity to consult with counsel (Fed. R. Crim. P. 5(c)).
- D. Set bail (see 1.03: Release or detention pending trial).
- E. For a material witness, see 18 U.S.C. § 3144.
- F. If the person is before the court for violating probation or supervised release, see Fed. R. Crim. P. 32.1. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

### NOTE

If the alleged offense was committed in another district, see 1.05: Commitment to another district (removal proceedings)

*1.01: Initial appearance*

**Other FJC sources**

The Bail Reform Act of 1984 at 14–15 (2d ed. 1993)

## **1.02 Assignment of counsel or pro se representation**

18 U.S.C. § 3006A; CJA Forms 20, 23

If counsel has not been assigned by the magistrate judge before defendant's first court appearance, assignment of counsel should be the first item of business before the judge.

A. If defendant has no attorney:

1. Inform defendant:

- (a) of his or her constitutional right to be represented by an attorney at every stage of the proceedings;
- (b) that if he or she is unable to afford an attorney, the court will appoint one without cost to him or her (18 U.S.C. § 3006A, Fed. R. Crim. P. 44);
- (c) of the offense with which he or she is charged.

2. Ask defendant:

- (a) if he or she understands his or her right to an attorney;
- (b) if he or she wishes and is able to obtain counsel;
- (c) if he or she wants the court to appoint counsel.

B. If defendant requests appointed counsel:

- 1. Require the completion of a Financial Affidavit by defendant and sign the Appointment of Counsel order, both on the appropriate Criminal Justice Act forms.
- 2. Inform defendant that he or she is swearing to the answers to the questions on the affidavit and that he or she may be penalized for perjury if he or she gives false information.

C. If defendant does not wish counsel:

The accused has a constitutional right to self-representation. Waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that defendant is fully aware of the hazards and disadvantages of self-representation.

*Section 1.02: Assignment of counsel or pro se representation*

If defendant states that he or she wishes to represent himself or herself, you should ask questions similar to the following:

1. Have you ever studied law?
2. Have you ever represented yourself in a criminal action?
3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?
4. Do you understand that if you are found guilty of the crime charged in Count I the court must impose an assessment of \$50 and could sentence you to as many as \_\_\_ years in prison and fine you as much as \$\_\_\_\_?  
[Ask defendant a similar question for each crime with which he or she may be charged in the indictment or information.]
5. Do you understand that if you are found guilty of more than one of these crimes this court can order that the sentences be served consecutively, that is, one after another?
6. Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will affect your sentence if you are found guilty?
7. Do you understand that if you represent yourself you are on your own? I cannot tell you or even advise you how you should try your case.
8. Are you familiar with the Federal Rules of Evidence?
9. Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules?
10. Are you familiar with the Federal Rules of Criminal Procedure?

**NOTE:**

\$25 if a Class A misdemeanor, \$10 if Class B, \$5 if Class C or infraction.

*Section 1.02: Assignment of counsel or pro se representation*

11. Do you understand that those rules govern the way a criminal action is tried in federal court?

[Then say to defendant something to this effect:]

12. I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?

14. Is your decision entirely voluntary?

[If the answers to the two preceding questions are yes, say something to the following effect:]

15. I find that the defendant has knowingly and voluntarily waived the right to counsel. I will therefore permit the defendant to represent himself [herself].

It is probably advisable to appoint standby counsel, who can assist defendant or can replace defendant if the court determines during trial that defendant can no longer be permitted to proceed pro se.

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials 1–6* (4th ed. 1996)

*Manual for Complex Litigation, Third* 265–70 (1995)





## **1.03 Release or detention pending trial**

18 U.S.C. §§ 3141–3142  
Fed. R. Crim. P. 46

### A. Preliminary

1. Ask defendant:
  - (a) full name;
  - (b) age;
  - (c) whether defendant has an attorney. If defendant is unrepresented by counsel, inform defendant of his or her right to counsel, and appoint counsel if defendant is qualified (see 1.02: Assignment of counsel or pro se representation).
2. If you are not sure defendant understands English, ask defendant:

Are you able to speak and understand English?

[If defendant has an attorney, ask counsel if he or she has been able to communicate with defendant in English. If you doubt defendant’s capacity to understand English, use an interpreter.]

3. Ask the U.S. attorney whether the government wishes to move for detention under 18 U.S.C. § 3142(d) or (f). If the motion is made, hold the appropriate hearing. This may require a continuance (not to exceed five days on defendant’s motion, three days on government’s motion, except for good cause). 18 U.S.C. § 3142(f). If not, proceed to the bail inquiry.

### B. Bail inquiry

1. Hear information relevant to considerations for fixing bail:
  - (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves narcotics;

*Section 1.03: Release or detention pending trial*

- (b) the weight of the evidence against the accused;
  - (c) the history and characteristics of the accused, including
    - (1) character, physical and mental condition, family ties, employment, financial resources, length of residence in community, community ties, past conduct, history of drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings;
    - (2) whether, at the time of the current offense or arrest, defendant was on probation or parole or on release pending trial, sentencing, appeal, or completion of sentence under federal, state, or local law;
  - (d) the nature and seriousness of danger to any person or the community, if the accused is released.
  - (e) In a case involving domestic violence, give the alleged victim an opportunity to be heard regarding the danger posed by defendant. 18 U.S.C. § 2263 (effective Sept. 13, 1994).
2. If a secured bond or surety bond is being considered, inquire about defendant's financial resources and, if appropriate, the sources of any property to be designated for potential forfeiture or offered as collateral. See 18 U.S.C. § 3142(c)(1)(B)(xii), (c)(2), and (g)(4).
- C. If there is a pretrial services agency in your district (18 U.S.C. § 3154), use the report of the interview by the pretrial services officer as an aid to fixing bail. If you do not have a pretrial services agency, consult the probation office.
- D. In developing information from defendant relevant to bail, the following questions are typical:
- 1. Are you married?
  - 2. Do you have any children?
  - 3. Are you living with your spouse or children? Do you support your spouse or children?

*Section 1.03: Release or detention pending trial*

4. Do you support or live with anyone else? Who?
  5. Are you employed?
  6. How long have you worked for your current employer?
  7. What is your average weekly or monthly take-home pay?
  8. Do you own an automobile?
  9. Do you have a savings account, bonds, stocks, or similar liquid assets?
  10. Do you own or rent your home?
  11. Do you own any other real property?
  12. How long have you lived at your current address?
  13. How long have you lived in this city (state) or the surrounding area?
  14. Do you have a telephone? Where can you be reached by telephone?
  15. Do you possess a passport?  
[*Note:* The defendant might be asked to deposit his or her passport with the marshal (bailiff) as a condition of bail.]
  16. Do you owe anyone money? Do you have to make mortgage payments, time payments, or other periodic payments?
  17. Are you regularly receiving medical treatment?
  18. Have you ever been treated or hospitalized for mental illness?
- E. Ask the U.S. attorney for defendant's rap sheet (fingerprinting record) to determine past convictions and the issuance of bond forfeiture warrants indicating prior failure to appear for scheduled court hearings.
- F. Set bail with appropriate conditions, 18 U.S.C. § 3142(b) or (c), or hold a detention hearing under § 3142(f). If you do not hold a detention hearing:

*Section 1.03: Release or detention pending trial*

1. In setting bail, determine whether appearance and community safety can reasonably be assured by release on personal recognizance or on an unsecured appearance bond with only the condition that the accused not commit a crime while on release.
2. If you determine that further conditions are necessary, set them. Do not set a financial condition that defendant cannot meet.
3. Explain the conditions to defendant.
4. Execute a bail form and obtain defendant's acknowledgment on the form.
5. Tell defendant when to appear in court again, or explain how he or she will be advised when next to appear in court.
6. Explain to defendant, as 18 U.S.C. § 3142(h)(2) requires:
  - (a) that failing to appear in court as required is a crime for which he or she can be sentenced to imprisonment (18 U.S.C. § 3146);
  - (b) that if defendant violates any condition of release, a warrant for arrest may be issued, and he or she may be jailed until trial and may also be prosecuted for contempt of court (18 U.S.C. § 3148);
  - (c) that committing a crime while on release may lead to more severe punishment than he or she would receive for committing the same crime at any other time (18 U.S.C. § 3147); and
  - (d) that it is a crime to try to influence a juror, to threaten or attempt to bribe a witness or other person who may have information about this case, to retaliate against anyone for providing information about the case, or to otherwise obstruct the administration of justice (18 U.S.C. §§ 1503, 1510, 1512, 1513).
- G. If temporary detention for up to ten days is sought under 18 U.S.C. § 3142(d):
  1. Ask the U.S. attorney to state the factual basis for the motion.

*Section 1.03: Release or detention pending trial*

2. Give defendant's counsel an opportunity to respond.
  3. Determine whether defendant fits within one or more of the categories set forth in 18 U.S.C. § 3142(d)(1).
  4. If defendant fits within one or more of these categories, determine whether he or she "may flee or pose a danger to any other person or the community." 18 U.S.C. § 3142(d)(2). If so, detention is mandatory.
  5. If detention for up to ten days is not ordered, proceed to the bail inquiry. If detention for up to ten days is ordered:
    - (a) Direct the U.S. attorney to notify the appropriate officials immediately and to notify the court and defendant's counsel immediately if any such official expressly declines or fails to take defendant into custody.
    - (b) Fix a date and time for bail hearing to be held in the event that the defendant is not taken into custody by any such official.
    - (c) Execute a temporary detention form.
- H. If pretrial detention has been sought under 18 U.S.C. § 3142(e), conduct the required hearing under § 3142(f):
1. Make findings of fact and state the reasons for the decision. If detention is ordered, these must be written. 18 U.S.C. § 3142(i)(1). See also Fed. R. App. P. 9.
  2. If detention is not ordered, set bail.
  3. If detention is ordered, execute a pretrial detention form that meets the requirements of 18 U.S.C. § 3142(i).

**Other FJC sources**

The Bail Reform Act of 1984 (2d ed. 1993)



## **1.04 Offense committed in another district**

Fed. R. Crim. P. 20

### A. Preliminary

Have oath administered and ask defendant:

1. What is your full name?
2. How old are you?
3. How far did you go in school? What is your employment experience?
4. Are you currently or have you recently been under the care of a physician or a psychiatrist, or been hospitalized or treated for narcotics addiction? Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours?

[If the answer to either question is yes, pursue the subject with defendant and with counsel to determine that defendant is currently competent to waive proceedings in the district where the offense was committed.]

5. Do you have an attorney?

[If he or she does not have an attorney, inform defendant of the right to counsel and appoint counsel if defendant qualifies. See 1.02: Assignment of counsel or pro se representation.]

[If you are not sure defendant understands English, ask defendant:]

6. Are you able to speak and understand English?

[If defendant has an attorney, ask counsel if he or she has been able to communicate with defendant in English. If you doubt defendant's capacity to understand English, use an interpreter.]

- B. Obtain a waiver of indictment if one is required (see 1.06: Waiver of indictment).

*Section 1.04: Offense committed in another district*

- C. Explain that defendant's case cannot be handled in this court unless he or she wishes to plead guilty or nolo contendere. (*Note: For juveniles, see 18 U.S.C. § 5031 and Fed. R. Crim. P. 20(d).*)
- D. Question defendant to ascertain on the record that defendant understands he or she is agreeing to:
  - 1. plead guilty or nolo contendere;
  - 2. waive proceedings in the district in which the crime was allegedly committed;
  - 3. be proceeded against in this court.
- E. Explain to defendant and ask if defendant understands that:
  - 1. he or she has a right to be tried in the district where the crime is alleged to have been committed;
  - 2. he or she cannot be convicted or sentenced in this court unless he or she consents freely;
  - 3. if he or she does not consent to be proceeded against in this court, he or she may be proceeded against in the district in which the crime was allegedly committed.
- F. Obtain defendant's written statement incorporating the understanding described above.
- G. Obtain written consents of the U.S. attorneys.
- H. Take defendant's plea. (*Note: All points should be covered in taking plea as in ordinary arraignment. See relevant portions of 1.07: Arraignment and plea and 2.01: Taking pleas of guilty or nolo contendere.*)



## **1.05 Commitment to another district (removal proceedings)**

Fed. R. Crim. P. 40

- A. Appearance before a magistrate judge by a defendant arrested in this district for an alleged offense committed in another district (U.S. attorney will have filed a Petition for Removal).
  - 1. Ascertain from U.S. attorney or arresting officer:
    - (a) where the alleged offense was committed;
    - (b) when defendant was arrested and whether the arrest was with or without a warrant;
    - (c) whether an indictment has been returned or an information or complaint filed;
    - (d) whether a warrant has been issued.
  - 2. If you are unsure, ask defendant if he or she can speak and understand English. If defendant has an attorney, ask if counsel has been able to communicate with defendant in English. If you doubt defendant's capacity to understand English, use an interpreter.
  - 3. Advise the defendant of his or her:
    - (a) general rights under Fed. R. Crim. P. 5 (nature of charge, right to counsel, right to remain silent—see 1.01: Initial appearance);
    - (b) right to waive removal and voluntarily return to the district where charges are pending;
    - (c) right, if charges are based on complaint and warrant, to:
      - (1) have a preliminary examination in this district,
      - (2) have a preliminary examination in the district where the charges are pending, or
      - (3) waive preliminary examination;
    - (d) right to an identity hearing if charges are based on indictment or information;

*Section 1.05: Commitment to another district*

- (e) right under Fed. R. Crim. P. 20 to plead guilty or nolo contendere in this district if both U.S. attorneys consent.
- 4. If defendant appears without counsel, appoint counsel or allow time for defendant to retain counsel; set an appropriate hearing or examination date to allow counsel time to confer and elect options.
- 5. If defendant appears with counsel or after counsel has been appointed or retained, ascertain which of the above options (3(b)–3(d) of this section) he or she desires, then sign an Order of Removal (whereby defendant returns voluntarily) or set an appropriate examination or hearing date.
  - (a) Set the date of the hearing or examination to allow time for inquiry into possible Fed. R. Crim. P. 20 transfer.
  - (b) Keep in mind Speedy Trial Act requirements (see 1.10: Speedy Trial Act).
- 6. Set bail. The amount of bail previously fixed in the district where charges are pending must be taken into account but is not binding. A different bail, however, requires reasons in writing.
- 7. If the arrest in this district was without a warrant (rarely occurs):
  - (a) Defendant cannot be ordered removed until a complaint and warrant are issued in the district of offense.
  - (b) Must obtain a complaint forthwith. See Fed. R. Crim. P. 5(a).
- 8. Conduct hearings:
  - (a) Preliminary examination (Fed. R. Crim. P. 5.1).
  - (b) Identity hearing (Fed. R. Crim. P. 40(a)):
    - (1) compare name(s) given by defendant with name in indictment or information,
    - (2) take evidence as to physical descriptions, fingerprints, handwriting, hearsay statements, tele-

*Section 1.05: Commitment to another district*

phone checks with charging district, photographs, probation officer's testimony, etc.

- (c) Fed. R. Crim. P. 20 transfer plea (see 1.04: Offense committed in another district).
- 9. Order defendant held and transferred (Order of Removal), or discharged; transmit papers and any bail to the clerk of the district court where charges are pending.
- B. Arrest of probationer or supervised releasee in a district other than the district of supervision (Fed. R. Crim. P. 40(d)).
  - 1. Ascertain arrest, inform defendant of charges, and advise defendant of general rights (nature of charge, right to counsel, right to remain silent).
  - 2. Ascertain if jurisdiction has been or will be transferred to this district pursuant to 18 U.S.C. § 3605 (made applicable to supervised releasees by 18 U.S.C. § 3586). If so, proceed under Fed. R. Crim. P. 32.1 as normal revocation case in this district.
  - 3. If the alleged violation occurred in this district and if jurisdiction is not transferred, schedule and hold a prompt preliminary hearing after counsel has been secured.
    - (a) If probable cause is found, hold defendant to answer in the supervising district, and order him or her transferred there.
    - (b) If no probable cause is found, dismiss proceedings and notify the supervising court.
  - 4. If the alleged violation occurred in a district other than this one, schedule and hold a prompt identity hearing (unless waived) after counsel has been secured.
    - (a) If, upon production of certified copies of the probation order, warrant, and application for warrant, defendant is found to be the person named in the warrant, hold defendant to answer in the supervising district and order him or her transferred there.

Or

*Section 1.05: Commitment to another district*

(b) Dismiss the proceedings and notify the supervising court if you find defendant is not the person so named.

C. Arrest for failure to appear (Bench Warrant) (Fed. R. Crim. P. 40(e)).

When the person has been arrested in this district on a warrant issued in another district for failure to appear, pursuant to a subpoena or the terms of his or her release:

1. Ascertain arrest, inform defendant of charges, and advise defendant of general rights (nature of charges, right to counsel, right to remain silent).
2. Schedule and hold an identity hearing (unless waived) after counsel has been secured.
  - (a) If, upon production of the warrant or a certified copy you find that the person before the court is the person named in the warrant, hold defendant to answer in the district where the warrant was issued and order him or her transferred there.

Or

(b) Dismiss the proceedings and notify the district where the warrant was issued if you find defendant is not the person so named.

**Other FJC sources**

The Bail Reform Act of 1984 at 15 (2d ed. 1993)

## 1.06 Waiver of indictment

Fed. R. Crim. P. 6 & 7

### A. Preliminary

Have oath administered and ask defendant:

1. What is your full name?
2. How old are you?
3. How far did you go in school? What is your employment experience?

[If you are not sure defendant can understand English, ask:]

4. Are you able to speak and understand English?

[If defendant has an attorney, ask counsel if he or she has been able to communicate with defendant. If you doubt defendant's capacity to understand English, use an interpreter.]

5. Are you currently or have you recently been under the care of a physician or a psychiatrist or been hospitalized or treated for narcotics addiction? Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours?

[If the answer to either question is yes, pursue the subject with defendant and with counsel to determine that defendant is currently competent to waive indictment.]

6. Do you have an attorney?

[If defendant does not have an attorney, inform defendant of the right to counsel and appoint counsel if defendant qualifies (see 1.02: Assignment of counsel or pro se representation).]

### B. Ask defendant:

Have you been furnished with a copy of the charge(s) against you?

### NOTE

An offense that may be punishable by death must be prosecuted by indictment and therefore precludes waiver of indictment under Fed. R. Crim. P. 7(a).

*Section 1.06: Waiver of indictment*

C. Explain in detail the charge(s) against defendant and make clear that he or she is charged with committing a felony.

D. Ask defendant:

Do you understand the charge(s) against you?

E. Inform defendant:

1. You have a constitutional right to be charged by an indictment of a grand jury, but you can waive that right and consent to being charged by information of the U.S. attorney.
2. Instead of an indictment, these felony charges against you have been brought by the U.S. attorney by the filing of an information.
3. Unless you waive indictment you may not be charged with a felony unless a grand jury finds by return of an indictment that there is probable cause to believe that a crime has been committed and that you committed it.
4. If you do not waive indictment, the government may present the case to the grand jury and ask it to indict you.
5. A grand jury is composed of at least sixteen and not more than twenty-three persons, and at least twelve grand jurors must find that there is probable cause to believe you committed the crime with which you are charged before you may be indicted. [Fed. R. Crim. P. 6(a) and 6(f).]
6. The grand jury might or might not indict you.
7. If you waive indictment by the grand jury, the case will proceed against you on the U.S. attorney's information just as though you had been indicted.

F. Ask defendant:

1. Have you discussed waiving your right to indictment by the grand jury with your attorney?
2. Do you understand your right to indictment by a grand jury?

*Section 1.06: Waiver of indictment*

3. Have any threats or promises been made to induce you to waive indictment?
  4. Do you wish to waive your right to indictment by a grand jury? [Fed. R. Crim. P. 7(b).]
- G. Ask defense counsel if there is any reason defendant should not waive indictment.
- H. If defendant waives indictment:
1. have defendant sign waiver of indictment form in open court, and enter an order and finding that the waiver is knowingly and voluntarily made and is accepted; and
  2. proceed to arraignment on information (see 1.07: Arraignment and plea).
- I. If defendant does not waive indictment:
1. Ask the U.S. attorney whether the government intends to present the matter to the grand jury.
    - a. If so, continue or reset bail (see 1.03: Release or detention pending trial).
    - b. If not, discharge defendant.





## **1.07 Arraignment and plea**

Fed. R. Crim. P. 10

### A. Preliminary

Have oath administered and ask defendant:

1. What is your full name?
2. How old are you?
3. How far did you go in school? What is your employment experience?

[If you are not sure defendant can understand English, ask:]

4. Are you able to speak and understand English?

[If defendant has an attorney, ask counsel if he or she has been able to communicate with defendant. If you doubt defendant's capacity to understand English, use an interpreter.]

5. Are you currently or have you recently been under the care of a physician or a psychiatrist or been hospitalized or treated for narcotics addiction? Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours?

[If the answer to either question is yes, pursue the subject with defendant and with counsel to determine that defendant is currently competent to enter a plea.]

6. Do you have an attorney?

[If not, see 1.02: Assignment of counsel or pro se representation].]

### B. Ask defendant:

1. Have you received a copy of the indictment (information)?
2. Have you had time to consult with your attorney?
3. Do you want the indictment (information) read, or will you waive the reading of the indictment (information)?

*Section 1.07: Arraignment and plea*

[Have the indictment (information) read if defendant desires.]

4. How do you plead to the charges?
- C. If defendant's plea is not guilty:
1. Set motion and/or trial dates according to your local speedy trial plan.
  2. Continue or reset bail (see 1.03: Release or detention pending trial).
- D. If defendant indicates a desire to plead guilty or nolo contendere, see 2.01: Taking pleas of guilty or nolo contendere.

**Other FJC sources**

Manual for Complex Litigation, Third 264 (1995)

## 1.08 Joint representation of codefendants

### Introductory note

Fed. R. Crim. P. 44(c) provides as follows in cases of joint representation:

Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, *the court shall* promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel. (Emphasis added.)

When a trial court becomes aware of a potential conflict of interest, it must pursue the matter, even if counsel does not. Judges should strongly recommend to codefendants against dual representation and should make clear that a court-appointed attorney is available to represent defendant or to consult with the defendant concerning dual representation. Following is a hearing procedure for so advising defendants and for obtaining a waiver of the right to separate counsel. Note, however, that in certain situations, a district court may disqualify an attorney, despite a defendant's voluntary, knowing, and intelligent waiver of the right to conflict-free counsel. See *Wheat v. United States*, 486 U.S. 153, 163 (1988) ("district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses").

**Procedure**

- A. Determine if defendant is competent.
  - 1. Ask defendant:
    - (a) Mr., Ms., Mrs., Miss \_\_\_\_\_, how old are you?
    - (b) How far did you go in school?  
[If you are not sure defendant can understand English, ask:]
    - (c) Are you able to speak and understand English?  
[Ask defense counsel if he or she has been able to communicate with defendant in English. If you doubt defendant's capacity to understand English, use an interpreter.]
    - (d) Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours? Do you understand what is happening today?
  - 2. Then ask defense counsel and prosecutor:  
Do either of you have any doubt as to the defendant's competence at this time?
  - 3. State finding on record of defendant's competence.
- B. Emphasize the seriousness of the charges. Tell defendant the maximum punishment for each count.
- C. Tell defendant:
  - 1. If at any time you do not understand something or have a question, consult your lawyer or ask me any questions.
  - 2. This proceeding can be continued to another day if you wish to consult another lawyer.
- D. Advise defendant about the apparent conflict of interest in his or her lawyer's representation. For example, state:  
The United States Constitution gives every defendant the right to effective assistance of counsel. When one lawyer represents two or more defendants in a case, the lawyer may have trouble representing all of the defendants with the same

*Section 1.08: Joint representation of codefendants*

fairness. This is a conflict of interest that denies the defendant the right to effective assistance of counsel. Such conflicts are always a potential problem because different defendants may have different degrees of involvement. Each defendant has the right to a lawyer who represents only him or her.

- E. Point out the various ways in which dual representation might work to defendant's disadvantage. This may be done by giving defendant a form to read or by advising defendant in the following way:
  - 1. Dual representation may inhibit or prevent counsel from conducting an independent investigation in support of each defendant's case. For example, the attorney-client privilege may prevent your lawyer from communicating information gathered from another defendant to you.
  - 2. The government may offer immunity or offer to recommend a lesser sentence to one defendant for cooperating with the government. Should you receive such an offer, your lawyer ought to advise you whether or not to accept it. But if your lawyer advises you to accept the offer, it may harm the cases of the other defendants represented by that lawyer.
  - 3. The government may let a defendant who is not as involved as other defendants plead guilty to lesser charges than the other defendants. After the guilty plea, however, the government may require the defendant to testify. A lawyer who represents more than one defendant might recommend that the first defendant not plead guilty to protect the other defendants that the lawyer represents. On the other hand, the lawyer might recommend that the first defendant plead guilty, which might harm the cases of the other defendants.
  - 4. Dual representation may affect how your lawyer exercises peremptory challenges or challenges for cause during jury selection. Potential jurors who may be perceived as favorable to you may be perceived as harmful to another defendant, or jurors who may be perceived as favorable to other defendants may be harmful to you.

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5. Sometimes one of the defendants represented by a lawyer will take the stand to testify in his or her own behalf. In order to represent the other defendants fairly, the lawyer should question the defendant on the stand as completely as possible. However, the lawyer may not be able to do that because he or she cannot ask the defendant as a witness about anything that the defendant has told the lawyer in confidence.
  6. The best defense for a single defendant often is the argument that while the other defendants may be guilty, he or she is not. A lawyer representing two or more defendants cannot effectively make such an argument.
  7. Evidence that helps one defendant might harm another defendant's case. When one lawyer represents two or more defendants, the lawyer might offer or object to evidence that could help one defendant but harm another.
  8. Regarding sentencing, dual representation would prohibit the lawyer from engaging in post-trial negotiations with the government as to full disclosure by one defendant against the other. It would also prohibit the lawyer from arguing the relative culpability of the defendants to the sentencing judge.
- F. An attorney proposing to represent codefendants should be required to assure the court that there will be no conflict that could result in a lack of effective assistance of counsel or other prejudice to any defendant.
- G. Consider recommending that defendant consult with other, independent counsel about the wisdom of waiver. Offer to make CJA counsel available (if appropriate) and allow adjournment for that purpose.
- H. If defendant wants to waive the right to separate counsel, get a clear, on-the-record oral waiver by him or her of the right to separate counsel. In addition, you may want defendant to sign a written waiver.

*Section 1.08: Joint representation of codefendants*

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 6–7 (4th ed. 1996)

*Manual for Complex Litigation*, Third 267–68 (1995)





## **1.09 Waiver of jury trial (suggested procedures, questions, and statements)**

### **Introductory note**

Trial by jury is a fundamental constitutional right, and waiver of the right to a jury trial should be accepted by a trial judge only when three requirements are satisfied:

1. the procedures of Fed. R. Crim. P. 23(a) have been followed;
2. the waiver is knowing and voluntary; and
3. the defendant is competent to waive a constitutional right.

Fed. R. Crim. P. 23(a) requires that the accused's waiver of the right to trial by jury be:

1. made in writing;
2. approved by the court; and
3. consented to by the government.

Following this rule alone does not satisfy the requirement that the waiver be knowing and voluntary, however.

The trial judge should ascertain on the record:

1. whether the accused understands that he or she has a right to be tried by jury;
2. whether the accused understands the difference between a jury trial and a nonjury trial; and
3. whether the accused has been made to understand the advantages and disadvantages of a jury trial.

A defendant's mental capacity to waive a jury trial must be considered in approving the waiver. A defendant is not competent to waive a constitutional right if mental incapacity or illness substantially impairs his or her ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of the waiver.

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When information available from any source presents a question as to defendant's competence to waive a jury trial, sua sponte inquiry into that competence must be made.

In any psychiatric examination ordered under the inherent power of the court or under 18 U.S.C. § 4241, the examining psychiatrist should be directed to give an opinion on defendant's competence to make an intelligent waiver. Whenever any question as to defendant's competence arises, a specific finding of competence or incompetence should be made.

Finally, if any doubt of competence exists, order a jury trial.

### **Suggested Procedures and Questions**

#### **A. Preliminary questions for defendant**

1. The court is informed that you desire to waive your right to a jury trial. Is that correct?
2. Before accepting your waiver to a jury trial, there are a number of questions I will ask you to ensure that it is a valid waiver. If you do not understand any of the questions or at any time wish to interrupt the proceeding to consult further with your attorney, please say so, since it is essential to a valid waiver that you understand each question before you answer. Do you understand?
3. What is your full true name?
4. How old are you?
5. How far did you go in school?

[If you are not sure defendant understands English, ask:]

6. Are you able to speak and understand English?

[Ask defense counsel if counsel has been able to communicate with defendant in English. If you doubt defendant's capacity to understand English, use an interpreter.]

7. What is your employment background?

8. Have you taken any drugs, medicine, or pills, or drunk any alcoholic beverage in the past twenty-four hours?
9. Do you understand that you are entitled to a trial by jury on the charges filed against you?
10. Do you understand that a jury trial means that you will be tried by a jury consisting of twelve people and that all of the jurors must agree to the verdict?
11. Do you understand that you have the right to participate in the selection of the jury?
12. Do you understand that if I approve your waiver of a jury trial, the court will try the case and determine your innocence or guilt?
13. Have you discussed with your attorney your right to a jury trial?
14. Have you discussed with your attorney the advantages and disadvantages of a jury trial? Do you want to discuss this issue further with your attorney?

B. Questions for counsel

In determining whether the accused has made a “knowing and voluntary” waiver and is competent to waive, the judge should question both defense counsel and the prosecutor.

1. Ask defense counsel
  1. Have you discussed with the defendant the advantages and disadvantages of a jury trial?
  2. Do you have any doubt that the defendant is making a “knowing and voluntary” waiver of the right to a jury trial?
  3. Has anything come to your attention suggesting that the defendant may not be competent to waive a jury trial?
2. Ask the prosecutor:

Has anything come to your attention suggesting that the defendant may not be competent to waive a jury trial?

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C. Form of waiver and oral finding

1. A written waiver of a jury trial must be signed by defendant, approved by defendant's attorney, consented to by the government, and approved by the court.
2. It is suggested that the judge state orally:

This court finds that the defendant has knowingly and voluntarily waived his [her] right to a jury trial, and I approve that waiver.

3. An appropriate written waiver of jury trial may take the form shown on the next page.

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 9–10 (4th ed. 1996)

**In the U.S. District Court  
for the District of [                    ]**

United States of America	)	
	)	No. Cr _____
v.	)	Waiver of trial by jury
	)	
[Defendant]	)	

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right, request the court to try all issues of fact and law without a jury, and waive my right to special findings.

Dated at \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Defendant

APPROVED:

\_\_\_\_\_  
Attorney for Defendant

The United States of America consents to the defendant's waiver of a jury trial and waives its right to request special findings.

\_\_\_\_\_  
Assistant U.S. Attorney

I find that the defendant has knowingly and voluntarily waived the right to a jury trial, and I approve the waiver.

\_\_\_\_\_  
Judge



## **1.10 Speedy Trial Act**

Title I of the Speedy Trial Act of 1974 (18 U.S.C. § 3161) imposes time limits within which criminal defendants must be brought to trial. The time limits are expressed as numbers of days from certain events, but the statute provides that certain periods of time be “excluded” in computing these limits, thereby extending the deadlines. The statute applies to offenses other than petty offenses.<sup>1</sup> This section is offered as a general guide to the time limits and exceptions in the Speedy Trial Act. Judges should be aware that circuit law may differ on specific issues.

### **Dismissal**

Failure to comply with the time limits generally requires that a cause be dismissed, although not necessarily with prejudice. In deciding whether to dismiss with or without prejudice, the court should consider the seriousness of the offense, the facts and circumstances that led to the dismissal, and the impact of a re prosecution on the administration of the Speedy Trial Act and the administration of justice. See 18 U.S.C. § 3162(a)(1) and (2).

### **Waiver by defendant**

Although a defendant’s failure to make a timely motion for dismissal on speedy trial grounds is deemed a waiver of the right to dismissal, see 18 U.S.C. § 3162(a)(2), it is widely understood that relying on defendants’ agreements to delay their trials beyond the statutory time limits is inappropriate.

### **Basic time limits**

#### ***Indictment or information***

An indictment or information must be filed within thirty days after arrest or service of a summons. However, if a defendant is charged with a felony in a district in which no grand jury has

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1. “Petty offense” means an offense that is punishable by imprisonment of six months or less and for which the maximum fine (including any “alternative fine” under 18 U.S.C. § 3571(d)) is no more than \$5,000 for individuals or \$10,000 for organizations. 18 U.S.C. §§ 19 and 3581.

### *Section 1.10: Speedy Trial Act*

been in session during the thirty-day period, the time for filing an indictment shall be extended an additional thirty days. See 18 U.S.C. § 3161(b). If an indictment or information is dismissed or otherwise dropped and if charges based on or arising from the same conduct are later refiled, “the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information.” 18 U.S.C. § 3161(d)(1).

#### ***Trial***

A trial must commence within seventy days after the *later* of (a) the date of the indictment or information or (b) the date of defendant’s initial appearance before a judicial officer in the district in which charges are brought. See 18 U.S.C. § 3161(c). In some circumstances, the deadline for trial on a superseding indictment relates back to the original indictment.

#### ***Trial, defendant in custody***

A trial of a defendant held in pretrial detention must also commence within ninety days of the beginning of continuous custody. This deadline may in some cases be earlier than the seventy-day deadline referred to above. See 18 U.S.C. § 3164(b). The sanction is release from custody rather than dismissal of the case. See 18 U.S.C. § 3164(c).

#### ***Retrial***

A retrial following a mistrial or order for a new trial must commence within seventy days after the date the action occasioning the retrial becomes final. 18 U.S.C. § 3161(e). Retrial following a dismissal by the trial court and reinstatement after appeal, or following an appeal or collateral attack, must also commence within seventy days, but an extension of up to 180 days may be allowed if trial within seventy days is impractical. 18 U.S.C. § 3161(d) and (e).

#### **Trial commencement limitations**

The Act requires that the trial date be determined at the earliest practicable time, after consultation with counsel. See 18 U.S.C. § 3161(a). A trial may not commence less than thirty days after defendant first appears through counsel or expressly waives



counsel and elects to proceed pro se, unless defendant consents in writing. See 18 U.S.C. § 3161(c)(2).

### **Excludable periods**

There are several periods of delay that “shall be excluded” from the time limits for filing an indictment or information or for commencing trial. See 18 U.S.C. § 3161(h)(1)–(9). Among these are periods of delay resulting “from other proceedings concerning the defendant,” “from the absence or unavailability of the defendant or an essential witness,” and “from the fact that the defendant is mentally incompetent or physically unable to stand trial.”

A period of delay resulting from the granting of a continuance may also be excluded if the continuance was granted on the basis of a finding that “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” The court must put on the record, “either orally or in writing, its reasons for [that] finding.”<sup>2</sup> See 18 U.S.C. § 3161(h)(8)(A). Note that a continuance under this section may not 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.” 18 U.S.C. § 3161(h)(8)(C).

### **Other aids to interpretation**

The speedy trial plan adopted by each district court pursuant to 18 U.S.C. §§ 3165, 3166

Administrative Office of the U.S. Courts, Clerks Manual: United States District Courts (1993): Vol. 1 at § 8.08

Judicial Conference Committee on the Administration of the Criminal Law, Guidelines to the Administration of the Speedy Trial Act of 1974 (rev. ed. October 1984)

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2. Consider asking the U.S. attorney to prepare the form of the order.

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**Other FJC sources**

Manual for Complex Litigation, Third 258, 273, 306 (1995)

Anthony Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (Federal Judicial Center 1980)

## 1.11 Delinquency proceedings

18 U.S.C. §§ 5031 et seq.

### A. Proceeding as an adult or a juvenile

#### 1. Jurisdiction

- (a) The district court has jurisdiction over a juvenile who is alleged to have committed a violation of law in the court's special maritime and territorial jurisdiction for which the maximum authorized term of imprisonment is six months or less.
- (b) In other cases, the district court has jurisdiction only if the Attorney General, after investigation, certifies one of the following:
  - (1) that a juvenile court or other appropriate state court does not have jurisdiction or refuses to assume jurisdiction over a juvenile with respect to the alleged act of juvenile delinquency;
  - (2) that the state does not have available programs and services adequate for the needs of juveniles; or
  - (3) that the offense charged is a crime of violence that is a felony, or is an offense described in certain sections of title 21, *and* that there is a substantial federal interest in the case or the offense.

If jurisdiction is not established under paragraph (a) or (b) above, the juvenile must be surrendered to appropriate state authorities. If jurisdiction is established, the prosecution proceeds by information. *See* 18 U.S.C. § 5032. See also the Calendar of Events at the end of this section.

#### 2. Preliminary procedures

- (a) Clear the courtroom of all persons except those associated with the case. Close the outside and inside doors and instruct the marshal not to open them during the proceedings.

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- (b) Take the appearances of counsel.
  - (c) Explain to the parties that the hearing will be divided into two parts as follows:
    - (1) to determine if the juvenile should proceed as an adult or a juvenile;
    - (2) to admit or deny the charges against the juvenile (see subsection B of this section).
  - (d) Ensure that the juvenile can speak and understand English and that defense counsel has been able to communicate with the juvenile in English. If there is any doubt about the juvenile's ability to understand English, use an interpreter.
3. Explain rights of an adult:
- (a) to an initial appearance before the magistrate judge;
  - (b) to counsel;
  - (c) to a bail hearing;
  - (d) to an indictment, if applicable;
  - (e) to a preliminary examination to determine probable cause if defendant is not indicted;
  - (f) to a trial by jury (explain composition of jury) in which the government will have to prove that defendant is guilty beyond a reasonable doubt and in which defendant has the right:
    - (1) to confront and cross-examine witnesses;
    - (2) to remain silent, testify, or call witnesses.
4. Explain rights of a juvenile:
- (a) to an initial appearance before the magistrate judge;
  - (b) to counsel;
  - (c) to an information, as opposed to an indictment by grand jury;<sup>1</sup>
  - (d) to a hearing before the court to determine delinquency,<sup>2</sup> during which defendant has the right:

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1. 18 U.S.C. § 5032; *United States v. Hill*, 538 F.2d 1072 (4th Cir. 1976).

2. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *United States v. Hill*, 538

Section 1.11: Delinquency proceedings

- (1) to confront and cross-examine witnesses;<sup>3</sup>
  - (2) to remain silent, testify, or call witnesses;<sup>4</sup>
  - (3) to have the government prove guilt beyond a reasonable doubt.<sup>5</sup>
- (e) to have his or her name or picture withheld from the media.<sup>6</sup>
5. Election to proceed as an adult or a juvenile:
- (a) Explain maximum penalties under applicable statute if juvenile elects to proceed as an adult.
  - (b) Explain the disposition under the Federal Juvenile Delinquency Act (FJDA), which gives the court the following options:
    - (1) to suspend the findings of delinquency;
    - (2) to require that the juvenile make restitution to the victim(s) of the delinquent conduct;
    - (3) to place the juvenile on probation; or
    - (4) to commit the juvenile to official detention.18 U.S.C. § 5037(a)
  - (c) Explain that if the juvenile elects to proceed as an adult:
    - (1) The request must be in writing and upon the advice of counsel.<sup>7</sup>
    - (2) The juvenile may plead not guilty and force the government to trial by jury under an indictment, if applicable.

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F.2d 1072 (4th Cir. 1976).

3. *In re Gault*, 387 U.S. 1 (1967); *United States v. Costanzo*, 395 F.2d 441 (4th Cir.), *cert. denied*, 393 U.S. 883 (1968).

4. *In re Gault*, 387 U.S. 1 (1967); *United States v. Hill*, 538 F.2d 1072 (4th Cir. 1976); *West v. United States*, 399 F.2d 467 (5th Cir. 1968) (factors in deciding if juvenile has waived privilege against self-incrimination), *cert. denied*, 393 U.S. 1102 (1969).

5. *In re Gault*, 387 U.S. 1 (1967); *United States v. Hill*, 538 F.2d 1072 (4th Cir. 1976); *United States v. Costanzo*, 395 F.2d 441 (4th Cir.), *cert. denied*, 393 U.S. 883 (1968).

6. 18 U.S.C. § 5038(e).

7. 18 U.S.C. § 5032.

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- (3) The juvenile may plead guilty and forgo trial.
- (d) Explain that if the juvenile elects to proceed as a juvenile:
  - (1) The request may be oral.
  - (2) The juvenile may deny charges against him or her and force the government to trial before the judge.
  - (3) The juvenile may admit the charges filed in the information, forgoing trial.
- (e) Ask counsel:
  - (1) if proceeding as a juvenile is in the individual's best interests;
  - (2) if family members present in the courtroom have discussed the individual's election with counsel.
- (f) Ask the juvenile:

**Do you elect to proceed as an adult or as a juvenile?**

  - (1) If the juvenile elects to proceed as an adult, proceed to arraignment as an adult (see 2.01: Taking pleas of guilty or nolo contendere).
  - (2) If the juvenile elects to proceed as a juvenile, proceed to arraignment as a juvenile (see subsection B of this section).
- 6. Motion by Attorney General to proceed as an adult:
  - (a) The Attorney General may make a motion to transfer the juvenile to adult prosecution if the juvenile:
    - (1) committed an act that if committed by an adult would be a felony that is a crime of violence or a specified drug offense from title 21; and
    - (2) committed the act after his or her fifteenth birthday.
  - (b) The court may grant the motion if, after a hearing and after considering and making findings in the record on the factors listed in the statute, it finds that the transfer would be "in the interest of justice."

- (c) The age limit for committing the act is lowered to after the thirteenth birthday for certain crimes of violence or if the juvenile possessed a firearm during the offense.
- (d) Reasonable notice of a transfer hearing must be given to the juvenile; the juvenile's parents, guardian, or custodian; and counsel. The juvenile shall be assisted by counsel, and any statements the juvenile makes before or during the transfer hearing are not admissible at subsequent criminal prosecutions.

See 18 U.S.C. § 5032.

7. Mandatory proceeding as an adult:

The juvenile shall be transferred to district court for prosecution as an adult if the juvenile:

- (a) committed an act after his or her sixteenth birthday that if committed by an adult would be a felony offense that is a crime of violence, or a drug offense or other serious crime as described in the statute; and
- (b) has been previously found guilty of an act that if committed by an adult would have been one of the offenses described above or in paragraph 6 above, or found guilty of a violation of a state felony statute that would have been such an offense if committed under federal jurisdiction.

See 18 U.S.C. § 5032.

B. Arraignment of a Juvenile:

1. Give oath and make sure the juvenile understands that to lie under oath is to commit the crime of perjury.
2. Direct the U.S. attorney to read the charge against juvenile.
  - (a) The charge must:
    - (1) reflect that the individual committed an act of juvenile delinquency;
    - (2) cite the statute allegedly violated;
    - (3) cite 18 U.S.C. § 5032.

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- (b) The court should direct the following questions to the juvenile:
- (1) Have you been given a copy of the charge?
  - (2) Have you talked to counsel about the charge filed against you?  
[Explain the charge and inquire:]
  - (3) Do you understand the charges against you?  
[Explain the penalty and inquire:]
  - (4) Do you understand the maximum penalty that could be assessed against you if you are found guilty of these charges?
  - (5) Do you understand that you are entitled to have counsel present with you at all times during these proceedings?
  - (6) Are you satisfied with your representation (counsel)?
  - (7) Do you understand that you have a right to deny the charges that have just been read?
  - (8) Do you understand that if you deny the charges, the government will have to bring witnesses that your counsel can cross-examine, and the government will have to convince the court beyond a reasonable doubt:
    - (i) that you committed the crime with which you have been charged;
    - (ii) that you committed this crime before you reached the age of eighteen?
3. Read the elements of the offense that the government will have to prove.
  4. Determine competence of the juvenile to understand the proceedings and to enter an admission or denial.



- (a) The court should ask the following questions:
    - (1) Have you taken any drugs, medicines, or pills or drunk any alcoholic beverages in the past twenty-four hours?
    - (2) Do you understand what is happening today?
  - (b) The court should also ask the juvenile's counsel and the prosecutor this question:

Do either of you have any doubt as to the juvenile's competence to admit or deny the charges against him [her] at this time?
  - (c) If, after further interrogation of juvenile and counsel, there is any question of the juvenile's understanding of the proceedings and of his or her competence to plead, continue the taking of the admission or denial to a later date.
5. Determine the juvenile's awareness of the consequences of an admission. Ask:
- (a) Are you aware that, if you admit the charges against you, you are giving up your right:
    - (1) to trial by the court?
    - (2) to confront and cross-examine witnesses?
    - (3) to remain silent, testify, and call witnesses?
    - (4) to require the government to prove guilt beyond a reasonable doubt?
  - (b) Are you aware that if you admit the charges against you, you will lose the right to elect to proceed as an adult with the following rights:<sup>8</sup>
    - (1) to an indictment, if applicable?

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8. *Cf.* *United States v. Doe*, 627 F.2d 181 (9th Cir. 1980) (discussing timing requirement for making request to proceed as an adult).

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(2) to a trial by jury? [See subsection A.3(f) of this section.]

6. Explain to the juvenile that if he or she admits the act with which he or she has been charged, the government will then tell the court what it believes the facts to be and what it could prove if the case were to go to trial. Further, explain that the court would then ask the juvenile:

- (a) if what the government says is true as far as he or she knows;
- (b) if any part of what the government says is not true;
- (c) if so, what is not true?
- (d) if he or she believes that the government can prove what it says it can prove;
- (e) if he or she committed [here go through the elements of the offense].

7. Determine the voluntariness of the admission:

The court must be satisfied that if the juvenile admits the charges against him or her, this admission is voluntary and not the result of any force or threat or inducement. Suggested questions to ask the juvenile include:

- (a) Has anyone threatened you or anyone else or forced you in any way to admit these charges? [If the answer is yes, ascertain the facts and recess if necessary to permit the juvenile and his or her counsel to confer, or postpone taking the admission.]
- (b) Do you understand that nobody can compel you to admit anything?

8. Take the admission or denial. Ask the juvenile:

Do you admit or deny that you are a juvenile delinquent as charged in the information?

- (a) If the juvenile denies, set for trial.
- (b) If the juvenile admits:
  - (1) Ask the U.S. attorney to state what he or she can prove at trial.
  - (2) Ask the juvenile the following questions:

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(i) So far as you know, is what the government says true?

(ii) Is any part of what the government says not true?

(iii) If so, what is not true?

(iv) Do you believe that the government can prove what it says it can prove?

(v) Did you [here go through elements of the offense]?

(3) Ask counsel for the juvenile if counsel is satisfied the government can prove what it says it can prove.

**NOTE**

Consider asking the juvenile to tell, in his or her own words, what he or she did.

9. Findings for the record:

(a) Find that all laws (18 U.S.C. § 5031 et seq.) have been complied with and that a basis for federal jurisdiction exists (see subsection B.1 of this section).

(b) Find that the juvenile is competent.

(c) Find that the juvenile understands his or her rights and has elected to give them up, except the right to counsel.

(d) Find that the juvenile has voluntarily admitted the charges against him or her after fully knowing and understanding his or her constitutional rights as a juvenile.

(e) Find that the juvenile is aware of the maximum penalty that could be imposed against him or her.

(f) Find that the juvenile is aware that the government has sufficient facts to support an adjudication of juvenile delinquency.

(g) Ask the juvenile if he or she wants to change his or her mind and not proceed as a juvenile or not admit the charges against him or her.

(h) Adjudge that the juvenile is a juvenile delinquent.

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10. Inform the juvenile and his or her parents or guardian, in writing, of the juvenile's rights relating to the confidentiality of juvenile records.<sup>9</sup>

C. Disposition (18 U.S.C. § 5037)<sup>10</sup>

1. Detention prior to disposition (18 U.S.C. § 5035)

(a) A juvenile alleged to be delinquent may be detained only in a juvenile facility or other suitable place designated by the Attorney General.

(b) Detention shall be in a foster home or community-based facility located in or near the juvenile's home community whenever possible.

(c) The juvenile shall not be detained or confined in any institution in which he or she would have regular contact with adults convicted of crimes or awaiting trial on criminal charges. Also, insofar as possible, *alleged* delinquents shall be kept separate from *adjudicated* delinquents.

(d) Every juvenile in custody should be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

2. Timing of hearing (18 U.S.C. § 5037(a))

If the juvenile is adjudicated to be delinquent, the court must have a hearing disposing of the case within twenty court days after said adjudication unless the court has ordered further studies in accordance with 18 U.S.C. § 5037(d). (See subsection C.4 of this section.)

3. Judgment following disposition hearing

After the disposition hearing, the court may:

(a) suspend the findings of delinquency;

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9. 18 U.S.C. § 5038(b). See 18 U.S.C. § 5038(a), (c), (d), and (f) for authority to release juvenile records.

10. The following outline is not intended as a procedure for conducting a dispositional hearing but as supplemental material to be used in setting the dispositional hearing.

- (b) require the juvenile to make restitution pursuant to 18 U.S.C. § 3556;
- (c) place the juvenile on probation; or
- (d) commit the juvenile to official detention in the custody of the Attorney General.

4. Sentence:

A juvenile may not be placed on probation or committed for a term longer than the maximum probation or prison term that would have been authorized had the juvenile been sentenced as an adult under the Sentencing Guidelines. *United States v. R.L.C.*, 112 S. Ct. 1329, 1339 (1992). Subject to that limitation, the maximum terms applicable are as follows:

- (a) For a juvenile under eighteen at the time of disposition, neither the probation nor the detention term may extend beyond the juvenile's twenty-first birthday. 18 U.S.C. § 5037(b)(1), (c)(1).
- (b) For a juvenile between eighteen and twenty-one at the time of disposition, the probation term may not exceed three years. 18 U.S.C. § 5037(b)(2). The detention term may not exceed five years if the act of delinquency was a Class A, B, or C felony; it may not exceed three years in other cases. 18 U.S.C. § 5037(c)(2).

5. Observation and study (§ 5037(d)):

An alleged or adjudicated delinquent may be committed, after notice and a hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. This observation and study shall be conducted on an outpatient basis unless the court determines that inpatient observation and study are necessary to obtain the desired information. If the juvenile is only an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his or her attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his or her personal

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traits, capabilities, background, any previous delinquency or criminal experience, any mental or physical defects, and any other relevant factors.

The Attorney General must submit a report on the observation and study to the court and to the attorneys for the juvenile and the government within thirty days after commitment unless the court grants additional time.

## **Calendar of events**

### **Juvenile in custody**

The juvenile must be brought to trial within thirty days from the date detention was begun. 18 U.S.C. § 5036.

The dispositional hearing must occur within twenty court days after a juvenile is adjudicated delinquent. 18 U.S.C. § 5037(a).

### **Juvenile not in custody**

The juvenile must be tried within seventy days from the date of filing of the charging information or from the date the juvenile appeared before a judicial officer of the court in which such charge is pending, whichever date occurs last. 18 U.S.C. §§ 3161 et seq.<sup>11</sup>

The dispositional hearing must occur within twenty court days after a juvenile is adjudicated delinquent. 18 U.S.C. § 5037(a).

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11. But see Model Statement of the Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases (Committee on the Administration of the Criminal Law of the Judicial Conference of the United States) (1979) (except as specifically provided, the time limits are not applicable to proceedings under the FJDA).

## **1.12 Mental competency in criminal matters**

The mental competency of a defendant may come before the court in a number of different contexts. The most important are:

- competency to stand trial;
- competency to plead guilty;
- competency to commit the crime with which defendant is charged (e.g., ability to form the requisite intent);
- competency after acquittal by reason of insanity;
- competency to be sentenced;
- mental condition as it bears on the sentence to be imposed;
- civil commitment of a convicted offender in need of care or treatment for a mental condition;

The Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4247, is now controlling with respect to most situations involving the mental competency of a defendant. It is a complex enactment, the provisions of which are spelled out in great detail. Its provisions must be read with care and complied with meticulously.

### A. Competency to stand trial (18 U.S.C. § 4241):

1. 18 U.S.C. § 4241(a) provides that after the commencement of a prosecution and prior to sentencing, either the U.S. attorney or defense counsel may move for a hearing to determine defendant's mental competency. The court shall grant the motion, or shall order a hearing on its own motion, if there is reasonable cause to believe that defendant is not mentally competent:
  - (a) to understand the nature and consequences of the proceedings against him; or
  - (b) to assist properly in his defense.
2. Prior to the hearing the court may (and probably should) order that a psychiatric or psychological examination be

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conducted and that a report be filed with the court. 18 U.S.C. § 4241(b).

- (a) The examiner should be asked for his or her opinion as to whether defendant is suffering from a mental disease or defect rendering defendant mentally incompetent to understand the nature and consequences of the proceedings against him or her or to assist properly in his or her defense. The examiner should be requested to have the report include all of the information required by 18 U.S.C. § 4247(c)(1) through (c)(4)(A).
  - (b) The psychiatrist or psychologist should not be asked to determine defendant's mental competency at the time the alleged offense was committed.
  - (c) To secure a § 4241 examination the court may, if necessary, order defendant committed to a suitable hospital or facility for a reasonable period not to exceed thirty days, even if defendant is not otherwise confined. For just cause this commitment may be extended by fifteen days. 18 U.S.C. § 4247(b).
3. The court shall then hold an evidentiary hearing, to be conducted pursuant to the provisions of 18 U.S.C. § 4247(d). Defendant "shall be represented by counsel." *Id.*
4. At the conclusion of the evidentiary hearing, the court shall make a finding by a preponderance of the evidence as to the accused's mental competency to stand trial. 18 U.S.C. § 4241(d).
  - (a) A finding of mental competency to stand trial does not prejudice a plea of not guilty by reason of insanity, because the court's finding is not admissible in evidence on the issue of guilt or innocence. 18 U.S.C. § 4241(f).
  - (b) If defendant is found to be incompetent to stand trial, the court shall commit the defendant to the custody of the Attorney General. 18 U.S.C. § 4241(d). The trial



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court should receive periodic reports as to defendant's mental condition.

- (c) The Attorney General shall hospitalize defendant for a reasonable period not to exceed four months, to determine whether there is a substantial probability that defendant will in the foreseeable future become competent to stand trial. 18 U.S.C. § 4241(d)(1).
- (d) The Attorney General may hospitalize defendant for an additional reasonable period of time if the court finds that within that additional period there is a substantial probability that defendant will become competent to stand trial. 18 U.S.C. § 4241(d)(2).
- (e) If, at the end of the time provided for by 18 U.S.C. § 4241(d), defendant is still not competent to be tried, he or she is subject to further commitment under the provisions of § 4246 if the court finds by *clear and convincing evidence* that releasing defendant would create a substantial risk of bodily injury to another or of serious damage to another's property. The provisions of § 4246 are detailed and complex. To avoid error the court must refer to those provisions and follow them with great care. The report of any § 4246 psychiatric or psychological examination must comply with the requirements of § 4247(c). Any hearing must be held pursuant to the provisions of § 4247(d).
- (f) When the director of the facility certifies to the court that defendant is competent to stand trial, the court must hold a hearing, conducted pursuant to the requirements of 18 U.S.C. § 4247(d). If the court determines that defendant is competent to stand trial, it shall order defendant's discharge from the facility and set the matter down for trial. 18 U.S.C. § 4241(e).

**B. Competency to plead guilty:**

Because a defendant is required to make a knowing and voluntary waiver of certain constitutional rights in entering a guilty plea, the court must, in accepting a Fed. R. Crim. P. 11 plea, be satisfied that defendant has sufficient mental com-

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petency to waive those rights, to make a reasoned choice among the alternatives presented to him or her, and to understand the nature and consequences of the guilty plea (see the colloquy in section 2.01).

If there is any question as to defendant's mental competency to enter a guilty plea, an 18 U.S.C. § 4241 examination should be ordered and a hearing held prior to acceptance of the plea. In requesting such an examination, the court should spell out for the examiner the criteria that the examiner is to apply in determining whether defendant is competent to enter a guilty plea. The examiner should be requested to furnish the information required by § 4247(c), along with an opinion as to defendant's competency to enter a guilty plea.

- C. Competency to commit the crime with which the defendant is charged (Fed. R. Crim. P. 12.2; 18 U.S.C. § 17):
1. If defendant intends to rely on the insanity defense or to introduce expert testimony relating to his or her mental condition, defendant must notify the government attorney in writing of that intention within the time provided for filing pretrial motions or at a later time if so ordered by the court. The court may allow late filing of the notice if good cause is shown. Fed. R. Crim. P. 12.2(a) and (b).
  2. On motion of the government attorney, the court may order defendant to submit to a mental examination by a psychiatrist or other expert designated by the court pursuant to 18 U.S.C. §§ 4241 and 4242. Fed. R. Crim. P. 12.2(c). The examiner should be asked to give his or her opinion as to whether, at the time of the acts constituting the offense, defendant was unable to appreciate the nature and quality or the wrongfulness of his or her acts as a result of a severe mental disease or defect. See 18 U.S.C. § 17(a). The examiner should be requested to include in his or her report all of the information required by § 4247(c).
  3. Defendant bears the burden of proving the defense of insanity by clear and convincing evidence. 18 U.S.C. § 17(b).

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4. No statement made by defendant during a court-ordered mental examination (whether the examination was with or without defendant's consent), no testimony by the expert based on that statement, and no fruit of that statement may be admitted against defendant in any criminal proceeding except on an issue respecting mental condition on which defendant has introduced testimony. Fed. R. Crim. P. 12.2(c).
  5. If defendant fails to provide timely notice to the government attorney of his or her intent to introduce expert testimony relating to an insanity defense, or if he or she fails to submit to an examination, the court may exclude the testimony of any expert witness offered by defendant upon the issue of defendant's mental condition at the time of the alleged criminal offense. Fed. R. Crim. P. 12.2(d).
- D. Competency after acquittal by reason of insanity (18 U.S.C. § 4243):  
If a defendant is found not guilty only by reason of insanity, he or she shall be committed to a suitable facility until such time as he or she is eligible for release under 18 U.S.C. § 4243(f). The provisions of § 4243(e) relating to the confinement and release of a defendant acquitted by reason of insanity are detailed and complex. Those provisions must be followed with meticulous care. Any hearing must comply with the provisions of § 4247(d). Any report of a psychiatric or psychological examination must comply with the requirements of § 4247(c).
- E. Competency to be sentenced:  
Because he or she has the right of allocution at sentencing and must be able to understand the nature of the proceedings, defendant cannot be sentenced if he or she does not have the mental capacity to exercise the right of allocution or to understand the nature of the proceedings.  
If there is any question as to defendant's mental competency to be sentenced, an 18 U.S.C. § 4241 examination should be ordered and a hearing held before sentencing. The

**NOTE**

Serious due process and compulsory process issues may arise if the court excludes expert testimony concerning an insanity defense when a continuance of the trial would be feasible. See *Taliaferro v. Maryland*, 456 A.2d 29, cert. denied, 461 U.S. 948 (1983) (White, J., dissenting).

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court should provide the examiner with the criteria the examiner is to apply in determining whether defendant is competent to be sentenced. The court should request the examiner to include in his or her report all of the information required by § 4247(c). Any hearing must be held pursuant to the requirements of § 4247(d).

F. Mental condition as it bears on sentence imposed:

1. Adult offenders (18 U.S.C. § 3552(b))<sup>1</sup>:

(a) If the court determines that it needs more detailed information about defendant's mental condition as a basis for determining the sentence to be imposed, the court may order a study of defendant.

(b) The study should be conducted by a qualified consultant in the local community, unless the judge finds that there is a compelling reason to have the study done by the Bureau of Prisons or that there are no adequate professional resources in the local community to perform the study.

(1) If the study is to be done in the local community, the court should designate a consultant, usually a psychiatrist or psychologist, to conduct the study and order defendant to submit to the examination. The probation office will assist in identifying people who are qualified and willing to perform such studies; the probation office also can provide funds for this purpose.

(2) If the study is to be done by the Bureau of Prisons, defendant should be committed under 18 U.S.C. § 3552(b) to the custody of the Bureau to be studied. Imposing a provisional sentence is not necessary.

(c) The court order should specify the additional information the court needs before determining the sen-

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1. Subsections (b) and (c) of § 3552 both authorize studies in aid of sentencing. Subsection (c) specifically authorizes a psychiatric or psychological exam, but it appears preferable to rely on the more flexible general authority of § 3552(b).

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tence to be imposed and should inform the examiner of any guideline or policy statement that should be addressed by the study.

- (d) The court order should specify a period for the study, not to exceed sixty days. The period may be extended, at the discretion of the court, for up to sixty more days.
  - (e) To minimize delay if the study is to be done by the Bureau of Prisons, consider directing the probation officer to secure immediate designation of the institution at which the study will be performed, and directing the marshal to transport defendant to that institution by the most expeditious means available.
  - (f) After receiving the report of the study, the court should proceed to sentencing. The report should be disclosed in the same manner as a presentence report. See Fed. R. Crim. P. 32(c)(3)(F).
  - (g) See also U.S.S.G. §§ 5H1.3 and 5K2.13, which delineate the extent to which a defendant's mental or emotional condition may be taken into account under the Sentencing Guidelines.
2. Juvenile offenders (18 U.S.C. § 5037(d)):
- (a) If the court determines that it needs additional information concerning an alleged or adjudicated juvenile delinquent's mental condition, the court may commit the juvenile to the Attorney General's custody for observation and study after notice and a hearing at which the juvenile is represented by counsel.
  - (b) The observation and study of the juvenile must be performed on an outpatient basis, unless the court determines that inpatient observation is necessary to obtain the desired information. If the juvenile has not been adjudicated delinquent, inpatient study can be ordered only with the consent of the juvenile and his or her attorney.

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- (c) The agency selected by the Attorney General shall make a complete study of the juvenile's mental health.
- (d) The Attorney General shall submit to the court and to the juvenile's attorney the results of the study. That report shall be submitted within thirty days of the juvenile's commitment, unless the time for reporting is extended by the court.

G. Civil commitment of convicted offender in need of care or treatment for mental condition (18 U.S.C. § 4244):

Upon motion of defendant or the government or on its own motion, the court may, before sentencing, determine that there is reasonable cause to believe that defendant may be suffering from a mental disease or defect for the treatment of which he or she is in need of custody in a suitable facility. In that event the court shall order a hearing. 18 U.S.C. § 4244(a).

Before the hearing the court may order that a psychiatric or psychological examination of defendant be conducted and that a report be filed with the court, pursuant to § 4247(b) and (c). If it is the opinion of the examiner that defendant is suffering from a mental disease or defect but that the condition is not such as to require defendant's custody for care or treatment, the examiner shall give his or her opinion concerning the sentencing alternatives that could best accord defendant the kind of treatment he or she does need. 18 U.S.C. § 4244(b).

The hearing shall be conducted pursuant to the provisions of § 4247(d).

If, after the hearing, the court finds by a preponderance of the evidence that defendant is suffering from a mental disease or defect and that, in lieu of being sentenced to imprisonment, he or she should be committed to a suitable facility for care or treatment, the court shall commit defendant to the custody of the Attorney General for care or treatment in a suitable facility. Such commitment shall constitute a provisional sentence of imprisonment to the maximum term

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authorized by law for the offense for which defendant was found guilty. 18 U.S.C. § 4244(d).

When the director of the facility to which defendant is sent certifies that defendant is no longer in need of custody for care or treatment, the court shall proceed to sentencing, provided that the provisional sentence has not yet expired. 18 U.S.C. § 4244(e).

**Other FJC sources**

The Bail Reform Act of 1984 at 27 (2d ed. 1993)

Pattern Criminal Jury Instructions 67 (1987)





## 1.13 Referrals to magistrate judges (criminal matters)

Listed below are duties in criminal matters that are covered in Sections 1, 2, and 4 of this *Benchbook* and that may be referred to magistrate judges. Most districts have local rules or standing orders governing referrals to magistrate judges.

For a more comprehensive listing of the duties magistrate judges may perform, see *Inventory of United States Magistrate Judge Duties*, prepared by the staff of the Judicial Conference Committee on the Administration of the Magistrate Judges System (February 1995). This inventory is available from the Administrative Office of the U.S. Courts upon request and is also found in Chapter 3, “Jurisdiction,” of the *Legal Manual for U.S. Magistrate Judges*, prepared by the Administrative Office.

A magistrate judge may conduct:

1. bail proceedings and detention hearings. 18 U.S.C. §§ 3041, 3141 et seq.; 28 U.S.C. § 636(a)(2). (See 1.03: Release or detention pending trial.)
2. arraignments, and may take not guilty pleas in felony cases.<sup>1</sup> 28 U.S.C. § 636(b)(1)(A). (See 1.07: Arraignment and plea.)
3. trials, and may and enter sentences in misdemeanor cases with the written consent of defendants. 18 U.S.C. § 3401; 28 U.S.C. § 636(a)(3), (4). A judgment of conviction by a magistrate judge may be appealed to the district court. 18 U.S.C. § 3402. Fed. R. Crim. P. 58 governs trials and appeals of misdemeanors and petty offenses. (See generally 2.03: Trial outline (criminal case).)
4. pretrial matters:

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1. Note that two circuits have held that a magistrate judge may take a plea of guilty in a felony case if the defendant consents. See *United States v. Ciapponi*, 77 F.3d 1247 (10th Cir. 1996); *United States v. Williams*, 23 F.3d 629 (2d Cir. 1994).

Section 1.13: Referrals to magistrate judges (criminal matters)

- (a) A magistrate judge may hear and determine non-dispositive pretrial matters in felony cases,<sup>2</sup> including discovery and appointment of counsel. A district court may reconsider a magistrate judge’s ruling on a non-dispositive matter if it is “clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A).
- (b) A magistrate judge may hear and submit to the district court proposed findings of fact and recommended determinations of dispositive pretrial matters such as a motion to suppress evidence or to dismiss an indictment. 28 U.S.C. § 636(b)(1)(B). A district court must make a de novo determination of those portions of proposed findings and recommendations to which the parties object, 28 U.S.C. § 636(b)(1)(C), but need not hold a de novo hearing of all the evidence, *United States v. Raddatz*, 447 U.S. 667 (1980).

See generally 2.03: Trial outline (criminal case).

- 5. voir dire in a felony case, if the parties consent. *Peretz v. United States*, 111 S. Ct. 2661 (1991). A magistrate judge may not conduct voir dire in a felony trial if defendant objects. *Gomez v. United States*, 490 U.S. 858 (1989). (See 2.06: Standard voir dire questions—criminal.)
- 6. probation and supervised release modification hearings:
  - (a) A magistrate judge may revoke, modify, or reinstate probation and modify, revoke, or terminate supervised release if any magistrate judge imposed the probation or supervised release in a misdemeanor case. 18 U.S.C. § 3401(d), (h).
  - (b) In other cases, a district court judge may designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release, and to submit to the district judge proposed findings of fact and rec-

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2. The Supreme Court held that decisions touching the core trial features of a felony case may be delegated to a magistrate judge only if expressly authorized by statute. *Gomez v. United States*, 490 U.S. 858 (1989).

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commend disposition under 18 U.S.C. § 3583(e). 18 U.S.C. § 3401(i).<sup>3</sup>

See generally 4.02: Revocation of probation or supervised release.

7. an omnibus hearing, subject to any right of review before a district court of dispositive matters. 28 U.S.C. § 636(b)(1)(A) and (B).
8. extradition hearings. 18 U.S.C. § 3184; *Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990), *cert. dismissed*, 111 S. Ct. 2844 (1991). (See 7.05: Foreign extradition proceedings.)
9. “[A]dditional duties [that] are not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. § 636(b)(3). For examples of additional duties and case law on § 636(b)(3), see *Inventory of United States Magistrate Judge Duties* 88–109.

**Other FJC sources**

Manual for Complex Litigation, Third 264–65 (1995)

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3. The Ninth Circuit held that neither 28 U.S.C. § 636 nor 18 U.S.C. § 3401 authorize a magistrate judge to conduct probation revocation hearings in a *felony* case without defendant’s consent. See *United States v. Colacurcio*, 84 F.3d 326, 329–34 (9th Cir. 1996) (reversed). See also *United States v. Curry*, 767 F.2d 328, 331 (7th Cir. 1985) (magistrate judge not authorized by 28 U.S.C. § 636(b)(3) to conduct probation revocation hearings without defendant’s consent); *Banks v. United States*, 614 F.2d 95, 97–98 (6th Cir. 1980) (same).



## **2.01 Taking pleas of guilty or nolo contendere**

Fed. R. Crim. P. 11

### **Introductory note**

This section is intended to serve as a guide to district judges when they conduct the formal plea taking, whether it occurs before or after review of the presentence report. It is important to emphasize that, while the plea of guilty is entered at the Rule 11 proceeding, the court may defer deciding whether to accept the terms of a plea agreement until after review of the presentence report.<sup>1</sup> If after review of the report the district court rejects an agreement made pursuant to Rule 11(e)(1)(A) or (C), the court shall give defendant the option to withdraw the plea. In either event, the judge's goal in taking the plea must be to establish that defendant is competent, that the plea is free and voluntary, that the defendant understands the charges and penalties, and that there is a factual basis for the plea. This section is not intended to be all-inclusive. Circumstances may require that additional matters be established of record. In some cases, moreover, the court may find it necessary to resolve disputes about the presentence report before determining whether a plea agreement is acceptable. See 4.01: Guideline sentencing.

Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not be familiar to persons from different cultures.

Some courts have developed Application for Permission to Enter Plea of Guilty forms and Written Plea Agreement forms. If used, such forms do not obviate the need for complete oral proceedings in open court that meet the requirements of Fed. R. Crim. P. 11.

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1. Fed. R. Crim. P. 11(e)(2); U.S.S.G. § 6B1.1(c), p.s.

## Outline

- A. Determine, on the record, the purpose of defendant's appearance, that is, obtain a statement from defense counsel<sup>2</sup> that defendant wishes to enter a plea of guilty (or nolo contendere).
- B. If it has not previously been established, determine whether the plea is being made pursuant to a plea agreement of any kind. If so, require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(e)(2).
- C. Have the clerk administer oath to defendant.<sup>3</sup>
- D. Ask defendant:
  1. Do you understand that you are now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making a false statement? [See Fed. R. Crim. P. 11(c)(5).]
  2. What is your full name?
  3. How old are you?
  4. How far did you go in school?
  5. Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?  
[*Note:* If the answer to this question is yes, pursue the subject with defendant and with counsel in order to determine that defendant is currently competent to plead.]
  6. Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind?

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2. If defendant lacks counsel, you must advise defendant of the right to an attorney. See 1.02: Assignment of counsel or pro se representation; Fed. R. Crim. P. 11(c)(2).

3. An oath is not required by Fed. R. Crim. P. 11 but is strongly recommended to avoid any subsequent contention in a proceeding under 28 U.S.C. § 2255 that defendant did not answer truthfully at the taking of the plea because he or she was not sworn.

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[*Note:* Again, if the answer is yes, pursue the subject with defendant and with counsel to determine that defendant is currently competent to plead.]

7. Have you received a copy of the indictment (information)<sup>4</sup> pending against you—that is, the written charges made against you in this case—and have you fully discussed those charges, and the case in general, with Mr./Ms. \_\_\_\_\_ as your counsel?
  8. Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney, Mr./Ms. \_\_\_\_\_?
  9. Is your willingness to plead guilty (nolo contendere) the result of discussions that you or your attorney have had with the attorney for the government? [See Fed. R. Crim. P. 11(d).]
- E. *If there is a plea agreement of any kind*, ask defendant:
1. [If the agreement is written:]  
Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?
  2. Does the plea agreement represent in its entirety any understanding you have with the government?
  3. Do you understand the terms of the plea agreement?
  4. Has anyone made any other or different promise or assurance of any kind to you in an effort to induce you plead guilty (nolo contendere) in this case?
  5. [*If the terms of the plea agreement are nonbinding recommendations pursuant to Rule (11)(e)(1)(B):*<sup>5</sup> ]

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4. If the case involves a felony offense being prosecuted by information rather than indictment, and if a waiver of indictment has not previously been obtained in open court (see Fed. R. Crim. P. 7(b)), refer to 1.06: Waiver of indictment.

5. Note that a plea agreement may contain factual stipulations which, unless part of a Rule 11(e)(1)(C) agreement, are not binding under the Rules or the Guidelines. However, some cases have held that a factual stipulation that directly affected the severity of the sentence should have been construed as a Rule 11(e)(1)(C) agreement, or that the stipulation was otherwise relied on by

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Do you understand that the terms of the plea agreement are merely recommendations to the court—that I can reject the recommendations without permitting you to withdraw your plea of guilty and impose a sentence that is more severe than you may anticipate?

6. *[If any or all of the terms of the plea agreement are pursuant to Rule 11(e)(1)(A) or (C):]*

Do you understand that if I choose not to follow the terms of the plea agreement [if some, but not all, terms are binding, identify those terms] I will give you the opportunity to withdraw your plea of guilty, and that if you choose not to withdraw your plea I may impose a more severe sentence, without being bound by the plea agreement [or the specific terms rejected by the court]?

- F. *If there is no plea agreement* of any kind, ask defendant:

Has anyone made any promise or assurance to you of any kind in an effort to induce you to plead guilty (nolo contendere) in this case? [See Fed. R. Crim. P. 11(d).]

- G. Ask defendant:

Has anyone attempted in any way to force you to plead guilty (nolo contendere) in this case? Are you pleading guilty of your own free will because you are guilty? [See Fed. R. Crim. P. 11(d).]

- H. *If the plea relates to a felony offense*, consider asking defendant:

Do you understand that the offense(s) to which you are pleading guilty (nolo contendere) is a (are) felony offense(s), that if your plea is accepted you will be adjudged guilty of that offense, and that such adjudication

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the parties so that it should have been followed or defendant allowed to withdraw the plea. *See, e.g.*, United States v. Bohn, 959 F.2d 389 (2d Cir. 1992); United States v. Torres, 926 F.2d 321 (3d Cir. 1991); United States v. Kemper, 908 F.2d 33 (6th Cir. 1990); United States v. Jeffries, 908 F.2d 1520 (11th Cir. 1990); United States v. Mandell, 905 F.2d 970 (6th Cir. 1990). *See also* Guideline Sentencing: An Outline of Appellate Case Law, at section IX.A.4 (Federal Judicial Center 1996). Courts are advised to discuss any such stipulations before accepting the plea and to warn defendant that it might not follow them and that defendant will not be allowed to withdraw the plea.



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may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?

- I. Inform defendant of the following:
  1. The maximum possible penalty provided by law, and any mandatory minimum penalty:
    - (a) *For drug offenses*: Determine whether the drug quantity involved or other aggravating factors will trigger application of a mandatory minimum sentence. Because this may not be known at the time the plea is taken, the court is advised to warn defendant of any *possible* maximum and mandatory minimum sentences that may be imposed after a final determination of quantity and other conduct.
    - (b) Determine whether defendant faces a mandatory minimum sentence or an increase in the statutory maximum sentence because of one or more prior firearms offenses, violent felonies, or drug offenses. If this is not known at the time of the plea, advise defendant of the *possible* maximum sentence.
    - (c) Include the duration of any authorized or mandatory term of supervised release, and ask defendant:

Do you understand that if you violate the conditions of supervised release, you can be given additional time in prison?
    - (d) *If the offense carries a maximum sentence of twenty-five years or more*, include a reference to the unavailability of a probation sentence under 18 U.S.C. § 3561(a)(1).
  2. *If applicable*, that the court may also order, or be required to order,<sup>6</sup> defendant to make restitution to any victim of the offense.
  3. *If applicable*, that the court may require defendant to forfeit certain property to the government.

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6. See 18 U.S.C. § 3663A, Mandatory restitution to victims of certain crimes (effective April 24, 1996).

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4. *If the offense involved fraud or other intentionally deceptive practices*, that the court may order defendant to provide notice of the conviction to victims of the offense. See 18 U.S.C. § 3555.
  5. That for each offense, defendant must pay a special assessment of \$50 (\$25 for a Class A misdemeanor, \$10 for Class B, \$5 for Class C or infraction) required by 18 U.S.C. § 3013.
- J. Ask defendant:
- Do you understand those possible consequences of your plea? [See Fed. R. Crim. P. 11(c)(1).]
- K. Inform defendant that, under the Sentencing Reform Act of 1984, the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case.
- L. Ask defendant:
1. Have you and your attorney talked about how the sentencing guidelines might apply to your case?  
*[Note: If there is a plea agreement that a specific sentence will be imposed (Fed. R. Crim. P. 11(e)(1)(C)), skip to question 4.]*
  2. Do you understand that the court will not be able to determine the guideline sentence for your case until after the presentence report has been completed and you and the government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer, and that the sentence imposed may be different from any estimate your attorney may have given you?
  3. Do you also understand that, after your guideline range has been determined, the court has the authority in some circumstances to depart from the guidelines and impose a sentence that is more severe or less severe than the sentence called for by the guidelines?

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4. Do you also understand that parole has been abolished and that if you are sentenced to prison you will not be released on parole?

M. Ask defendant:

1. Do you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?
2. *[If the plea agreement involves a waiver of the right to appeal the sentence, ask defendant:]*

Do you understand that by entering into this plea agreement and entering a plea of guilty you will have waived or given up your right to appeal all or part of this sentence?

*[The court should discuss the specific terms of the waiver with defendant to ensure that the waiver is knowingly and voluntarily entered into and that defendant understands the consequences.<sup>7</sup>]*

N. Ask defendant:

1. Do you understand that you have a right to plead not guilty to any offense charged against you and to persist in that plea; that you would then have the right to a trial by jury; that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt; and that you would have the right to the assistance of counsel for your defense, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to the issuance

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7. Most circuits have held that a defendant may waive the right to appeal a sentence if the waiver is knowing and voluntary. *See, e.g.,* United States v. Ashe, 47 F.3d 770 (6th Cir. 1995); United States v. Schmidt, 47 F.3d 188 (7th Cir. 1995); United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993); United States v. Salcido-Contreras, 990 F.2d 51 (2d Cir. 1993); United States v. Melancon, 972 F.2d 566 (5th Cir. 1992); United States v. Rutan, 956 F.2d 827 (8th Cir. 1992); United States v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990); United States v. Wiggins, 905 F.2d 51 (4th Cir. 1990). *See also* Guideline Sentencing: An Outline of Appellate Case Law, at section IX.A.5 (Federal Judicial Center 1996). Note that the waiver may not be enforceable if the sentence is not in accordance with the terms of the plea agreement.

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of subpoenas or compulsory process to compel the attendance of witnesses to testify in your defense? Do you understand that should you decide not to testify or put on any evidence, these facts cannot be used against you?

2. Do you further understand that by entering a plea of guilty (*nolo contendere*), if that plea is accepted by the court, there will be no trial and you will have waived or given up your right to a trial as well as those other rights associated with a trial as I just described them?

[See Fed. R. Crim. P. 11(c)(3) and (4).]

O. Inform defendant of the charge(s) to which he or she is pleading guilty (*nolo contendere*) by reading or summarizing the indictment (information). Then:

1. further explain the essential elements of the offense, i.e., what the government would be required to prove at trial;<sup>8</sup> and/or (except in pleas of *nolo contendere*)
2. have defendant explain and assent to the facts constituting the crime(s) charged. See Fed. R. Crim. P. 11(c)(1).

P. *In the case of a plea of guilty (including an Alford plea<sup>9</sup>),* have government counsel make a representation concerning the facts the government would be prepared to prove at trial (to establish an independent factual basis for the plea). See Fed. R. Crim. P. 11(f).

*If defendant's plea is nolo contendere,* he or she is neither admitting nor denying guilt.<sup>10</sup> Fed. R. Crim. P. 11(f) is therefore not applicable. The court may wish to consider

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8. Reference may be made to the standard or pattern jury instructions normally used in your court.

9. *North Carolina v. Alford*, 400 U.S. 25 (1970). See also *U.S. v. Tunning*, 69 F.3d 107, 110–14 (6th Cir. 1995) (discussing establishment of factual basis for *Alford* plea and difference between *Alford* plea and plea of *nolo contendere*).

10. The plea of *nolo contendere* is never entertained as a matter of course. Fed. R. Crim. P. 11(b) provides that the plea may be entered “with the consent of the court.” It provides further that the plea shall be accepted “only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.” In general, courts accept a plea of *nolo contendere* only in certain types of cases involving nonviolent crimes where civil implications may arise from a guilty plea.

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having the government make a representation concerning the facts of the case.

- P. If there is a plea agreement involving dismissal of other charges, or an agreement that a specific sentence will be imposed, and if consideration of the agreement is to be deferred, ask defendant:

Do you understand that if you plead guilty, a presentence report will be prepared, and I will then consider whether or not to accept the plea agreement, and that if I decide to reject the plea agreement, you will then have an opportunity to withdraw your plea and change it to not guilty?

- Q. Ask defendant:

How do you now plead to the charge: guilty or not guilty?

- R. If you are satisfied with the responses given during the hearing, make the following finding on the record:

It is the finding of the court in the case of *United States v. \_\_\_\_\_* that the defendant is fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty (nolo contendere) is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea is therefore accepted, and the defendant is now adjudged guilty of that offense.

- S. If a presentence report has been reviewed before plea taking or is not required (see Fed. R. Crim. P. 32(b)(1)), proceed to disposition. (See 4.01: Guideline sentencing.) Otherwise, inform defendant:

1. that a written presentence report will be prepared by the probation office to assist the judge in sentencing;
2. that defendant will be asked to give information for the report, and that his or her attorney may be present if defendant wishes;

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3. that the court shall permit defendant and counsel to read the presentence report and file any objections to the report before the sentencing hearing (Fed. R. Crim. P. 32(b)(6)); and
  4. that defendant and his or her counsel shall have an opportunity to speak on behalf of defendant at the sentencing hearing (Fed. R. Crim. P. 32(c)(1)).
- T. Refer defendant to the probation officer for a presentence investigation and report (pursuant to Fed. R. Crim. P. 32(b)(1)), set disposition date for sentencing, and determine bail or conditions of release pending sentencing. See 2.11: Release or detention pending sentence or appeal.
1. If defendant has been at liberty on bond or personal recognizance, invite defense counsel to argue for release pending sentencing. See 18 U.S.C. § 3143(a). Give the U.S. attorney an opportunity to respond.
  2. If defendant is to be released pending sentencing, advise defendant:
    - (a) when and where he or she is required to appear for sentencing;
    - (b) that failure to appear as required is a criminal offense for which he or she could be sentenced to imprisonment;
    - (c) that all the conditions on which he or she was released up to now continue to apply; and
    - (d) that the penalties for violating those conditions can be severe.

## 2.02 Taking pleas of guilty or nolo contendere (corporation)

- A. Before accepting a plea of guilty or nolo contendere from the representative of a corporation, you will want to satisfy yourself:
  1. that the person appearing before you is an officer or authorized employee of the corporation;
  2. that the board of directors is empowered to authorize a person to enter a plea of guilty or nolo contendere to a charge brought against the corporation;
  3. that the person before you is authorized by a valid resolution to enter a plea of guilty or nolo contendere to the charge before you;
  4. that the corporation is financially able to pay a substantial fine that could be imposed by the court for the charge involved in the plea of guilty or nolo contendere.
- B. After receiving the information set out above and satisfying yourself that the plea can be taken from the person before you, the person should be placed under oath and informed of the following:
  1. the nature of the charge(s) to which the plea is offered;
  2. the mandatory minimum penalty provided by law, if any;
  3. the special assessment for each offense of \$200 (\$125 for a Class A misdemeanor, \$50 for Class B, \$25 for Class C or infraction) required by 18 U.S.C. § 3013;
  4. the maximum possible penalty provided by law;
  5. *if applicable*, that the court may also order the corporation to make restitution to any victim of the offense;
  6. *if applicable*, that the court may require the corporation to forfeit certain property to the government;
  7. *if the offense involved fraud or other intentionally deceptive practices*, that the court may order the corporation to provide notice of the conviction to victims of the offense (see 18 U.S.C. § 3555);

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8. if appropriate, the right to be represented by an attorney;
  9. that the corporation has the right to plead not guilty or to persist in that plea if it has already been made;
  10. that the corporation has a right to be tried by a jury and at that trial has the right to:
    - (a) the assistance of counsel;
    - (b) confront and cross-examine witnesses against the corporation;
  11. that if the corporation pleads guilty, there will be no further trial of any kind;
  12. that by pleading guilty for the corporation the representative of the corporation waives the corporation's right to trial;
  13. that the court will ask the representative of the corporation questions about the offense before the court and that if he or she answers these questions, under oath, on the record, and in the presence of counsel, the answers may later be used against the representative in a prosecution for perjury or false statement;
  14. the essential elements of the offense that are involved, and whether the representative understands what the government must prove.
- C. The court will then inquire:
1. whether the corporation's willingness to allow the representative to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the corporation or its attorney;
  2. whether the plea is voluntarily made on behalf of the corporation and not as a result of force, threats, or promises apart from a plea agreement;
  3. whether there is a plea agreement and, if so, what the agreement is.
- D. If you are satisfied with the representative's responses, ask how he or she pleads: guilty, not guilty, or nolo contendere.
- E. If the plea is guilty, follow your normal Fed. R. Crim. P. 11 procedure for establishing the factual basis in the case. If the



*Section 2.02: Taking pleas of guilty or nolo contendere (corporation)*

plea is nolo contendere, the court may wish to consider having the government make a representation concerning the facts of the case.

- F. Make the required findings concerning the establishment of the plea, which should include findings concerning items A.1, A.2, A.3, and A.4 above, relating to the propriety of taking the plea from the representative of the corporation.
- G. Make a finding on the guilt of the corporation after the guilty or nolo contendere plea.
- H. Inform the representative:
  - 1. that a written presentence report will be prepared by the probation office to assist the judge in sentencing;
  - 2. that the corporation, the representative, or both will be required to give information for the report and that the corporation's attorney may be present;
  - 3. that the representative and the corporation's counsel shall be afforded the opportunity to speak on behalf of the corporation at the sentencing hearing (Fed. R. Crim. P. 32(c)(1)); and
  - 4. that the court shall permit the representative and counsel to read the presentence report before the sentencing hearing (Fed. R. Crim. P. 32(b)(6)).
- I. Advise the representative of the date, time, and place of the sentencing hearing, and order him or her to appear.



## 2.03 Trial outline (criminal case)

1. Have the case called for trial.<sup>1</sup>
2. Jury is selected (see 2.05: Jury selection—criminal).
3. Give preliminary instructions to the jury (see 2.07: Preliminary jury instructions in criminal case).
4. Ascertain whether any party wishes to invoke the rule to exclude from the courtroom witnesses scheduled to testify in the case.
5. Government counsel makes opening statement.
6. Defense counsel makes opening statement (unless permitted to reserve).
7. Government counsel calls witnesses.
8. Government rests.
9. Motion for judgment of acquittal. Fed. R. Crim. P. 29(a) (see 2.10: Trial and post-trial motions).
10. Defense counsel makes opening statement if he or she has been permitted to reserve.
11. Defense counsel calls witnesses for the defense.
12. Defense rests.
13. Counsel call rebuttal witnesses.
14. Government rests on its entire case.
15. Defense rests on its entire case.
16. Motion for judgment of acquittal. Fed. R. Crim. P. 29(a), (b) (see 2.10: Trial and post-trial motions).
17. Out of hearing of the jury, rule on counsel's requests for instructions and inform counsel as to the substance of the court's charge. Fed. R. Crim. P. 30.
18. Closing argument by prosecution, closing argument by defense, rebuttal by prosecution. Fed. R. Crim. P. 29.1.

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1. Fed. R. Crim. P. 43 prohibits trial in absentia of a defendant who is not present at the beginning of trial. *Crosby v. United States*, 113 S. Ct. 748 (1993).

Section 2.03: Trial outline (criminal case)

19. Charge the jury (see 2.08: General instructions to jury at end of criminal case). Fed. R. Crim. P. 30. In the court's discretion, the jury may be instructed before closing arguments.
20. Rule on objections to the charge and make any appropriate additional charge. Fed. R. Crim. P. 30.
21. Excuse and thank alternate jurors. Fed. R. Crim. P. 24(c).
22. Instruct the jury to go to the jury room and commence its deliberations.
23. Determine which exhibits are to be sent to the jury room.
24. Have the clerk give the exhibits and the verdict forms to the jury.
25. Recess court during the jury deliberations.
26. Before responding to any communications from the jury, consult with counsel on the record (see 2.08: General instructions to jury at end of criminal case).
27. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide either for their overnight sequestration or permit them to separate after admonishing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.
28. If the jury reports that they cannot agree on a verdict, determine by questioning whether they are hopelessly deadlocked. Do not inquire as to the numerical split of the jury. If you are convinced that the jury is hopelessly deadlocked, declare a mistrial. If you are not so convinced, direct them to resume their deliberations. Consider giving your circuit's approved *Allen*-type charge to the jury before declaring a mistrial.
29. When the jury has agreed on a verdict, reconvene court and take the verdict (see 2.09: Verdict—criminal).
30. Poll the jury on the request of either party (see 2.09: Verdict—criminal). Fed. R. Crim. P. 31(d).
31. Thank and discharge the jury.

32. If the verdict is “not guilty,” discharge defendant.
33. If defendant has been found guilty, determine whether defendant should be committed to the custody of the U.S. marshal or released on bail (see 2.11: Release or detention pending sentence or appeal).
34. Fix a time for post-trial motions.
35. Adjourn or recess court.

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* (4th ed. 1996)

For a discussion of case-management techniques in civil trials, some of which may also be helpful in the management of criminal trials, see *Manual for Litigation Management and Cost and Delay Reduction* 141–47 (1992)

For discussions of trial management in complex civil and criminal litigation, see *Manual for Complex Litigation, Third* 127–63, 286–97 (1995)



## **2.04 Findings of fact and conclusions of law in criminal cases and motions**

### A. When required

#### 1. Fed. R. Crim. P. 23(c):

In all cases tried without a jury, “the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially.”

#### 2. Fed. R. Crim. P. 12(e) and (g)—Ruling upon Motions:

“Where factual issues are involved in determining a motion, the court shall state its essential *findings* on the record.” (Emphasis added.)

### B. Form

#### 1. Fed. R. Crim. P. 23(c) provides that, after a trial without a jury, “[s]uch findings [of fact] may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.”

#### 2. Fed. R. Crim. P. 12(e) provides that “[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record.”

#### 3. Fed. R. Crim. P. 12(g) provides that “[a] verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.”





## 2.05 Jury selection—criminal

The Benchbook Committee recognizes that there is no uniform recommended procedure for selecting jurors to serve in criminal or civil cases and that judges will develop the patterns or procedures most appropriate for their districts and their courts. Section 2.06, however, provides an outline of standard voir dire questions. For a sample juror questionnaire, see Sample Form 37 on page 317 of the *Manual for Litigation Management and Cost and Delay Reduction* (Federal Judicial Center 1992). A discussion of *Batson* cases and anonymous juries is included below.

The 1982 Federal Judicial Center publication *Jury Selection Procedures in United States District Courts*, by Gordon Bermant, contains a detailed discussion of several different methods of jury selection. The Center sends this publication to all new district and magistrate judges. Copies are also available on request. See also the section on jury selection and composition (pp. 580–82) in Judge William W Schwarzer’s article “Reforming Jury Trials” in volume 132 of *Federal Rules Decisions* (1990).

### Peremptory challenges

Judges should be aware of the cases, beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), that prohibit peremptory challenges based on race. *Batson* has been extended to cover a criminal defendant’s peremptory challenges, *Georgia v. McCollum*, 112 S. Ct. 1348 (1992), and a defendant may object to race-based exclusions whether or not he or she is the same race as the challenged juror, *Powers v. Ohio*, 499 U.S. 400 (1991). Peremptory strikes based on gender are also prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

The Supreme Court has left it to the trial courts to develop rules of procedure and evidence for implementing these decisions. It has, however, set out a three-step inquiry for resolving a *Batson* challenge (see *Purkett v. Elem*, 115 S. Ct. 1769, 1770–71 (1995)):

1. The opponent of a peremptory challenge must make out a prima facie case of discrimination.

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2. The burden of production then shifts to the proponent of the strike, who must come forward with a nondiscriminatory (i.e., race- and gender-neutral) explanation of the strike.
3. Trial court must then decide whether the opponent of the strike has proved purposeful discrimination.

The Benchbook Committee suggests that judges:

- conduct the above inquiry on the record but outside of the jury’s hearing, to avoid “tainting” the venire by discussions of race, gender, or other characteristics of potential jurors; and
- use a method of jury selection which requires litigants to exercise challenges at sidebar or otherwise outside the jurors’ hearing and in which no venire members are dismissed until all of the challenges have been exercised. See *Jury Selection Procedures in United States District Courts*, infra.

In this way, jurors are never aware of *Batson* discussions or arguments about challenges and therefore can draw no adverse inferences by being temporarily dismissed from the venire and then recalled.<sup>1</sup>

### **Anonymous Juries<sup>2</sup>**

In rare cases, a district court may determine that a jury should be impaneled anonymously because of concerns about juror safety or tampering. The court may enter an order to prevent disclosure of names, addresses, places of employment, and other facts that

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1. For a summary of procedures that courts developed for criminal cases in the first two years after *Batson*, see Bench Comment, 1988, nos. 3 & 4. For a discussion of voir dire practices in light of *Batson*, see Chambers to Chambers, Vol. 5, No. 2 (1987).

2. Note that, with one exception, anonymous juries are not allowed in capital cases. See 18 U.S.C. § 3432 (defendant charged with capital offense must be given list of potential jurors and witnesses three days before trial, “except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person”) (exception added Sept. 13, 1994).

might reveal the identity of jurors.<sup>3</sup> The Benchbook Committee neither advocates nor discourages use of an anonymous jury but notes that courts must be careful to take steps to minimize potential prejudice to defendants from this procedure. Listed below are the main “rules” that may be summarized from circuit court decisions on this issue.<sup>4</sup>

1. There must be strong reason to believe the jury needs protection. For example, anonymous juries have been approved in cases involving organized crime figures who, currently or previously, attempted to or did influence, intimidate, or harm witnesses, jurors, or judges. Extensive media coverage may be considered in combination with other factors.
2. The court must take reasonable precautions to minimize any prejudicial effects on the defendant and ensure that fundamental rights to an impartial jury and fair trial are not infringed. For example, the court should:
  - (a) ensure that the voir dire allows defendant to adequately assess the prospective jurors and uncover possible bias as to defendant or the issues in the case. The court should conduct a thorough and searching voir dire, which could include use of written questionnaires.

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3. The Third Circuit held that it is within the trial court’s discretion to hold an evidentiary hearing on whether the facts warrant an anonymous jury. It also held that the court is not required to make findings and give reasons on the record for using an anonymous jury, but suggested that doing so is the “better practice.” See *United States v. Eufrazio*, 935 F.2d 553 (3d Cir.), *cert. denied sub nom. Idone v. United States*, 112 S. Ct. 340 (1991).

4. Several circuits have now ruled on this issue and approved the use of anonymous juries under appropriate circumstances. See *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *United States v. Krout*, 66 F.3d 1420 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 963 (1996); *United States v. Edmond*, 52 F.3d 1080 (D.C. Cir.) (per curiam), 116 S. Ct. 539 (1995); *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 2558 (1995); *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1617 (1993); *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991) (also discussing several prior Second Circuit cases), *cert. denied*, 112 S. Ct. 3029 (1992); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir.), *cert. denied*, 488 U.S. 910 (1988).

*Section 2.05. Jury selection—criminal*

- (b) give plausible and nonprejudicial reasons to ensure that the explanation for jury anonymity does not adversely reflect on defendant. The court may, for example, assure jurors that this is a common practice or that it is to protect them from unwanted media attention.<sup>5</sup> It may be advisable to repeat the explanation during jury instructions before deliberation, to stress that the need for anonymity should have no effect on the verdict.

**Other FJC sources**

For a discussion of techniques for assisting the jury in civil trials, some of which may also be helpful in criminal trials, see Manual for Litigation Management and Cost and Delay Reduction 41-42 (1992)

Donald S. Voorhees, Manual on Recurring Problems in Criminal Trials 11–19 (4th ed. 1996)

Manual for Complex Litigation, Third 288-91 (1995)

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5. For examples of explanations, see *Ross*, *supra* note 3, at n.27; *United States v. Tutino*, 883 F.2d 1125 (2d Cir. 1989), *cert. denied*, 493 F.2d 1081 (1990); *Scarfo*, *supra* note 3, at Appendix; *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

## 2.06 Standard voir dire questions—criminal

The following outline for an initial in-depth voir dire examination of the entire panel by the court assumes that:

1. if there are affirmative responses to any questions, follow-up questions will be addressed to the juror(s) (at sidebar, if such questions concern private or potentially embarrassing matters);
2. the court and counsel have been furnished with the name, address, age, and occupation of each prospective juror.

If the court conducts the entire examination, it should require counsel to submit proposed voir dire questions before trial to permit the court to incorporate additional questions at the appropriate places in this outline.

1. Have the jury panel sworn.
2. Explain to the jury panel that the purpose of the voir dire examination is:
  - (a) to enable the court to determine whether or not any prospective juror should be excused for cause;
  - (b) to enable counsel for the parties to exercise their individual judgment with respect to peremptory challenges—that is, challenges for which no reason need be given.
3. Explain to prospective jurors that presenting the evidence is expected to take \_\_ days, and ask if this presents a special problem to any of them.
4. Read or summarize the indictment.
5. Ask if any member of the panel has heard or read anything about the case.
6. Ask counsel for the government to introduce himself or herself and counsel associated in the trial, as well as all the witnesses who will testify on the government's presentation of its case in chief. Ask if the jurors:

### NOTE

Fed. R. Crim P. 24(a) provides that the court "may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination."

*Section 2.06: Standard voir dire questions—criminal*

- (a) know any of these persons;
  - (b) had any business dealing with them or were represented by them or members of their firms;
  - (c) had any other similar relationship or business connection with any of them.
7. Ask counsel for each defendant to introduce himself or herself and indicate any witnesses that defendant may choose to call. Ask if the jurors:
- (a) know any of these persons;
  - (b) had any business dealing with them or were represented by them or members of their firms;
  - (c) had any other similar relationship or business connection with any of them.
8. Ask prospective jurors:
- (a) Have you ever served as a juror in a criminal or a civil case or as a member of a grand jury in either a federal or state court?
  - (b) Have you, any member of your family, or any close friend ever been employed by a law enforcement agency?
  - (c) If you answer yes to [either of] the following question[s], or if you do not understand the question[s], please come forward, be seated in the well of the courtroom, and be prepared to discuss your answer with the court and counsel at the bench.
    - (1) Have you ever been involved, in any court, in a criminal matter that concerned yourself, any member of your family, or a close friend either as a defendant, a witness, or a victim?
    - (2) [Only if the charged crime relates to illegal drugs or narcotics, ask:]  
Have you had any experience involving yourself, any member of your family, or any close friend that relates to the use or possession of illegal drugs or narcotics?

- (d) If you are selected to sit on this case, will you be able to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?
- (e) Is there any member of the panel who has any special disability or problem that would make serving as a member of this jury difficult or impossible?

[At this point, if the court is conducting the entire examination, it should ask those questions suggested by counsel that in the opinion of the court are appropriate.]

- (f) Having heard the questions put to you by the court, does any other reason suggest itself to you as to why you could not sit on this jury and render a fair verdict based on the evidence presented to you and in the context of the court’s instructions to you on the law?
9. If appropriate, permit counsel to conduct additional direct voir dire examination, subject to such time and subject matter limitations as the court deems proper, or state to counsel that if there are additional questions that should have been asked or were overlooked, counsel may approach the bench and discuss them with the court.

### **Other FJC sources**

Manual for Complex Litigation, Third 288–89 (1995)





## **2.07 Preliminary jury instructions in criminal case**

These suggested instructions are designed to be given following the swearing of the jury. They are general and may require modification in light of the nature of the particular case. They are intended to give the jury, briefly and in understandable language, information to make the trial more meaningful. Other instructions may be given, as the need arises, at appropriate points during the trial. Many circuits have developed model or pattern jury instructions, and judges should consult the instructions that have been prepared for their circuits.

Members of the jury: Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

### **Duty of the jury**

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not.

Nothing the court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

### **Evidence**

The evidence from which you will find the facts will consist of the testimony of witnesses, documents, and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.
3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.
4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

### **Rules for criminal cases**

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First, the defendant is presumed innocent until proven guilty. The indictment against the defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his or her innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits

you from arriving at your verdict by considering that the defendant may not have testified.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

### **Summary of applicable law**

In this case the defendant is charged with \_\_\_\_\_. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements of the offense that the government must prove to make its case.

[Summarize the elements of the offense.]

### **Conduct of the jury**

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to the court's attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[If the court determines to allow note taking, state:]

If you wish, you may take notes. But if you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use.

### **Course of the trial**

The trial will now begin. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's at-

torney may, but does not have to, make an opening statement. Opening statements are neither evidence nor arguments.

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if he [she] wishes, present witnesses whom the government may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and the court will instruct you on the law.<sup>1</sup> After that you will retire to deliberate on your verdict.

### **Other FJC sources**

Pattern Criminal Jury Instructions 1–10 (1987)

For discussion of techniques for assisting the jury in civil trials, some of which may also be helpful in criminal trials, see Manual for Litigation Management and Cost and Delay Reduction 43–44 (1992)

For discussion of jury-related problems in criminal cases, see Donald S. Voorhees, Manual on Recurring Problems in Criminal Trials 17–37 (4th ed. 1996)

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1. Some judges may wish to give some instructions before closing arguments. See Fed. R. Crim. P. 30.

## **2.08 General instructions to jury at end of criminal case**

### **Introductory note**

Fed. R. Crim. P. 30 outlines the procedure for the submission and consideration of the parties' requests for specific jury instructions. It requires:

1. that the court inform counsel before closing arguments of its proposed action upon the instructions requested by counsel;
2. that the court give counsel adequate opportunity outside the presence of the jury to object to the court's instructions.

There is no prescribed method for the court to settle on its final set of instructions. Some courts hold an on-the-record charge conference with counsel during trial. At that conference the tendered instructions are discussed and are accepted, rejected, or modified by the court.

Other courts, without holding a charge conference, prepare a set of proposed instructions from those tendered by counsel. These courts then give a copy of the proposed instructions to all counsel and permit counsel to take exception to the instructions. Thereafter, the court may revise its instructions if convinced by counsel's objections that the instructions should be modified.

Still other courts require counsel to confer during trial and to agree, to the extent that they can, on the instructions that should be given. The court then considers only those instructions upon which the parties cannot agree.

The court may, of course, give an instruction to the jury that neither party has tendered.

While the court is free to ignore tendered instructions and to instruct the jury *sua sponte*, the usual practice is for the court to formulate the final instructions with the assistance of counsel and principally from the instructions counsel tendered.

Local practice varies as to whether a written copy of the instructions is given to the jury for use during its deliberations.

Many judges always give the jury a written copy of the instructions. Some courts have the instructions recorded as they are given in court and permit the jury to play them back in the jury room. Some courts do neither but will repeat some or all of the instructions in response to a request from the jury.

### **Outline of instructions**

Instructions delivered at the end of a trial consist of three parts: first, general rules that define and control the jury's duties in a criminal case; second, definitions of the elements of the offenses charged in the indictment (information); third, rules and guidelines for jury deliberation and return of verdict. Many circuits have developed model or pattern jury instructions, and judges should consult the instructions that have been prepared for use in their circuits.

#### **A. General rules:**

1. Outline the duty of the jury:
  - (a) to find the facts from admitted evidence;
  - (b) to apply the law as given by the court to facts as found by the jury;
  - (c) to decide the case on the evidence and the law, regardless of personal opinions and without bias, prejudice, or sympathy.
2. Clearly enunciate the three basic rules in a criminal case:
  - (a) presumption of innocence;
  - (b) burden of proof on government;
  - (c) proof beyond a reasonable doubt.
3. Indicate the evidence to be considered:
  - (a) sworn testimony of witnesses;
  - (b) exhibits;
  - (c) stipulations;
  - (d) facts judicially noticed.
4. Indicate what is not evidence:
  - (a) arguments and statements of counsel;
  - (b) questions to witnesses;

*Section 2.08: General instructions to jury at end of criminal case*

- (c) evidence excluded by rulings of the court;
  - (d) indictment (information).
- B. Define with precision and with specific consideration of the law of your circuit the elements of each offense to be submitted to the jury and of each defense the jury is to consider.
- C. Closing instructions
- 1. selection and duty of foreperson;
  - 2. process of jury deliberation:
    - (a) rational discussion of evidence by all jurors for the purpose of reaching a unanimous verdict;
    - (b) each juror to decide case for himself or herself in the context of the evidence and the law, with proper consideration of other jurors' views;
    - (c) reconsider views if persuaded by rational discussion but not solely for the sake of reaching a unanimous verdict;
  - 3. verdict must be unanimous on each count (explain verdict form if used);
  - 4. communications with the court during deliberation must be in writing and signed by the foreperson;
  - 5. jury must not disclose how it stands numerically or otherwise on question of guilt or innocence.
- D. Consider providing the jury with a written copy or transcript of the jury instructions.

**Other FJC sources**

Pattern Criminal Jury Instructions (1987)

For a discussion of techniques for assisting the jury in civil trials, some of which may also be helpful in criminal trials, see Manual for Litigation Management and Cost and Delay Reduction 44–45 (1992)

For a discussion of jury-related problems in criminal cases, see Donald S. Voorhees, Manual on Recurring Problems in Criminal Trials 17–37 (4th ed. 1996)





## 2.09 Verdict—criminal

Fed. R. Crim. P. 43 (a); Fed. R. Crim. P. 31(d)

### A. Reception of unsealed verdict

1. Upon announcement by the jury that it has reached a verdict, have all interested parties convene in open court to receive the verdict. Presence of defendant(s) is required. Fed. R. Crim. P. 43(a).
2. When court is convened, announce that the jury is ready to return its verdict(s), and instruct the deputy marshal (or bailiff) to have the jury enter and assume their seats in the jury box.
3. If not already known, inquire of the jury who speaks as its foreperson.
4. Ask the foreperson if the jury has unanimously agreed on its verdict. (*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.)
5. Instruct the foreperson to hand the verdict form(s) to the clerk to be delivered to you for inspection before publication.
6. Inspect the verdict(s) to ensure regularity of form. (*Note:* If the verdict form(s) is (are) not properly completed, take appropriate corrective action before publication.)
7. Explain to the jury that their verdict(s) will now be “published”—that is, read aloud in open court.
8. Instruct the jury to pay close attention as the verdict(s) is (are) published; explain that, following publication, the jury may be “polled”—that each juror may be asked, individually, whether the verdict(s) as published constituted his or her individual verdict(s) in all respects.
9. Publish the verdict(s) by reading it (them) aloud (or by having the clerk do so).
10. If either party requests, or on your own motion, poll the jury by asking (or by having the clerk ask) each juror, by

*Section 2.09: Verdict—criminal*

name or number, whether the verdict(s) as published constituted his or her individual verdict(s) in all respects. (Fed. R. Crim. P. 31(d) requires polling upon request.)

11. If polling verifies unanimity, direct the clerk to file and record the verdict, and discharge the jury with appropriate instructions concerning their future service, if any.
12. If polling results in any doubt as to unanimity, make no further inquiry and have no further discussions with the jury; rather, confer privately, on the record, with counsel and determine whether the jury should be returned for further deliberations or a mistrial should be declared.

**B. Reception of sealed verdict**

*(Note: In some cases a sealed verdict may be delivered to the clerk for subsequent “reception” and publication in open court when the jury, the judge, and all necessary parties are present. For example, on some occasions an indispensable party may not be available to receive a verdict when the jury reaches agreement. This may occur when the jury reaches its verdict late in the evening, a defendant is absent from the courtroom because of illness, or the judge is unavailable. In these instances, the verdict may be sealed and the jury allowed to return home. A sealed verdict may also be appropriate when the jury reaches a verdict as to one defendant but not as to another or when the jury wishes to return a partial verdict.)*

1. Upon announcement by the jury that it has reached a verdict, have all interested and available parties convene in open court and on the record.
2. When court is thus convened, announce that the jury is ready to return its verdict(s) and explain that a sealed verdict will be taken in accordance with the following procedure:
  - (a) Instruct the deputy marshal (or bailiff) to usher the jurors into the courtroom to assume their seats in the jury box.
  - (b) If not already known, inquire of the jury who speaks for it as its foreperson.

- (c) Ask the foreperson if the jury has unanimously agreed on its verdict.

*(Note: If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.)*

- (d) Poll the jury on the record.
- (e) Explain to the jury that a sealed verdict will be taken, and further explain why that procedure has become necessary in the case.
- (f) Direct the clerk to hand a suitable envelope to the foreperson. Instruct the foreperson to place the verdict form(s) in the envelope, to seal the envelope, then to hand it to the clerk for safekeeping.
- (g) Recess the proceedings, instructing the jury and all interested parties to return at a fixed time for the opening and formal reception of the verdict. Instruct that, in the interim, no member of the jury should have any conversation whatever with any other person, including any other juror, concerning the verdict or any other aspect of the case.
- (h) When court is again convened for reception of the verdict, have the clerk hand the sealed envelope to the jury foreperson.
- (i) Instruct the foreperson to open the envelope and verify that the contents consist of the jury's verdict form(s) without modification or alteration of any kind.
- (j) Follow the steps or procedures outlined in A.5 through A.12, *supra*.

**NOTE**

In the event the jury will not be present at the opening of the verdict, it is recommended that each juror sign the verdict form(s).

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 33–36 (4th ed. 1996)

*Manual for Complex Litigation, Third* 296–97 (1995)



## 2.10 Trial and post-trial motions

Fed. R. Crim. P. 29, 33, and 34

### A. Fed. R. Crim. P. 29—Motion for Judgment of Acquittal

#### 1. Timing

- (a) The motion may be made by defendant or the court before submission to jury, after the evidence on either side is closed. Fed. R. Crim. P. 29(a).
- (b) The motion may also be made or renewed (if court earlier reserved decision under Fed. R. Crim. P. 29(b)) within seven days of a guilty verdict or discharge of the jury without a verdict, or within such further time as the court may fix during the seven-day period. Fed. R. Crim. P. 29(c); *Carlisle v. United States*, 116 S. Ct. 1460 (1996).
- (c) Failure to make a Fed. R. Crim. P. 29 motion prior to submission of the case to the jury does not waive defendant's right to move after the jury returns a guilty verdict or is discharged without reaching a verdict.

#### 2. Procedure

- (a) The motion should be heard out of the presence of the jury. Whether an oral hearing will be held or the motion will be decided on written submissions only is a matter within the court's discretion. If the court reserved decision on a motion that is later renewed, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b).
- (b) If defendant moves for a judgment of acquittal, but not for a new trial under Fed. R. Crim. P. 33, the district court may not grant a new trial in lieu of granting the motion for judgment of acquittal. If the motion for acquittal is granted and defendant has moved for a new trial, the court should consider making a conditional ruling on the motion for new trial in case the

#### NOTE

The case law on this subject will vary from circuit to circuit. The suggested procedure may be varied to conform with the law of the circuit, the practice of the district, and the preferences of the individual judge.

Section 2.10: Trial and post-trial motions

judgment of acquittal is vacated or reversed on appeal. See Fed. R. Crim. P. 29(d).

- (c) When the court grants a motion for judgment of acquittal, it should consider whether the evidence was sufficient to sustain conviction of a lesser offense necessarily included in the offense charged.

3. Standard

- (a) The motion shall be granted “if the evidence is insufficient to sustain a conviction of such offense or offenses.” Fed. R. Crim. P. 29(a).

- (b) In resolving the motion, the court should not assess the credibility of witnesses, weigh the evidence, or draw inferences of fact from the evidence.<sup>1</sup> The role of the court is simply to decide whether the evidence viewed in the light most favorable to the government was sufficient for any rational trier of fact to find guilt beyond a reasonable doubt.

*Caution:* Consult your circuit’s law for any special rules governing consideration of the evidence.

B. Fed. R. Crim. P. 33—Motion for New Trial

1. Timing

Except as noted below with respect to newly discovered evidence, the motion must be made within seven days after a verdict or finding of guilty, *unless* within the same seven days the court fixes a longer period.

*Exception:* A motion for a new trial based on newly discovered evidence may be made before or within two years after final judgment. If made during the pendency of an appeal, the motion may be granted only if the case is remanded.

2. Procedure

Whether an oral hearing will be held or the motion will be decided on written submissions only is a matter within

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1. Of course, these restrictions do not apply in a bench trial. However, the standard for deciding the motion remains the same.

the discretion of the court. The propriety of holding a hearing will depend necessarily on the grounds invoked. This motion may be made only by defendant and cannot be granted by the court *sua sponte*.

3. Standard

- (a) Any alleged error in the trial that could be raised on appeal may be raised on a motion for a new trial, and the motion may be granted “if required in the interest of justice,” that is, if letting the verdict stand would result in a miscarriage of justice.
- (b) When the motion for a new trial is on the ground that the verdict is contrary to the weight of the evidence, the motion should be granted only in exceptional cases where the evidence preponderates heavily against the verdict. Unlike a motion for judgment of acquittal, the court is not required to view the evidence in the light most favorable to the government. Some circuits hold the court has broad power to weigh the evidence and consider the credibility of witnesses. However, other circuits reject the idea of the court as a “thirteenth juror” and limit the extent to which courts may reweigh the evidence. Courts should look to the law of their circuit on this issue.
- (c) For a motion based on newly discovered evidence, a defendant must show that: the evidence is newly discovered and was unknown to defendant at the time of trial; failure to discover the evidence sooner was not due to lack of diligence by defendant; the evidence is material, not merely cumulative or impeaching; and the new evidence would likely lead to acquittal at a new trial. Many circuits have held that such motions are disfavored and should be granted with caution.

4. Findings and conclusions

The court’s findings and conclusions should be placed on the record. An order denying a new trial is appealable as a final decision under 28 U.S.C. § 1291. An order granting a

*Section 2.10: Trial and post-trial motions*

new trial may be appealed by the government under 18 U.S.C. § 3731.

C. Fed. R. Crim. P. 34—Motion for Arrest of Judgment

1. Timing

Motion must be made within seven days after verdict or finding of guilty, or after a plea of guilty or *nolo contendere*, *unless* within seven days the court fixes a longer period.

2. Procedure

Whether an oral hearing will be held or the motion will be decided on written submissions only is a matter within the discretion of the court. Despite the fact that this motion raises jurisdictional issues, after trial it cannot be granted by the court *sua sponte* but may only be made by defendant. Compare Fed. R. Crim. P. 12(b)(2) (same issues raised here may be raised pretrial by either defendant *or* the court).

3. Standard

The motion is resolved upon examination of the “record,” i.e., the indictment or information, the plea or the verdict, and the sentence. The court does not consider the evidence produced at trial. A motion for arrest of judgment is based only on one or both of the following contentions: (i) the indictment or information does not charge an offense or (ii) the court was without jurisdiction of the offense charged.

**Other FJC sources**

For a discussion of techniques in managing motions in civil trials, some of which may be helpful in criminal trials, see Manual for Litigation Management and Cost and Delay Reduction 25–27 (1992)

Donald S. Voorhees, Manual on Recurring Problems in Criminal Trials 159 (4th ed. 1996)



## **2.11 Release or detention pending sentence or appeal**

18 U.S.C. § 3143; Fed. R. App. P. 9

- A. Pending imposition or execution of sentence
1. If defendant was in custody at the time of sentencing, there will ordinarily be no question of release after sentencing to a term of imprisonment.
  2. If defendant was at liberty at the time of sentencing, invite counsel for defendant to address the question of whether continued release is appropriate. Invite counsel for the government to respond.
  3. Except for those individuals subject to paragraph 4 below, a person may be released while awaiting imposition or execution of sentence only if the judge finds “by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community.” 18 U.S.C. § 3143(a)(1). “The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.” Fed. R. Crim. P. 46(c).  
Release shall be in accordance with the provisions of 18 U.S.C. § 3142(b) or (c) (governing release pending trial). This authority may be used to permit an offender to surrender at a Bureau of Prisons institution as well as to permit a delay before a defendant begins to serve the sentence.
  4. Persons convicted of a crime of violence, an offense punishable by life imprisonment or death, or a drug offense for which the maximum term of imprisonment is ten years or more shall not be released pending imposition or execution of sentence unless the judge finds by clear and convincing evidence that the person is not likely to flee or to pose a danger to any other person or the community, *and* (i) there is a substantial likelihood that a motion for acquittal or new trial will be granted or (ii) an attorney for

*Section 2.11: Release or detention pending sentence or appeal*

the government has recommended that no sentence of imprisonment be imposed upon the person. 18 U.S.C. § 3143(a)(2). Release may be authorized, however, in “exceptional cases.” See 18 U.S.C. § 3145(c).

B. Pending appeal by defendant

1. Except for those individuals subject to paragraph 2 below, if defendant appeals, he or she may be released pending appeal *only* if the judge finds:
  - (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
  - (B) that the appeal is not for purpose of delay and raises a substantial question<sup>1</sup> of law or fact likely to result<sup>2</sup> in—

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1. A “substantial question” has been defined differently by different circuits. Compare *United States v. Giancola*, 754 F.2d 898, 900–01 (11th Cir. 1985) (per curiam) (“a ‘close’ question or one that very well could be decided the other way”), *cert. denied*, 107 S. Ct. 669 (1986), with *United States v. Handy*, 761 F.2d 1279, 1281–83 (9th Cir. 1985) (“fairly debatable”). Most circuits that have considered the issue have followed *Giancola*: *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991); *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam); *United States v. Shoffner*, 791 F.2d 586, 589–90 (7th Cir. 1986) (per curiam); *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985); *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1231–34 (8th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1947 (1986); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024–25 (5th Cir. 1985); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (en banc). The Third Circuit has followed *Handy*, which is generally regarded as posing less of a barrier to the appellant seeking release. *United States v. Smith*, 793 F.2d 85, 89–90 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). The Second Circuit has expressed the view that the two standards are not significantly different but has indicated a preference for the *Giancola* formulation. *United States v. Randell*, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 474 U.S. 1008 (1985).

2. “Likely to result” means likely to result if defendant prevails on the substantial question. *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985), and cases cited *supra* note 1. A substantial question concerning only harmless error would not meet this requirement. “Likely” has been defined by some circuits as “more probable than not.” *United States v. Balko*, 774 F.2d 516, 522 (1st Cir. 1985); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024–25 (5th Cir. 1985); *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1232–34 (8th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1947 (1986).

*Section 2.11: Release or detention pending sentence or appeal*

- (i) reversal,
- (ii) an order for a new trial,
- (iii) a sentence that does not include a term of imprisonment, or
- (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b).

Release under § 3143(b) shall be in accordance with the provisions of 18 U.S.C. § 3142(b) or (c) (governing release pending trial). If defendant is to be released because of the likelihood of a reduced sentence under § 3143(b)(1)(B)(iv), “the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.”

- 2. Detention is mandatory for persons appealing from a sentence to a term of imprisonment for a crime of violence, an offense punishable by life imprisonment or death, or a drug offense for which the maximum term of imprisonment is ten years or more. 18 U.S.C. § 3143(b)(2). Release may be authorized, however, in “exceptional cases.” See 18 U.S.C. § 3145(c).

C. Government appeal of sentence

- 1. After sentence of imprisonment:

If defendant does not appeal and the government appeals a sentence pursuant to 18 U.S.C. § 3742(b), release pending appeal may not be granted. 18 U.S.C. § 3143(c)(1).

- 2. After sentence not including imprisonment:

If the government appeals pursuant to 18 U.S.C. § 3742(b) from a nonincarcerative sentence, the government should move for a redetermination of defendant’s status. Release or detention is to be determined in accordance with 18 U.S.C. § 3142 (governing release or detention pending trial). 18 U.S.C. § 3143(c)(2); see 1.03: Release or detention pending trial. Place the reasons for the determination on the record.

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3. Note that, except for a sentence imposed by a magistrate judge, the government's appeal must be approved personally by the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General. 18 U.S.C. § 3742(b) and (g).

D. Burden of proof

"The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant." Fed. R. Crim. P. 46(c). The rules of evidence do not apply. Fed. R. Evid. 1101(d)(3). A testimonial hearing may be required.

E. Written order required

If defendant is detained or conditions of release are imposed, the reasons must be stated in writing. Fed. R. App. P. 9(b). If defendant is released over the government's objection, reasons should be placed on the record to facilitate appellate review.

**Other FJC sources**

The Bail Reform Act of 1984 at 37–39, 41–45 (2d ed. 1993)

### 3.01 Death penalty procedures

18 U.S.C. §§ 3591–3595; 21 U.S.C. § 848(e)–(q)

Following is an outline of procedures for imposing the death penalty authorized in various federal statutes. There has been little experience under these statutes and a number of problems may arise. This outline is offered as very tentative guidance for consideration.<sup>1</sup>

Effective Sept. 13, 1994, the Federal Death Penalty Act of 1994 establishes procedures for imposing any death penalty under federal law (except for prosecutions under the Uniform Code of Military Justice). See 18 U.S.C. §§ 3591–3595. These new provisions largely duplicate, but do not seem to replace,<sup>2</sup> the authorization and procedure for imposing the death penalty for certain drug-related killings in 21 U.S.C. § 848(e). The information in this outline applies to capital cases under both statutes unless noted otherwise.

The killing in the course of a drug-related offense under 21 U.S.C. § 848(e) appears to be a separate offense that must be charged and proved, not merely an aggravating factor to be considered in sentencing on the underlying drug offense.<sup>3</sup> When the

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1. Judges may wish to look at the first four appellate court decisions to discuss death penalty procedures under 21 U.S.C. § 848. See *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996) (affirmed); *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (remanded); *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995) (affirmed); *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993), cert. denied, 114 S. Ct. 2724 (1994). In addition, in 1995 the Federal Judicial Center began a series of *Chambers to Chambers* discussing legal and practical issues unique to capital cases. The series draws upon the experiences of district court judges who have handled death penalty cases under § 848; the first issue also includes the names of judges who have tried capital cases who may be contacted. The Center is also collecting copies of orders and other selected case materials from judges who have handled capital cases. Judges seeking information on death penalty issues should contact the Information Services Office at the Center.

2. Nothing in the new legislation specifically repeals or supersedes any part of section 848, and there are some differences.

3. Subsection (e) was added to 21 U.S.C. § 848 by the Anti-Drug Abuse Act of 1988, Pub. L. 10-690, § 7001(a), 102 Stat. 4181, 4387–88. The catchline of § 7001(a) was “Elements of Offense.” Moreover, other subsections refer to being found guilty of or pleading guilty to “an offense under subsection (e).” 21 U.S.C.

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death penalty is sought for an offense under 18 U.S.C. § 3591, the court should determine whether the relevant activity is a separate offense—or an element of the offense—that must be charged and proved.

A. Pretrial

1. The government must provide written notice to the court and defendant that it will seek the death penalty, and it must identify which statutory and non-statutory aggravating factors it intends to prove at “a reasonable time” before trial or acceptance by the court of a guilty plea.<sup>4</sup> 18 U.S.C. § 3593(a); 21 U.S.C. § 848(h)(1).
2. *If requested by defendant* pursuant to 18 U.S.C. § 3005, promptly assign two counsel to defendant, “of whom at least one shall be learned in the law applicable to capital cases.”<sup>5</sup>

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§ 848(i)(1), (j), (n).

4. For § 848(e) offenses, the government must identify and prove one aggravating factor from § 848(n)(1) plus at least one factor from § 848(n)(2)–(12). Section 3591 contains three groups of offenses for which death is authorized, and each group has a separate list of aggravating factors from which the government must identify and prove at least one. Additional factors from any list may be used, but only the one is required to impose the death penalty. *See* § 3593(e). The Fourth and Tenth Circuits have held that allowing the jury to find duplicative aggravating factors is prohibited and would require a new penalty phase. *See Tipton*, 90 F.3d at 898–901 (but affirming sentence because error was harmless in this case); *McCullah*, 76 F.3d at 1111–12 (remanded: prosecution submitted both § 841(n)(1)(C) and (D), which substantially overlap, and a non-statutory aggravating factor that overlapped § 841(n)(1)(C)). *See also* *United States v. McCullah*, 87 F.3d 1136, 1137–38 (10th Cir. 1996) (upon denial of rehearing and rehearing en banc, clarifying that overlapping aggravating factors are improper if supported by same underlying conduct, thus distinguishing *Flores*, *infra*). *But cf. Flores*, 63 F.3d at 1372–73 (defendant’s conduct supported finding of both n(1)(A) (intentionally killed the victim) and n(1)(C) (intentionally engaged in conduct intending that the victim be killed) factors—defendant personally participated in the killings and hired others to help). The Fourth and Tenth Circuits rejected the claim that allowing the government to introduce nonstatutory aggravating factors violated separation of powers principles.

5. *See* *Chambers to Chambers*, Vol. 10, No. 1 (Federal Judicial Center 1995), for a discussion of whether more than two attorneys may be appointed under § 3005. *See also McCullah*, 76 F.3d at 1098 (no abuse of discretion to refuse to appoint additional counsel where district court found that two were adequate). For a discussion of compensation of counsel, investigators, and expert wit-

3. At least three days before commencement of trial, the defendant must receive a copy of the indictment and a list of the names and addresses of venirepersons and witnesses, unless the court finds by a preponderance of the evidence that providing the list may endanger any person. 18 U.S.C. § 3432 (as amended Sept. 13, 1994).
4. Arrange for a jury venire large enough to accommodate additional peremptory challenges (twenty for each side, see Fed. R. Crim. P. 24(b)), the length of time required for trial and penalty phases, and the likelihood that alternate jurors will be needed.<sup>6</sup>
5. Consider having venire members complete a juror questionnaire, and consider providing attorneys with the responses prior to jury selection.
6. After familiarizing the venire with jury service, explain the two-stage decision process. Following is a suggested explanation.

Before we continue with the jury selection process, I will explain to you how a capital case proceeds. Potentially this case has two stages. The first requires the jury to consider whether or not the government has proved the charges brought against the defendant, \_\_\_\_\_, beyond a reasonable doubt. In this stage of the proceeding, the jury shall not consider any possible punishment that might be imposed.

If, at the conclusion of the first stage, the jury reports that it does not find the defendant, \_\_\_\_\_, guilty of the capital charge, then the jury's responsibilities are at an end. It is also the end regardless of how the jury finds as to any other charges. This is because the court decides the punishment for noncapital crimes.

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nesses, see Chambers to Chambers, Vol. 10, No. 1. Note that 21 U.S.C. § 848(q)(10) was amended by the Antiterrorism and Effective Death Penalty Act of 1996 (effective April 24, 1996), to limit attorney's fees and costs for other services. In cases not affected by the Act, compensation for appointed counsel is not limited by Criminal Justice Act maximums.

6. See Chambers to Chambers, Vol. 10, No. 1 (Federal Judicial Center 1995), for discussion of this issue and of the questionnaire in the next paragraph.

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If the jury reports that it finds the defendant, \_\_\_\_\_, guilty of the capital charge, then we proceed to a second stage: a sentencing hearing, at which the jury considers whether the death penalty should be imposed.<sup>7</sup>

Now, during the sentencing hearing, the government has the opportunity to introduce evidence of aggravating factors that might make the conduct alleged in the capital count so serious as to merit imposition of the death penalty. The defendant has the opportunity to present mitigating factors about the crime or about himself [herself] that might suggest that the death penalty is not appropriate in this case.

No aggravating factor may be considered by the jury unless all jurors agree on that factor unanimously. Nor can the jury find in favor of the death penalty unless it also unanimously agrees that the unanimously-agreed-upon aggravating factors sufficiently outweigh any mitigating factors that one or more jurors believe exist.

Even if no one on the jury finds that any mitigating factors exist, the jury cannot find in favor of the death penalty unless everyone on the jury finds that the aggravating factors that the jurors have unanimously found to exist are sufficiently serious to justify a death sentence. Even if the jury unanimously makes such findings, it is not required under law to find in favor of the death penalty; that is a matter for the jury to decide.

[For § 3591 offenses, *add:*] If a jury does not unanimously find in favor of the death penalty, it may consider whether a sentence of life imprisonment without the possibility of release should be imposed, a decision that must also be unanimous.<sup>8</sup>

If a jury unanimously finds in favor of the death penalty, this court is required to sentence the defendant to

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7. The term “recommend,” used in the statutes, should be avoided as potentially misleading. *See* *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The court is without authority to reject the recommendation. *See* 18 U.S.C. § 3594; 21 U.S.C. § 848(l).

8. The option of a jury-imposed sentence of life without release is not available under § 848. Section 3593(e) allows the jury to “recommend” such a sentence, and under § 3594 “the court shall sentence defendant accordingly.” *See also infra* note 18.



death. [For § 3591 offenses, add:] If a jury unanimously finds in favor of a sentence of life imprisonment without the possibility of release, the court is required to impose that sentence.

7. During voir dire, question the venirepersons as to their views on the death penalty.<sup>9</sup> It is recommended that this be done by questioning individual venirepersons at sidebar. A juror may not be excused for cause simply because the juror voices “general objections to the death penalty or express[es] conscientious or religious scruples against its infliction.”<sup>10</sup> “The standard is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>11</sup> Excuse the juror for cause if the juror answers yes to either of the following questions:
  - (a) Would you never find, under any circumstances, in favor of the death penalty under the law as I will explain it?<sup>12</sup>
  - (b) If the defendant is found guilty of conduct that is a capital offense, beyond a reasonable doubt, would you always find in favor of the death penalty?<sup>13</sup>

Note that the harmless error analysis does not apply to *Witherspoon* violations.<sup>14</sup>

8. When the jury retires to consider its verdict, do not discharge the alternate jurors.<sup>15</sup> Instruct the alternates to

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9. See Chambers to Chambers, Vol. 10, No. 1 (Federal Judicial Center 1995), for a discussion of jury selection, including “death-qualifying” the jury. See also *United States v. Tipton*, 90 F.3d 861, 870–81 (4th Cir. 1996) (affirming district court’s method of voir dire and the dismissal for cause of some jurors who opposed the death penalty); *United States v. Flores*, 63 F.3d 1342, 1353–56 (5th Cir. 1995) (same).

10. *Witherspoon v. Illinois*, 391 U.S. 510, 521–22 (1968).

11. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980). See also *Lockhart v. McCree*, 476 U.S. 162 (1986) (allowing a juror who could not perform in the penalty phase to be excluded from the guilt/innocence phase).

12. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

13. See *Morgan v. Illinois*, 504 U.S. 179 (1992).

14. *Gray v. Mississippi*, 481 U.S. 648 (1987).

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avoid discussing the case with anyone because they might be recalled for the sentencing phase.

B. After Verdict or Plea

1. No presentence report should be prepared. 18 U.S.C. § 3593(c); 21 U.S.C. § 848(j).
2. Unless defendant moves for a hearing without a jury and the government consents, the hearing must be before a jury.
  - (a) If defendant was convicted after a jury trial, the hearing should be before the jury that determined guilt, unless such jury has been discharged for good cause.
  - (b) If defendant was convicted upon a plea or after a bench trial, a jury and alternates should be impaneled in accordance with Fed. R. Crim. P. 24(c).  
18 U.S.C. § 3593(b); 21 U.S.C. § 848(i)(1).
3. Instruct the jury about the purpose of the hearing.<sup>15</sup>
  - (a) Inform the jurors that they will be required to make specific findings about possible aggravating circumstances, that any or all of them may make a finding regarding any mitigating circumstances,<sup>16</sup> and that if

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15. Although this advice is contrary to Fed. R. Crim. P. 24(c), that rule was not written with 18 U.S.C. § 3593(b) and 21 U.S.C. § 848(i) in mind. It is sensible and probably supportable to save the alternates and use them in the sentencing phase if it should become necessary and the same jury will be used. Note that §§ 3593(b) and 848(i) do not allow a jury of less than twelve members unless the parties stipulate to a lesser hearing before the conclusion of the sentencing hearing. See *Chambers to Chambers*, Vol. 10, No. 1 (1995), for a discussion of retaining the alternate jurors.

16. Samples of jury instructions that have been used in death penalty cases are available from the Federal Judicial Center's Information Services Office.

17. Under §§ 3593(d) and 848(k), specific findings about mitigating factors are not required. However, both sections state that such findings "may be made by one or more members of the jury," and the Eleventh Circuit held that "Section 848(k) requires that the jury be instructed that it has the option to return written findings of mitigating factors." *United States v. Chandler*, 996 F.2d 1073, 1087 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994). The court also noted that under § 848(q)(3)(B) the reviewing court is to consider whether such findings, or any failure to find a mitigating factor, are supported by the record, but held that this section requires only "that if the jury exercises its option, we must review those findings." 996 F.2d at 1087. There is no similar provision re-

certain findings are made, they will be required to decide whether defendant should be sentenced to death (or, if the offense is under § 3591, to life imprisonment without the possibility of release).

- (b) Instruct the jurors that they must not consider the race, color, religious beliefs, national origin, or sex of defendant or of the victim in deciding whether to impose the death penalty, and that each of them will be required to certify that he or she has not been influenced by such factors. 18 U.S.C. § 3593(f); 21 U.S.C. § 848(o)(1).
4. Proceed with the hearing in the manner set forth in 18 U.S.C. § 3593(c) or 21 U.S.C. § 848(j). Note that:
    - (a) the government may seek to prove only those aggravating factors of which it gave notice;
    - (b) the rules of evidence do not apply, but information may be excluded if its probative value is outweighed (§ 3593(c)) or “substantially outweighed” (§ 848(j)) by the danger of unfair prejudice, confusion of the issues, or misleading the jury;
    - (c) the trial transcript and exhibits may be used, particularly if a new jury has been impaneled for the sentencing stage;
    - (d) the order of argument is prescribed by the statute.
  5. Instruct the jury and provide it with a form for findings relative to sentencing. (See the suggested form for sentencing findings at the end of this section.)<sup>18</sup> Be sure to cover the following points:
    - (a) The jury should first consider the aggravating factors that the government has sought to establish.
    - (b) The aggravating factors must be proved beyond a reasonable doubt, and the jury can find that an aggravating factor exists only by unanimous vote. If the jury

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garding appellate review of mitigating circumstances in § 3595(c)(2). Nevertheless, it is recommended that the trial judge require such findings.

18. Sample jury instructions and forms are available from the Federal Judicial Center’s Information Services Office.

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is not unanimous in finding that an aggravating factor has been proved, it must treat it as not proved.<sup>19</sup>

- (c) For the jurors even to consider the death penalty, they must:
  - (1) *for § 3591 offenses*: answer yes to the required § 3592(b), (c), or (d) question (question 1 on the suggested form);
  - (2) *for § 848(e) offenses*: answer yes to the § 848(n)(1) question (question 1 on the suggested form) and to at least one of the § 848(n)(2)–(12) questions (question 2 on the suggested form).
- (d) If the jury’s findings about aggravating factors permit consideration of a death sentence, the jury should then consider defendant’s evidence of mitigating factors.
- (e) A mitigating factor should be taken as true if it has been established by a preponderance of the evidence. Distinguish between the reasonable doubt and preponderance tests.
- (f) The jurors should discuss the evidence about mitigating factors but are not required to reach a unanimous decision. A finding of a mitigating factor may be

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19. This outline and the accompanying form are based on the understanding that, if the jury is in disagreement about the findings required for a death sentence, a sentence other than death will be imposed. 18 U.S.C. § 3594; 21 U.S.C. § 848(l). For § 3591 offenses, the jury is specifically instructed that it may choose a sentence of life imprisonment without release or a lesser sentence. However, there is no similar choice for the jury in § 848, and no requirement that the jury be told the consequences of failure to unanimously agree on a sentence of death. *See Chandler, supra*, 996 F.2d at 1089 (“district court is not required to instruct the jury on the consequences of the jury’s inability to reach a unanimous verdict”). The Supreme Court held that when defendant’s future dangerousness is an issue and the only alternative sentence to death is life with no possibility of parole, due process entitles defendant to tell the jury that defendant will never be released from prison. *Simmons v. South Carolina*, 114 S. Ct. 2187, 2196–201 (1994). *Cf. Flores, supra*, 63 F.3d at 1368–69 (affirmed: distinguishing *Simmons* because, although government used defendant’s future dangerousness as aggravating factor, there was still possibility of departure under Guidelines to less than life sentence, and government focused on danger defendant “would pose *while still in prison*,” not after release).

made by one or more jurors, and any member of the jury who finds the existence of a mitigating factor by a preponderance of the evidence may consider such a factor established, regardless of whether any other juror agrees.

- (g) In considering whether the death penalty should be imposed, each juror should consider only those aggravating factors that have been found to exist beyond a reasonable doubt by unanimous vote, but each juror should consider any mitigating factors that have been proved by a preponderance of the evidence to his or her own satisfaction.
- (h) The jury should then:
  - (1) *for § 3591 offenses:*
    - (i) consider whether the aggravating factor(s) sufficiently outweigh the mitigating factor(s) to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor(s) alone are sufficient to justify a sentence of death;
    - (ii) determine whether defendant should be sentenced to death, to life imprisonment without possibility of release, or some other sentence, a decision that must be unanimous.<sup>20</sup>
  - (2) *for § 848(e) offenses:*

determine—based on consideration of whether the aggravating factors sufficiently outweigh any mitigating factors, or in the absence of mitigating factors, whether the aggravating factors alone are sufficient to justify a sentence of death—whether the death penalty should be imposed. The jury may find in favor of the death penalty only by unanimous vote.

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20. Although § 3593(e) states that the jury may unanimously recommend “some other lesser sentence,” § 3594 implies that the court may still impose a sentence of life without release.

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- (i) Regardless of its findings about aggravating and mitigating factors, the jury is never required to find in favor of a death sentence.<sup>21</sup>
  - (j) The jury shall not consider the race, color, religious beliefs, national origin, or sex of defendant or the victim and must not impose a death sentence unless it would do so no matter what the race, color, religious beliefs, national origin, or sex of defendant and the victim. The jurors must sign a certificate to this effect when a death sentence is returned. 18 U.S.C. § 3593(f); 21 U.S.C. § 848(o)(1).
6. Discharge the alternates when the jury retires. (Note that, although Fed. R. Crim. P. 23(b) permits a court to accept a verdict from eleven jurors if a juror is excused after the jury retires, §§ 3593(b) and 848(i)(2) allow sentencing findings to be accepted from fewer than twelve jurors only if the parties agree to a lesser number before the jury retires.)
7. If the jury finds in favor of a death sentence, the court must impose such a sentence. Otherwise:
- (a) *For § 3591 offenses:* If the jury unanimously finds in favor of life imprisonment without the possibility of release, the court must impose that sentence; otherwise, the court shall impose any other sentence authorized by law. See 18 U.S.C. § 3594.
  - (b) *For § 848(e) offenses:* The court may impose any other sentence authorized by law. 21 U.S.C. § 848(l).

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21. This is explicitly stated in § 848(k) and is implicit in § 3593(e) from the jury's authorization to choose a lesser sanction.

### Suggested form for sentencing findings

1. Do you find unanimously that the government has proved, beyond a reasonable doubt, that the defendant [insert government's claim under § 3592(b), (c), or (d), or § 848(n)(1)(A), (B), (C), or (D)]?<sup>22</sup>

Yes  No

IF THE ANSWER TO QUESTION 1 IS "NO," STOP HERE. ALL JURORS SHOULD SIGN AT THE END OF THE FORM.

2. [*For § 848(e) offenses only:*] Do you find unanimously that the government has proved, beyond a reasonable doubt, that the defendant [insert government's claim under § 848(n)(2)–(12)]?

Yes  No

[Repeat the above for as many separate factors under (n)(2)–(12) as the government alleges.]

IF THE ANSWER TO QUESTION 2 IS [OR TO QUESTIONS 2 THROUGH \_\_ ARE ALL] "NO," STOP HERE. ALL JURORS SHOULD SIGN AT THE END OF THE FORM.

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22. One of the aggravating factors listed in 21 U.S.C. § 848(n)(1) must be found if the death penalty is to be imposed. It is hard to imagine a conviction under § 848(e) that does not subsume a factor under (n)(1). Nevertheless, the statute requires that the existence of an (n)(1) factor be considered at the penalty stage. It appears that subsection (n)(1) was drafted in contemplation of application to a wider range of criminal conduct than § 848(e) encompasses. For the Supreme Court's treatment of a similar statute, see *Lowenfield v. Phelps*, 484 U.S. 231 (1988). See also *United States v. McCullah*, 76 F.3d 1087, 1109–10 (10th Cir. 1996) (recognizing this aspect of § 848(e) but finding it meets requirements of *Lowenfield*); *United States v. Flores*, 63 F.3d 1342, 1369–72 (5th Cir. 1995) (same); *United States v. Chandler*, 996 F.2d 1073, 1092–93 (11th Cir. 1993) (same) *cert. denied*, 114 S. Ct. 2724 (1994). Note that the Fourth and Tenth Circuits have held it is error to find duplicative (n)(1) factors. See *supra* note 4.

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3. Do you find unanimously that the government has proved, beyond a reasonable doubt, that the defendant [insert government's claim of other aggravating factor]?

Yes  No

[Repeat the above for as many additional aggravating factors as the government alleges.]

4. Do any jurors find that the defendant has proved, by a preponderance of the evidence, that [insert defendant's claim of mitigating factor]?

Yes  No

[Repeat the above for as many separate mitigating factors as defendant alleges.]

5. Do you find unanimously that the aggravating factor(s) to which you have provided a unanimous "yes" answer above sufficiently outweigh(s) the mitigating factor(s) to justify a sentence of death, or in the absence of a mitigating factor, that the aggravating factor(s) alone is (are) sufficient to justify a sentence of death, and that the defendant should be sentenced to death?

Yes  No

IF THE ANSWER TO QUESTION 5 IS "NO" AND A § 3591 OFFENSE IS INVOLVED, ASK:

Do you find unanimously that the defendant should be sentenced to life imprisonment without possibility of release?

Yes  No

Each of the undersigned jurors hereby certifies that:

1. in reaching my decisions about the sentence in this case, I did not consider the race, color, religious beliefs, national origin, or sex of either the defendant, [defendant's name], or the victim, [victim's name]; and



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2. I would have made the same decision about the sentence for this crime no matter what the race, color, religious beliefs, national origin, and sex of the defendant, [defendant's name], and the victim, [victim's name].

\_\_\_\_\_  
(Foreperson)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



## 4.01 Guideline sentencing

### Introductory note

Effective December 1, 1994, Fed. R. Crim. P. 32 was substantially amended. Along with textual additions and revisions, some sections have been moved to different subdivisions. Where this has occurred, the old section number will appear in brackets following the current designation.

Revised Rule 32(b)(6)(A) now requires that the presentence report be disclosed to defendant, defense counsel, and the attorney for the government not less than thirty-five days before the sentencing hearing, unless this period is waived by defendant.<sup>1</sup> The parties then have fourteen days to provide the probation officer with written objections to the presentence report. Many courts have adopted other procedures designed to ensure that disagreements about factual and legal issues material to sentencing are identified in advance of the sentencing hearing. Section 4.01 is based on the assumption that such procedures are in place. Note that the sentencing hearing does not have to proceed in a particular order—the following outline is only a guide and need not be followed precisely.

### Outline

1. If you are contemplating a departure on a ground not identified as such in either the presentence report or in a pre-hearing submission, announce your consideration of a departure and identify the departure grounds.<sup>2</sup>

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1. Note that the presentence report shall not include any diagnostic opinions that if disclosed may disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information that may result in harm to the defendant or others if disclosed. Fed. R. Crim. P. 32(b)(5) [former 32(c)(3)(A)]. The probation officer's final recommendation as to sentence, previously withheld, may now be disclosed pursuant to local rule or at the court's discretion. Fed. R. Crim. P. 32(b)(6).

2. *Burns v. United States*, 501 U.S. 129 (1991) (Court held that "reasonable notice" is required but left the timing of such notice to the lower courts). Some circuits have held that the government must receive notice before the district court departs downward on grounds not raised by either party. *See United*

### NOTE

Judges who receive cases that involve sentencing under the law that predated guideline sentencing may wish to consult another Center publication, *Sentencing Offenders for Crimes Committed Before Nov. 1, 1987* (1991).

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2. Ask defendant and both counsel whether they have reviewed the presentence report, including any revisions that may have been made after the initial disclosure.
3. If information has been withheld from the report pursuant to Fed. R. Crim. P. 32(b)(5) (former 32(c)(3)(A)), and the summary required by Fed. R. Crim. P. 32(c)(3)(A) (former 32(c)(3)(B)) has not yet been provided, summarize the withheld information orally if it will be relied on in determining the sentence.
4. Place in the record under seal any information that was summarized and not disclosed to defendant and counsel. Specify that counsel are not to be permitted access.
5. Establish what issues are in dispute.
6. If defendant entered a plea subject to the court's later decision whether to accept a plea agreement under Fed. R. Crim. P. 11(e)(1)(A) (dismissal of other charges) or 11(e)(1)(C) (binding agreement on sentence), make the decision. In some cases, you may find it necessary to defer this step until disputed issues have been resolved.
  - (a) If the decision is to accept the plea agreement, inform defendant that the plea agreement is accepted and that the judgment and sentence will be consistent with it. See Fed. R. Crim. P. 11(e)(3). Make any statement for the record that is deemed appropriate about the reasons for accepting the plea agreement. See U.S.S.G. § 6B1.2, p.s.
  - (b) If the decision is to reject the agreement, advise defendant that the court does not accept the plea agreement and afford defendant an opportunity to withdraw the plea. Advise defendant that if he or she persists in the guilty plea, the disposition of the case may be less favorable than that contemplated by the plea agreement. See Fed. R. Crim. P. 11(e)(4).

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States v. Maddox, 48 F.3d 791 (4th Cir. 1995); United States v. Edelin, 996 F.2d 1238 (D.C. Cir. 1993) (per curiam), *cert. denied*, 114 S. Ct. 895 (1994); United States v. Andruska, 964 F.2d 640 (7th Cir. 1992); United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990).

7. Receive any exhibits and hear any testimony that may be needed to resolve factual disputes. The decision to hold an evidentiary hearing is in the discretion of the court. See Fed. R. Crim. P. 32(c)(1) (former 32(c)(3)(A)).
8. If counsel or defendant alleges any factual inaccuracy in the presentence report, “the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing.” Fed. R. Crim. P. 32(c)(1) (former 32(c)(3)(D)). For issues that are *not* in dispute, the court may accept the presentence report as its findings of fact. Fed. R. Crim. P. 32(b)(6)(D).<sup>3</sup>

Even if matters controverted will not affect sentencing, it is important to resolve the issues and attach findings because the Bureau of Prisons will base custody decisions on the presentence report. Notations in the margin or excerpts from the reporter’s transcript may be adequate.<sup>4</sup>
9. Rule on any legal issues relevant to the determination of the sentence. In resolving disputes about particular guidelines, the court should refer to the factors described therein and make specific findings on each factor.
10. Announce your conclusions as to the appropriate offense level and criminal history category. Give the lawyers an opportunity to respond (without repeating previously expressed objections). If you have not yet decided whether to accept a plea agreement under Fed. R. Crim. P. 11(e)(1)(A) (dismissal of other charges), you may wish to determine the offense level both under the plea agreement and on the assumption that defendant pleaded to all counts.

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3. Note that Rule 32(b)(6)(D) is a new section that implies that courts should *not* adopt the conclusions in the presentence report with regard to disputed issues, as some circuits have allowed. Courts should resolve disputed issues of fact and guideline application by making specific findings independent of the conclusions of the presentence report. When a guideline adjustment depends on the resolution of disputed underlying facts, courts should make findings on those facts rather than simply find that the adjustment applies.

4. *But see* United States v. Cortez, 841 F.2d 456 (2d Cir.) (transcript of hearing must be appended), *cert. denied*, 486 U.S. 1058 (1988).

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11. If the sentence includes a departure:
  - (a) Explain the reasons for the departure<sup>5</sup>; and
  - (b) Explain the reasons for the extent of the departure<sup>6</sup>; and
  - (c) Ensure that the parties have had reasonable notice and opportunity to be heard.
12. If a request for departure is denied, state that:
  - (a) Departure is authorized in this case, but I choose not to depart because I believe departure is not warranted under the circumstances here. Or
  - (b) Departure is not authorized under these facts. Or
  - (c) Even if departure were authorized under the facts of this case, I would exercise my discretion not to depart.
13. Inform defendant and counsel if you have received any additional materials concerning sentencing (such as letters of recommendation or requests for departure). Considering motions for downward departure based on substantial assistance to the government sometimes may be more appropriate in chambers.
14. Recognize defendant's counsel for remarks on behalf of defendant.
15. You must give defendant an opportunity to speak on his or her own behalf.
16. Recognize the attorney for the government for any remarks on behalf of the government.
17. If sentence is to be imposed for a crime of violence or sexual abuse, address the victim, if he or she is present, and determine whether the victim wishes to make a statement or present any information in relation to the sentence. Fed. R. Crim. P. 32(c)(3)(E) (effective Dec. 1, 1994).

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5. Courts are advised to provide detailed reasons for any departure, with specific references to Guidelines or statutory provisions that authorize departure.

6. Some circuits merely require that the extent of departure be "reasonable," others require more detailed calculations that analogize to Guidelines factors. In any event, courts should first clearly establish the offense level and criminal history category from which a departure will be made.

18. If restitution is in issue, determine the appropriate amount and how and when it is to be paid.<sup>7</sup> Resolve any factual or legal disputes. 18 U.S.C. §§ 3663–3664; U.S.S.G. § 5E1.1.
19. Determine whether to impose a fine and, if so, in what amount. See 18 U.S.C. § 3572(a); U.S.S.G. § 5E1.2.<sup>8</sup>
20. Explain that you will now state the sentence, but that the attorneys will have a final chance to make legal objections before sentence is imposed.<sup>9</sup>
21. State the sentence.
22. State the reasons for the sentence.
  - (a) The statement must include the “specific reason” for any departure from the guidelines and for the extent of the departure. 18 U.S.C. § 3553(c)(2).
  - (b) If the sentence includes a prison term within the guidelines, and the lower and upper limits of the guideline range of imprisonment are more than twenty-four months apart, the statement must include the reasons for

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7. Note that some circuits have held that restitution must be determined at the time of sentencing, not at a later date. *See, e.g.*, *United States v. Porter*, 41 F.3d 68 (2d Cir. 1994); *United States v. Ramilo*, 986 F.2d 333 (9th Cir. 1993); *United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992); *United States v. Sannett*, 925 F.2d 392 (11th Cir. 1991). Several circuits have also held that the district court may not delegate to a probation officer the authority to set the specific terms of payment, including the ultimate amount of restitution and the size and schedule of any installment payments. The probation officer may make recommendations, but the court must make the final decision. *See, e.g.*, *United States v. Graham*, 72 F.3d 352 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1286 (1996); *United States v. Mohammad*, 53 F.3d 1426 (7th Cir. 1995); *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995); *United States v. Porter*, 41 F.3d 68 (2d Cir. 1994); *United States v. Albro*, 32 F.3d 173 (5th Cir. 1994). Effective April 24, 1996, 18 U.S.C. § 3572(d)(2) states that “the length of time over which scheduled [restitution] payments will be made shall be set by the court.”

8. 18 U.S.C. § 3572(d)(2), noted above, also applies to fines.

9. Fed. R. Crim. P. 35 no longer authorizes the court to correct an illegal sentence or to reduce a sentence as a matter of discretion. Once a sentence is imposed, changing it appears to be beyond the sentencing judge’s power, except for seven days in which to correct obvious technical errors under Rule 35(c). The procedure recommended here is intended to assure that the sentencing judge hears every possible objection before losing jurisdiction to change the sentence.

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selecting a particular point within the guideline range. 18 U.S.C. § 3553(c)(1).

(c) If restitution is not ordered, or only partial restitution is ordered, the statement must also include the reasons for that decision. 18 U.S.C. § 3553(c).<sup>10</sup>

23. Ask both counsel whether they know of any reason, other than reasons already argued, why the sentence should not be imposed as stated.
24. Order the sentence imposed as stated, or amend the sentence (and, if necessary, the statement of reasons) and then order it imposed.
25. Advise defendant of the right to appeal, if any, including any right to appeal the sentence.<sup>11</sup> Inform defendant of the right to apply for leave to appeal in forma pauperis, if appropriate, and that the clerk of the court will prepare and file a notice of appeal upon defendant's request. See Fed. R. Crim. P. 32(c)(5) (former 32(a)(2)). Also advise defendant that, with few exceptions, any notice of appeal must be filed within ten days. See Fed. R. App. P. 4(b).
26. If defendant has been sentenced to a term of imprisonment and was at liberty pending sentencing, consider whether defendant should now be released or detained (see 2.11: Release or detention pending sentence or appeal). Then order defendant remanded to the custody of the marshal or to report for service of sentence in the future, or order that the defendant be released pending appeal. If defendant is not immediately taken into custody, remind defendant that the release conditions previously established continue to apply.

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10. Note that, effective Sept. 13, 1994, restitution is mandatory under 18 U.S.C. §§ 2248 and 2259 for some sexual abuse offenses, and under §§ 2264 and 2327 for domestic violence and telemarketing fraud, unless the court specifically finds that defendant cannot pay any amount. Effective Apr. 24, 1996, restitution is also mandatory under new § 3663A for specified violent and other crimes.

11. In misdemeanor and petty offense trials, magistrate judges must notify defendants of their right to appeal. Fed. R. Crim. P. 58(c)(4). Note also that an appeal from a judgment of conviction or sentence by a magistrate judge is to the district court. Fed. R. Crim. P. 58(g)(2).



Impose any additional conditions that are appropriate. Point out that failure to report for service of sentence is a criminal offense under 18 U.S.C. § 3146(a)(2).

27. A transcript or other written record<sup>12</sup> of the court's statement of reasons must be provided to the Probation Office and, if the sentence includes a prison term, to the Bureau of Prisons. 18 U.S.C. § 3553(c).
28. Verify that the parties have copies of the presentence report, or order that they be furnished with an amended copy reflecting corrections and resolutions of disputed issues at the sentencing hearing. Order that a complete, corrected copy be prepared for the Bureau of Prisons and the U.S. Sentencing Commission. Order that any other copies of the presentence report shall remain confidential according to the practice of your court. Direct that, if an appeal is taken, counsel on appeal are to be permitted access to the report. If you accepted sentencing recommendations from the probation office that were not disclosed to counsel, specify that counsel on appeal are not to be permitted access to the recommendation section.

### **Entry of judgment**

A judgment of the conviction should promptly be prepared on the form prescribed for judgments including sentences under the Sentencing Reform Act.<sup>13</sup>

### **Administrative and research documentation**

Order that copies of the charging documents, plea agreement (if any), written proffer or stipulation of facts or law, presentence

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12. The Judicial Conference Committee on Criminal Law and Probation Administration has circulated a form that would be an appropriate other written record.

13. Such as the Judgment Orders approved by the Judicial Conference and distributed by the Administrative Office of the U.S. Courts, Federal Corrections & Supervision Division (formerly Probation & Pretrial Services Division). See Forms AO 245B (Judgment in a Criminal Case) and 245C (Amended Judgment in a Criminal Case).

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report, and judgment of conviction (with statement of reasons) be sent to the U.S. Sentencing Commission.

**Other FJC sources**

Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues (1996)

## **4.02 Revocation of probation or supervised release**

Fed. R. Crim. P. 32.1; 18 U.S.C. §§ 3565 and 3583

### **Introductory note**

Whenever a probationer or a person on supervised release fails to abide by the conditions of supervision or is arrested for another offense, a revocation hearing may be ordered. Revocation is mandatory if a probationer or supervised releasee possesses a firearm (including a destructive device) or a controlled substance or refuses to comply with required drug testing.<sup>1</sup> See 18 U.S.C. §§ 3565(b), 3583(g). Revocation is also mandatory under the Sentencing Guidelines for conduct that constitutes certain serious offenses. See U.S.S.G. §§ 7B1.1 and 7B1.3, p.s. (Nov. 1990).

Because the proceeding may result in incarceration, particular attention must be given to ensuring that the probationer or releasee receives substantive and procedural due process. The revocation procedure may be initiated by the court or at the request of the probation office or the office of the U.S. Attorney. An Order to Show Cause why probation or supervised release should not be revoked is effective for this purpose.

### **Preliminary hearing**

If the probationer or releasee is in custody, Fed. R. Crim. P. 32.1(a)(1) requires a preliminary probable cause hearing before a district judge or magistrate judge. A probable cause hearing is not required if the probationer or releasee is arrested after the issuance of an Order to Show Cause and brought before the court for an immediate revocation hearing without being held in custody, or if he or she appears voluntarily in response to an Order to Show Cause or other notice. Fed. R. Crim. P. 32.1 and Notes of Advisory Committee on Rules.

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1. The mandatory drug testing and revocation for refusal to comply provisions became effective Sept. 13, 1994. The ex post facto prohibition may prevent their application to defendants who committed their offenses before that date.

### **Suggested procedure at the revocation hearing<sup>2</sup>**

1. Establish for the record that the probationer or releasee, defense counsel, a U.S. attorney, and a probation officer are present.
2. Advise the probationer or releasee of the alleged violations by reading or summarizing the revocation motion. If the alleged violation is of a kind that makes revocation mandatory under 18 U.S.C. § 3565(a) or (b) or § 3583(g) (possession of firearm, destructive device, or controlled substance, or refusal to comply with a drug test<sup>3</sup>), or under U.S.S.G. § 7B1.3(a)(1), p.s., include advice to that effect.
3. Ascertain whether or not the alleged violations are admitted or denied by the probationer or releasee.
  - (a) If the violations are admitted:
    - (1) Ask the U.S. attorney to present the factual basis showing the violations of the terms of supervision.
    - (2) Permit the probationer or releasee, his or her counsel, the U.S. attorney, and the probation officer to be heard concerning whether supervision should be revoked or not.
  - (b) If the violations are denied:
    - (1) Receive evidence presented by the U.S. attorney and the probationer or releasee.

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2. Note that under the Federal Courts Administration Act of 1992, a magistrate judge may revoke, modify, or reinstate probation and modify, revoke, or terminate supervised release if any magistrate judge imposed the probation or supervised release. 18 U.S.C. § 3401(d), (h) (effective Jan. 1, 1993).

Also under the Act, a district judge may designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release, to submit proposed findings of fact, and to recommend a disposition. 18 U.S.C. § 3401(i) (effective Jan. 1, 1993).

3. The statutory provisions for mandatory revocation for refusal to comply with drug testing and, for supervised releasees, possession of a firearm, were enacted Sept. 13, 1994. Ex post facto considerations may prohibit application to defendants whose original offenses were committed before that date.

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- (2) The revocation hearing is not a formal trial and the Federal Rules of Evidence need not apply. Fed. R. Evid. 1101(d)(3).<sup>4</sup>
- (3) Proof beyond a reasonable doubt is not required. To revoke probation, the court must be “reasonably satisfied” that the probationer has not met the conditions of probation. *United States v. Francischine*, 512 F.2d 827 (5th Cir.), *cert. denied*, 423 U.S. 931 (1975). Revocation of supervised release requires a preponderance of the evidence. 18 U.S.C. § 3583(e)(3).

4. Sentencing options

- (a) If a determination is made not to revoke probation or supervised release:
  - (1) The original term of probation or supervised release may be extended up to the maximum term of probation or supervised release that could have been imposed originally. 18 U.S.C. §§ 3564(d), 3565(a)(1), 3583(e)(2); U.S.S.G. § 7B1.3(a)(2).
  - (2) Conditions of probation or supervised release may be modified or added. 18 U.S.C. §§ 3563(c), 3565(a)(1), 3583(e)(2); U.S.S.G. § 7B1.3(a)(2).
- (b) If a determination is made to revoke probation<sup>5</sup>:
  - (1) Resentence defendant under the provisions of 18 U.S.C. §§ 3551–3559 if defendant is subject to 18 U.S.C. § 3565(a)(2), as amended Sept. 13, 1994.<sup>6</sup> The court must also consider the provisions of U.S.S.G.

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4. But note that Fed. R. Crim. P. 32.1(c), effective Dec. 1, 1993, requires the production of witness statements pursuant to the terms of Fed. R. Crim. P. 26.2.

5. Courts are advised to give defendant the right of allocution when probation is revoked and a term of imprisonment is imposed. Some circuits have held defendant has such a right, even though Rule 32.1 does not mention it. *See, e.g., United States v. Anderson*, 987 F.2d 251, 261 (5th Cir.), *cert. denied*, 114 S. Ct. 157 (1993); *United States v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991). *Cf. United States v. Coffey*, 871 F.2d 39, 40–41 (6th Cir. 1989) (holding in pre-Guidelines case that there is no right, but stating that “it is sound practice for a district court to permit a defendant to speak regardless of the timing of the sentencing”).

6. Ex post facto considerations may require the use of prior law if defendant committed the original offense before Sept. 13, 1994.

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§ 7B1.3–1.4, p.s. Otherwise, impose any other sentence that was available under the sentencing provisions “at the time of the initial sentencing.”<sup>7</sup> 18 U.S.C. § 3565(a)(2) (before Sept. 13, 1994, amendment). For defendants initially sentenced under the Sentencing Guidelines, consider the provisions of U.S.S.G. § 7B1.3–1.4, p.s.

- (2) If probation is revoked for possession of drugs or firearms or for refusal of required drug testing, sentence defendant to a term of imprisonment.<sup>8</sup> 18 U.S.C. § 3565(b) (effective Sept. 13, 1994).
- (3) [Pre-Guidelines law:] Order, with or without modification, the execution of a sentence previously suspended (the sentence cannot be increased but may be reduced). 18 U.S.C. § 3653.

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7. Because of ex post facto considerations, this earlier version of § 3565(a)(2) may be required if defendant committed the original offense before Sept. 13, 1994. The Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have held that “any other sentence that was available . . . at the time of the initial sentencing” means the guideline range applicable to the original offense of conviction. Note that some of the sentences in the “Revocation Table,” U.S.S.G. § 7B1.4, p.s., may exceed the maximum sentences allowed under this interpretation. *See also* Guideline Sentencing: An Outline of Appellate Case Law at Section VII.A.1 (Federal Judicial Center 1996).

8. This amendment to § 3565 removed the requirement to “sentence the defendant to not less than one-third of the original sentence.” The courts of appeals split on whether “original sentence” meant the term of probation or was limited to the original guideline sentence that could have been imposed. *Compare* United States v. Penn, 17 F.3d 70 (4th Cir. 1994) (use original guideline maximum), United States v. Alese, 6 F.3d 85 (2d Cir. 1993) (same), United States v. Diaz, 989 F.2d 391 (10th Cir. 1993) (same), United States v. Clay, 982 F.2d 959 (6th Cir. 1993) (same), United States v. Granderson, 969 F.2d 980 (11th Cir. 1992) (same), *and* United States v. Gordon, 961 F.2d 426 (3d Cir. 1992) (same), *with* United States v. Sosa, 997 F.2d 1130 (5th Cir. 1993) (probation term), United States v. Byrnett, 961 F.2d 1399 (8th Cir. 1992) (per curiam) (same), *and* United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992) (same). As in note 6, *supra*, ex post facto considerations may limit the length of the sentence that may be imposed in some circuits for defendants who committed their original offenses before Sept. 13, 1994.

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- (c) If a determination is made to revoke supervised release<sup>9</sup>:
- (1) Require the person to serve in prison<sup>10</sup> all or part of the term of supervised release without credit for time previously served on post-release supervision, except that the person may not be required to serve more than five years in prison if the person was convicted of a Class A felony, more than three years in prison if the offense was a Class B felony, more than two years in prison if the offense was a Class C or D felony, or more than one year in any other case. 18 U.S.C. § 3583(e)(3). For defendants initially sentenced under the Sentencing Guidelines, consider the provisions of U.S.S.G. § 7B1.3–1.4, p.s.
  - (2) Require the person to serve a term of imprisonment when revocation is for possession of drugs or firearms or for refusal of required drug testing. 18 U.S.C. § 3583(g) (as amended Sept. 13, 1994).<sup>11</sup>
  - (3) If the term of imprisonment imposed is less than the statutorily authorized maximum, determine whether to reimpose a term of supervised release. The length of the reimposed term may not exceed the term of supervised release authorized by statute for the original offense, less the term of imprisonment imposed upon revocation. 18 U.S.C. § 3583(h) (added Sept. 13, 1994).<sup>12</sup>

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9. Courts are advised to give defendant the right of allocution when supervised release is revoked and a term of imprisonment is imposed. Some circuits have held that defendant has such a right, even though Rule 32.1 does not mention it. *See, e.g.,* *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1994).

10. Home confinement may also be imposed as an alternative to incarceration. *See* 18 U.S.C. § 3583(e)(4); U.S.S.G. § 5F1.2.

11. Before Sept. 13, 1994, § 3583 required such defendants “to serve in prison not less than one-third of the term of supervised release” and only applied to revocation for drug possession.

12. This new provision largely codifies the practice in the First and Eighth Circuits, which held that supervised release may be reimposed after revocation if the term of imprisonment plus the new term of release does not exceed the length of the term of release originally imposed. However, most of the other circuits had held that supervised release may not be reimposed, and the *ex post*

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5. Judgment or order

Enter the appropriate order or judgment. Note that for sentences imposed pursuant to U.S.S.G. § 7B1, p.s., the court should include “the reasons for its imposition of the particular sentence.” 18 U.S.C. § 3553(c).

**Other FJC sources**

Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues (1996)

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facto clause may prohibit application of § 3583(h) to defendants in those circuits whose original offenses were committed before Sept. 13, 1994. In these cases a more appropriate response to a violation may be the imposition of a limited term of home detention or community confinement as an additional condition of supervision. *See* 18 U.S.C. § 3583(e). Note also that, because § 3583(h) uses the statutorily authorized maximums as its limits, the ex post facto clause may limit a reimposed term of release in the First and Eighth Circuits if defendant originally received a term of supervised release less than the statutory maximum.



## 5.01 Handling a disruptive defendant

Fed. R. Crim. P. 43(b)(3)

The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere, . . . after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

Fed. R. Crim. P. 43(b)(3).

The Supreme Court held that a disruptive defendant, after appropriate warning, may be removed from the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970). (The Court also stated that a defendant may be cited for contempt or, “as a last resort,” allowed to remain in the courtroom bound and gagged, but those options are not discussed here.)

When faced with a disruptive defendant the court should:

1. Warn defendant that continuation of the disruptive conduct will lead to removal from the courtroom.<sup>1</sup>
2. If the disruptive conduct continues, determine whether it warrants removal of defendant.<sup>2</sup>
3. At the beginning of each session, advise defendant that he or she may return to the courtroom if defendant assures the court that there will be no further disturbances.

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1. One circuit held that, in a multidefendant case, “[n]otice to one defendant is notice to all present in the courtroom for purposes of Rule 43.” *United States v. West*, 877 F.2d 281, 287 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

2. Whether the conduct is serious enough to warrant removal is generally in the discretion of the trial judge. Rule 43(b)(3) simply states that it must be “such as to justify exclusion from the courtroom,” and the Supreme Court described it as conduct that is “so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom,” *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

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4. Consider ways to allow defendant to communicate with his or her attorney to keep apprised of the progress of the trial. The court may consider making arrangements to allow defendant to hear or see the proceedings via electronic means, if available.
5. Consider any other factors required by circuit law.<sup>3</sup>

If defendant is appearing pro se and standby counsel is present, the court should first warn defendant that pro se status will be denied and that standby counsel will take over if there is further disruption. If pro se status is denied and standby counsel takes over, defendant may be removed from the courtroom for any further disruption.

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 73–75 (4th ed. 1996)

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3. For example, the Eleventh Circuit requires courts to consider the potential prejudice to the defense of defendant's absence in addition to the adequacy of the warning and degree of misconduct. *See Foster v. Wainwright*, 686 F.2d 1382, 1388 (11th Cir. 1982), *cert. denied*, 459 U.S. 1213 (1983).

## **5.02 Grants of immunity**

18 U.S.C. § 6003(a); 21 U.S.C. § 884(b); 28 C.F.R. § 0.175.

The cited statutes provide for the entry of an order requiring an individual to give testimony or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States after the court ensures compliance with the requirements of 18 U.S.C. §§ 6002, 6003, and 28 C.F.R. § 0.175, or, in the case of testimony or information concerning controlled substances, with 21 U.S.C. § 884 and 28 C.F.R. § 0.175.

### **Procedure**

- A. Review the motion of the U.S. attorney to satisfy yourself that:
  1. the motion is made with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General of the United States Department of Justice;
  2. the motion asserts that the testimony or other information from the individual may be necessary to the public interest; and
  3. the motion asserts that the individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.
- B. If the above requirements have been met, enter an order reflecting the court's satisfaction that the prerequisites have been met and ordering, pursuant to 18 U.S.C. § 6002 or 21 U.S.C. § 884, that:
  1. the person shall give testimony or provide other information as to all matters about which the person may be interrogated before the court or the grand jury, that he or she has refused to give or to provide on the basis of the privilege against self-incrimination;
  2. the order shall become effective only if, after the date of the order, the person refuses to testify or provide other

*Section 5.02: Grants of immunity*

information on the basis of his or her privilege against self-incrimination;

3. no testimony or other information compelled from the person under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the person in any criminal case except in a prosecution for perjury, for giving a false statement, or for otherwise failing to comply with the order; and
  4. the motion and order are to be sealed, if appropriate.
- C. Cause the (sealed) motion and order to be delivered to the Clerk of Court.

**Other FJC sources**

Pattern Criminal Jury Instructions 32 (1987)

Manual for Complex Litigation, Third, at 258 n.818 (1995)

Donald S. Voorhees, Manual on Recurring Problems in Criminal Trials 125–26 (4th ed. 1996)

## 5.03 Invoking the Fifth Amendment

- A. If a witness refuses to answer a proper question and invokes the Fifth Amendment privilege to justify that refusal, the trial court must determine whether the privilege has been properly claimed. The Fifth Amendment privilege extends to:
1. answers that would support a conviction of the witness for violating a federal or state criminal statute; or
  2. answers that would furnish a link in the chain of evidence needed to prosecute the witness for violating a federal or state criminal statute.
- B. The following suggested procedure may be used when a witness claims the Fifth Amendment privilege:
1. Excuse the jury.
  2. Explain to the witness the nature of the Fifth Amendment privilege. Ask the witness if he or she wishes to consult counsel. Consider the appointment of counsel.
  3. Have the question repeated to the witness and ask the witness if he or she still refuses to answer the question.
  4. If the witness still refuses on the ground of the Fifth Amendment, the court should determine whether the claim of the privilege is appropriate. Be careful not to interrogate the witness about the claim in such a way as to force the witness to surrender the privilege in order to claim it.
  5. If the witness makes a prima facie showing of the validity of his or her claim, the party seeking the answer then has the burden to demonstrate that the answer could not possibly tend to incriminate the witness.
  6. Sustain the Fifth Amendment claim if you find that the witness has reasonable cause to believe that answering the particular question might tend to incriminate him or her. The criterion to be applied in making this determination is the *possibility* of prosecution, not the likelihood of prosecution.

### NOTE

The case law on this subject will vary from circuit to circuit. The suggested procedure may be varied to conform with the law of the circuit, the practice of the district, and the preferences of the individual judge.

*Section 5.03: Invoking the Fifth Amendment*

As the Supreme Court found in *Hoffman v. United States*, 341 U.S. 479, 486 (1951):

To sustain the privilege it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

7. The witness may not assert a blanket claim of the privilege as to all questions. For each question, the witness must assert or not assert the privilege. Out of the jury's presence, the court must rule as to each question whether the witness's claim of privilege is sustained or overruled. The court may sustain a blanket assertion of the privilege only if it concludes, after inquiry, that the witness could legitimately refuse to answer all relevant questions.

**Other FJC sources**

Manual for Complex Litigation, Third 100, 258, 306 (1995)

Donald S. Voorhees, Manual on Recurring Problems in Criminal Trials 115–27 (4th ed. 1996)

## 5.04 Handling the recalcitrant witness

Refusal by a witness during trial or before a grand jury to answer a proper question, after having been ordered to do so by the court, constitutes contempt of court, and the witness may be subject to both civil and criminal contempt sanctions. See 18 U.S.C. § 401(3); 28 U.S.C. § 1826(a).

### A. Recalcitrant witness during trial

When a witness refuses to answer a proper question during trial, consider the following procedure:

1. Excuse the jury.
2. Determine the reason for the refusal. (If the witness claims the Fifth Amendment privilege, see 5.03: Invoking the Fifth Amendment.)
3. If no valid Fifth Amendment claim or other good cause is shown, advise the witness:
  - (a) that the jury will be recalled and that the witness will be ordered to answer the question;
  - (b) that if the witness persists in refusing to answer, he or she will be cited in civil contempt and, if found guilty, will be confined until he or she answers the question or until the trial ends. Advise the witness that he or she may be fined in addition to being confined.
  - (c) that if the witness has not answered the question before the trial ends, he or she may then be cited for criminal contempt and, if found guilty, fined *or* imprisoned; that if the witness is found guilty of criminal contempt at a bench trial, he or she may be imprisoned for as much as six months; and that if a jury finds the witness guilty of criminal contempt, he or she may be imprisoned for as long as the judge in his or her discretion determines. (If the witness is currently serving another sentence, advise the witness that if he or she is confined for civil or criminal con-

### NOTE

The case law on this subject will vary from circuit to circuit. The suggested procedure may be varied to conform with the law of the circuit, the practice of the district, and the preferences of the individual judge.

*Section 5.04: Handling the recalcitrant witness*

tempt, the confinement will be in addition to the sentence already being served.)

4. The jury should then be recalled, the question re-asked, and the witness ordered to answer.
5. If the witness refuses to answer, counsel should be permitted to examine the witness relative to other subject matter about which the witness is willing to testify.
6. After the witness has been examined:
  - (a) direct him or her to remain in court until the next recess; or
  - (b) excuse the jury so that a time can be set for a hearing to determine if the witness should be found in civil contempt.

*Note:* The witness should be given a reasonable time to prepare for the hearing, but this time depends on the need for prompt action. If the trial is expected to be short, set an early hearing so that effective pressure to testify can be exerted on the witness before the trial ends. If the trial is expected to be lengthy, the hearing need not be held so promptly. (If, but only if, there is need for immediate action, the witness can be held in summary criminal contempt under Fed. R. Crim. P. 42(a) and committed at once for criminal contempt that occurred in the presence of the court. If committed for criminal contempt, the witness should be committed for a stated period of time but should be advised that the court would reconsider that sentence if the witness decided to testify during the trial. See, e.g., *United States v. Wilson*, 421 U.S. 309 (1975) (summary contempt under Rule 42(a) appropriate for already imprisoned witnesses who refused to testify despite grant of immunity).<sup>1</sup>) Advise the witness that he or she may be represented by an attorney at the hearing on the civil contempt citation and that, if the witness cannot afford an attorney, one will be appointed.

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1. Note that *Wilson* applies only to witnesses during a criminal trial. Witnesses before a grand jury should be given notice and a hearing under Rule 42(b). See *Harris v. United States*, 382 U.S. 162 (1965).



*Section 5.04: Handling the recalcitrant witness*

7. If, at the hearing, the witness fails to show good cause why he or she should not be compelled to answer the question that the court ordered the witness to answer, he or she should be found in civil contempt and remanded into the marshal's custody. Advise the witness that he or she may purge himself or herself of contempt and secure release by answering the question.
  8. Direct the marshal to return the witness to the courtroom before court convenes the next day. At that time ask the witness if he or she is prepared to answer the question which was asked of him or her. If not, again remand the witness into the marshal's custody. Advise the witness to notify the jailer at once if he or she decides to answer the question, so that the witness can be returned to court and permitted to purge himself or herself of contempt.
  9. If the witness has not purged himself or herself of contempt by the time the trial ends, have him or her brought back into court.
  10. Pursuant to the procedure outlined in Fed. R. Crim. P. 42(b), advise the witness that he or she is being cited for criminal contempt for refusing to obey the court's order.
  11. Set the matter down for hearing at a certain place and time to determine if the witness is guilty of criminal contempt. (Bear in mind that the maximum prison sentence that can be imposed after a bench trial is six months. For a prison sentence of more than six months, there must be a jury trial.)
  12. Advise the witness that he or she has a right to be represented by counsel at that hearing and that if the witness cannot afford counsel an attorney will be appointed by the court.
  13. Release the witness from custody. Bail may be set to ensure the witness's appearance at the hearing.
- B. Recalcitrant witness before grand jury
- When a witness refuses to answer a proper question before a grand jury, consider the following procedure:

*Section 5.04: Handling the recalcitrant witness*

1. Have the witness appear before the court out of the presence of the grand jury.
2. Determine the reason for the refusal. (If the witness claims the Fifth Amendment privilege, see 5.03: Invoking the Fifth Amendment.)
3. If no valid Fifth Amendment claim or other good cause is shown, advise the witness:
  - (a) that he or she will be returned to the presence of the grand jury and that the court is ordering the witness to answer the question that he or she had previously refused to answer.
  - (b) that if the witness persists in refusing, he or she will be cited in civil contempt and, if found guilty, may be confined for the term of the grand jury, including extensions, or for a period of eighteen months, or until the witness answers the question, whichever occurs first. Advise the witness that he or she may be fined in addition to being confined.
  - (c) that if the witness has not answered the question before the term of the grand jury and its extensions expire, or after eighteen months have passed, whichever occurs first, the witness will be released from custody but may then be cited for criminal contempt and, if found guilty, may be fined or imprisoned; that if the witness is found guilty of criminal contempt at a bench trial, he or she may be imprisoned for as much as six months; and that if a jury finds the witness guilty of criminal contempt, he or she may be imprisoned for as long as the judge in his or her discretion determines. (If the witness is currently serving another sentence, advise him or her that the confinement for criminal contempt would be in addition to the sentence currently being served.)
4. Return the witness to the grand jury room.<sup>2</sup>

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<sup>2</sup> This step may be unnecessary if the witness declares during the court proceeding that he or she will persist in refusing and that another opportunity to answer would be pointless.

*Section 5.04: Handling the recalcitrant witness*

5. If the witness persists in refusing to answer the question before the grand jury, have him or her brought before the court and at that time advise the witness that he or she is being cited for civil contempt. Do not summarily adjudge the witness to be in contempt pursuant to Fed. R. Crim. P. 42(a). Rather, advise the witness when and where a hearing will be held on the civil contempt citation. Advise the witness that he or she may be represented by counsel at that hearing and that, if the witness cannot afford counsel, the court will appoint an attorney.
6. If the evidence warrants, adjudge the witness to be in civil contempt and order him or her committed for the term of the grand jury and its extensions, for eighteen months, or until he or she answers the question, whichever occurs first. 28 U.S.C. § 1826.
7. Advise the witness that he or she will be released as soon as he or she has purged himself or herself of contempt by answering the question and that the witness should advise the jailer at once if he or she decides to answer the question.
8. If the witness has not purged himself or herself of civil contempt before the term of the grand jury and its extensions expire or eighteen months have passed, whichever occurs first, the witness may be cited for criminal contempt pursuant to Fed. R. Crim. P. 42(b).
9. If you decide to cite the witness for criminal contempt, advise the witness when and where the hearing will be held to determine if he or she should be punished for criminal contempt. (Bear in mind that the maximum prison sentence that can be imposed after a bench trial is six months. For a prison sentence of more than six months, there must be a jury trial.)
10. Advise the witness that he or she has a right to be represented by counsel at the hearing and that if the witness cannot afford counsel, the court will appoint an attorney.

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11. Release the witness from custody. If necessary, set bail to ensure that the witness appears at the hearing on the criminal contempt citation.

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 68–73 (4th ed. 1996)

*Manual for Complex Litigation*, Third 293 (1995)

## 5.05 Criminal defendant's motion for mistrial

### General guidelines

When a criminal defendant moves for a mistrial, the general rule is that retrial is not barred by double jeopardy concerns. See *United States v. Scott*, 437 U.S. 82, 93–94 (1978). However, there is one important exception to this rule: Retrial is barred if the motion was provoked by intentional government misconduct.

Only where the governmental conduct in question is intended to “goad” the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having successfully aborted the first on his own motion.

*Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

The court must find that the *intent* of the government was to deliberately provoke a mistrial, not merely that the conduct was harassing or in bad faith.

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.

*Id.* at 675–76.

Note that mistake or carelessness is not sufficient to support a double jeopardy claim. See, e.g., *United States v. Johnson*, 55 F.3d 976, 978 (4th Cir. 1995); *United States v. Powell*, 982 F.2d 1422, 1429 (10th Cir. 1992), *cert. denied*, 508 U.S. 917 (1993). Nor is “[n]egligence, even if gross,” *United States v. Huang*, 960 F.2d 1128, 1133 (2d Cir. 1992). Even a deliberate improper act that causes a mistrial does not prevent retrial if it was not *intended* to provoke a mistrial. *United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990) (although prosecutor deliberately attempted to elicit from witness evidence that court had ruled inadmissible, court found that conduct was motivated by “prosecutorial inexperience”).

If defendant moves for a mistrial with jeopardy attached on the specific ground of prosecutorial misconduct, the court should

not deny a mistrial on that ground and then declare a mistrial without prejudice over defendant's objection unless defendant consents or there is "manifest necessity" for a mistrial. See *Weston v. Kernan*, 50 F.3d 633, 636–38 (9th Cir.), *cert. denied*, 116 S. Ct. 351 (1995). See also *Corey v. District Court of Vt., Unit #1, Rutland Cir.*, 917 F.2d 88, 90–92 (2d Cir. 1990) (retrial prohibited where defendant consented to mistrial only if jeopardy attached but court declared mistrial without prejudice).

### **Multidefendant cases**

If only one or some of the defendants move successfully for mistrial, the court should give the other defendants an opportunity to object. Unless the nonmoving defendants join the motion or acquiesce to the decision,<sup>1</sup> the court should sever their cases or must find that there are grounds to declare a mistrial for those defendants, too. See, e.g., *White*, 914 F.2d at 753–55 (conviction must be vacated on double jeopardy grounds where defendant did not have sufficient opportunity to object to other defendant's mistrial motion at initial trial, the record did not indicate he joined the motion or otherwise consented to mistrial, and "there was no manifest necessity for declaring a mistrial in regard to him").

Courts should be particularly careful in multidefendant cases where some defendants would agree to a mistrial with prejudice but would object to mistrial without prejudice. See, e.g., *United States v. Huang*, 960 F.2d 1128, 1134–36 (2d Cir. 1992) (where all four defendants moved for mistrial, but two specifically moved for mistrial with prejudice and objected to granting of mistrial without prejudice, double jeopardy prevented retrial because there was no manifest necessity to declare mistrial rather than sever the cases and proceed with original trial for them).

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1. If defendant has a reasonable opportunity to object to the granting of a mistrial but does not, consent to the mistrial may be implied. See, e.g., *United States v. DiPietro*, 936 F.2d 6, 10–11 (1st Cir. 1991).

*Section 5.05: Criminal defendant's motion for mistrial)*

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 159–63 (4th ed. 1996)





## **6.01 Trial outline (civil case)**

1. Have the case called for trial.
2. Jury is selected (see 6.03: Jury selection—civil).
3. Give preliminary instructions to the jury (see 6.05: Preliminary jury instructions in civil case).
4. Ascertain whether any party wishes to invoke the rule to exclude from the courtroom witnesses scheduled to testify in the case.
5. Plaintiff's counsel makes opening statement.
6. Defense counsel makes opening statement (unless permitted to reserve).
7. Plaintiff's counsel calls witnesses for the plaintiff.
8. Plaintiff rests.
9. Hear appropriate motions.
10. Defense counsel makes opening statement if he or she has been permitted to reserve.
11. Defense counsel calls witnesses for the defense.
12. Defense rests.
13. Counsel call rebuttal witnesses.
14. Plaintiff rests on its entire case.
15. Defense rests on its entire case.
16. Consider appropriate motions.
17. Out of the hearing of the jury, rule on counsel's requests for instructions and inform counsel as to the substance of the court's charge. Fed. R. Civ. P. 51.
18. Closing arguments by counsel.
19. Charge the jury (see 6.06: General instructions to jury at end of civil case). Fed. R. Civ. P. 51.
20. Rule on objections to the charge and make any additional appropriate charge.
21. Instruct the jury to go to the jury room and commence its deliberations.

*Section 6.01: Trial outline (civil case)*

22. Determine which exhibits are to be sent to the jury room.
23. Have the clerk give the exhibits and the verdict forms to the jury.
24. Recess court during the jury deliberations.
25. Before responding to any communications from the jury, consult with counsel on the record (see 6.06: General instructions to jury at end of civil case).
26. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide for their overnight sequestration or permit them to separate after admonishing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.
27. If the jury reports that they cannot agree on a verdict, determine by questioning whether they are hopelessly deadlocked. Do not inquire as to the numerical split of the jury. If you are convinced that the jury is hopelessly deadlocked, declare a mistrial. If you are not so convinced, direct them to resume their deliberations.
28. When the jury has agreed on a verdict, reconvene court and take the verdict (see 6.07: Verdict—civil).
29. Poll the jury on the request of either party.
30. Thank and discharge the jury.
31. Enter judgment upon the verdict. Fed. R. Civ. P. 58.
32. Fix a time for post-trial motions.
33. Adjourn or recess court.

**Other FJC sources**

Manual for Litigation Management and Cost and Delay Reduction 41–47 (1992)

Manual for Complex Litigation, Third 127–63 (1995)

## 6.02 Findings of fact and conclusions of law in civil cases and motions

### A. When Required

#### 1. Fed. R. Civ. P. 52(a)

(a) *In all cases tried without a jury or with an advisory jury*, “the court shall find the facts specially and state separately its conclusions of law thereon.”

(b) *In granting or refusing interlocutory injunctions*, “the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.”

*Note:* This is in addition to the requirements of Fed. R. Civ. P. 65(d), which requires that “[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.”

#### 2. Fed. R. Civ. P. 52(c)—Judgment on Partial Findings

“If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party [on that issue]. . . . Such judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.”

#### 3. Fed. R. Civ. P. 41(a)(2)—Voluntary Dismissal

Plaintiff’s motion for voluntary dismissal shall not be granted “save upon order of the court and upon such terms and conditions as the court deems proper.”

### B. Not required:

*On any motions* (other than under Fed. R. Civ. P. 52(c)).

Fed. R. Civ. P. 52(a) states that findings of fact and conclusions of law “are unnecessary on decisions of motions

*Section 6.02: Findings of fact and conclusions of law in civil motions*

under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.”

Fed. R. Civ. P. 12 covers instances when defenses and objections to the pleadings are made and how they are presented—by pleading or motion. Fed. R. Civ. P. 12(c) pertains to a motion for judgment on the pleadings and refers to Fed. R. Civ. P. 56, which covers summary judgment.

The exemption of motions, particularly those under Fed. R. Civ. P. 12 and 56, from the requirement of making findings and conclusions means that most motions that are filed can be disposed of by simply stating “granted” or “denied.”

*Note:* Some circuit courts prefer findings and conclusions on dispositive motions, particularly on motions for summary judgment, and may vacate and remand orders if the district court fails to provide any reasoning on the record for its decision. Judges should be aware that circuit law may require, or strongly urge, detailed findings on some motions.<sup>1</sup>

C. Form and substance

1. No particular format is required if an opinion or memorandum is filed.

“It will be sufficient if the findings of fact and conclusions of law . . . appear in an opinion or memorandum of decision filed by the court.” Fed. R. Civ. P. 52(a). A memorandum that contains only a list of findings and conclusions is adequate. The findings and conclusions need not be listed separately in an opinion.

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1. *See, e.g.,* *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355 (4th Cir. 1994); *Pasquino v. Prather*, 13 F.3d 1049 (7th Cir. 1994); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 241 n.6 (5th Cir. 1993); *Telectronics Pacing Systems v. Ventritex, Inc.*, 982 F.2d 1520, 1526–27 (Fed. Cir. 1992); *United States v. Woods*, 885 F.2d 352 (6th Cir. 1989); *Clay v. Equifax, Inc.*, 762 F.2d 952 (11th Cir. 1985).

2. From the bench

“It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence . . . .” Fed. R. Civ. P. 52(a). It is always quicker and sometimes just as easy to make the findings and conclusions from the bench at the end of the case as it is to take the matter under submission. Be sure that they are put in the record.

3. Requested findings and conclusions submitted by counsel

Unlike in some state courts, specifically adopting or denying the requested findings and conclusions submitted by counsel is not necessary. Some courts of appeals look with a jaundiced eye on district court findings or conclusions that follow counsel’s requests verbatim.

4. Stipulations

Stipulations by counsel as to the facts are always helpful. Unlike requests, they should be used verbatim. Counsel, of course, cannot stipulate as to the applicable law. They can only suggest.

5. Length and style of opinion

This can be left only to the individual judge, but from the viewpoint of an appellate court, there are certain basics:

- (a) *Jurisdiction*. This is elementary, but sometimes overlooked. The statutory basis should be stated.
- (b) *The issues*. It is helpful if the issues are stated at the beginning of the opinion.
- (c) *Credibility findings*. These are the exclusive province of the district court. They should be clearly stated. If you do not believe a witness, say so.
- (d) *The facts*. If you have a transcript, refer to the pages that contain the evidence on which you rely. If there is no transcript and your opinion is based on your trial notes, say so. Some appellate courts forget that district court judges do not always have the benefit of a written record.

*Section 6.02: Findings of fact and conclusions of law in civil motions*

- (e) *The law.* There are three basic situations that you will face:
- (i) the law is well settled;
  - (ii) the law is unsettled; or
  - (iii) there is no applicable law—the case is one of first impression.

The first situation poses no problem; the second and third may create a fear-of-reversal syndrome. Do not worry about whether you may be reversed. No judge has been impeached for having been reversed. Get on with the opinion and do the best you can. The court of appeals or the Supreme Court is going to have the last word anyhow.

Be sure that someone checks the subsequent history of the cases. It is not a sin to be overruled except for relying on a case that was overruled.

**Other FJC sources**

Manual for Complex Litigation, Third 161–62 (1995)

Manual for Litigation Management and Cost and Delay Reduction (1992), Sample Form 34, Guidelines for Proposed Findings of Fact and Conclusions of Law, at 303

## 6.03 Jury selection—civil

The Benchbook Committee recognizes that there is no uniform recommended procedure for selecting jurors to serve in criminal or civil cases and that trial judges will develop the patterns or procedures most appropriate for their districts and their courts. Section 6.04, however, provides an outline of standard voir dire questions. For a sample juror questionnaire, see Sample Form 37 on page 317 of the *Manual for Litigation Management and Cost and Delay Reduction* (Federal Judicial Center 1992).

The 1982 Federal Judicial Center publication *Jury Selection Procedures in United States District Courts*, by Gordon Bermant, contains a detailed discussion of several different methods of jury selection. The Center sends this publication to all new district and magistrate judges. Copies are also available on request. See also the section on jury selection and composition (pp. 580–82) in Judge William W Schwarzer’s article “Reforming Jury Trials” in volume 132 of *Federal Rules Decisions* (1990).

Judges should be aware of the cases, beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), that prohibit peremptory challenges based on race. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Supreme Court extended *Batson* to prohibit private litigants in civil cases from using peremptory challenges to exclude jurors on account of race. Peremptory strikes on the basis of gender are also prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

The Supreme Court has left it to the trial courts to develop rules of procedure and evidence for implementing these decisions. It has, however, set out a three-step inquiry for resolving a *Batson* challenge (see *Purkett v. Elem*, 115 S. Ct. 1769, 1770-71 (1995):

1. The opponent of a peremptory challenge must make out a prima facie case of discrimination.
2. The burden of production then shifts to the proponent of the strike to come forward with a nondiscriminatory (i.e., race- and gender-neutral) explanation of the strike.

3. Trial court must then decide whether the opponent of the strike has proved purposeful discrimination.

The Benchbook Committee suggests that judges:

- conduct the above inquiry on the record but outside of the jury’s hearing, to avoid “tainting” the venire by discussions of race, gender, or other characteristics of potential jurors; and
- use a method of jury selection which requires litigants to exercise challenges at sidebar or otherwise outside of the jurors’ hearing and in which no venire members are dismissed until all of the challenges have been exercised. See *Jury Selection Procedures in United States District Courts*, infra.

In this way, jurors are never aware of *Batson* discussions or arguments about challenges, and therefore can draw no adverse inferences by being temporarily dismissed from the venire and then recalled.

### **Other FJC sources**

Manual for Litigation Management and Cost and Delay Reduction 41–42 (1992)

Manual for Complex Litigation, Third 146–49 (1995)

For a summary of procedures that courts developed for criminal cases in the first two years after *Batson*, see Bench Comment, 1988, Nos. 3 & 4

For a discussion of voir dire practices in light of *Batson*, see Chambers to Chambers, Vol. 5, No. 2 (1987)



## 6.04 Standard voir dire questions—civil

Fed. R. Civ. P. 47(a) provides that the court “may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination.” The following outline for an initial in-depth voir dire examination of the entire panel by the court assumes that:

1. if there are affirmative responses to any questions, follow-up questions will be addressed to the juror(s) (at sidebar, if such questions concern private or potentially embarrassing matters);
2. the court and counsel have been furnished with the name, address, age, and occupation of each prospective juror.

If the court conducts the entire examination, it should require counsel to submit proposed voir dire questions before trial to permit the court to incorporate additional questions at the appropriate places in this outline.

1. Have the jury panel sworn.
2. Explain to the jury panel that the purpose of the voir dire examination is:
  - (a) to enable the court to determine whether or not any prospective juror should be excused for cause;
  - (b) to enable counsel for the parties to exercise their individual judgment with respect to peremptory challenges—that is, challenges for which counsel need not give a reason.
3. Indicate that the case is expected to take \_\_\_ days to try, and ask if this fact presents a special problem to any member of the panel.
4. Briefly describe the case that is about to be tried.
5. Ask if any member of the panel has heard or read anything about the case.

### NOTE

*See also* Manual for Litigation Management and Cost and Delay Reduction (Federal Judicial Center 1992), Sample Form 40 at 325, for additional judicial colloquy with the jury, including admonitions and general instructions.

*Section 6.04: Standard voir dire questions—civil*

6. Introduce counsel (or have counsel introduce themselves) and ask if any member of the panel or his or her immediate family knows or has had any business dealings with any of the counsel or their law firms.
7. Introduce the parties (or have counsel introduce parties) and ask if any member of the panel or his or her immediate family
  - (a) is personally acquainted with,
  - (b) is related to,
  - (c) has had business dealings with,
  - (d) is currently or was formerly employed by,
  - (e) has had any other relationship or business connection with, or
  - (f) is a stockholder ofany party in the case.
8. Introduce or identify by name, address, and occupation all prospective witnesses (or have counsel do so). Ask if any member of the panel knows any of the prospective witnesses.
9. Ask prospective jurors:
  - (a) Have you ever served as a juror in a criminal or a civil case or as a member of a grand jury in either a federal or state court?
  - (b) Have you or has anyone in your immediate family ever participated in a lawsuit as a party or in any other capacity?
  - (c) If you are selected to sit on this case, will you be able to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?
  - (d) Is there any member of the panel who has any special disability or problem that would make serving as a member of the jury difficult or impossible?

*Section 6.04: Standard voir dire questions—civil*

- (e) [At this point, if the court is conducting the entire examination, ask those questions submitted by counsel that you feel should be propounded. If the questions elicit affirmative responses, ask appropriate follow-up questions.]
  - (f) Having heard the questions put to you by the court, does any other reason suggest itself to you as to why you could not sit on this jury and render a fair verdict based on the evidence presented to you and in the context of the court's instructions to you on the law?
10. (a) If appropriate, permit counsel to conduct additional direct voir dire examination, subject to such time and subject matter limitations as the court deems proper;  
or
- (b) Direct counsel to come to the bench, and consult with them as to whether any additional questions should have been asked or whether any were overlooked.

**Other FJC sources**

Manual for Litigation Management and Cost and Delay Reduction 41–42 (1992)

Manual for Complex Litigation, Third 147–49 (1995)



## **6.05 Preliminary jury instructions in civil case**

### **Introductory note**

These suggested instructions are designed to be given following the swearing of the jury. They are general and may require modification in light of the nature of the particular case. They are intended to give the jury, briefly and in understandable language, information to make the trial more meaningful. Other instructions, such as explanations of depositions, interrogatories, and the hearsay rule, may be given at appropriate points during the trial.

Members of the jury: Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

### **Duty of the jury**

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not.

Nothing the court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

### **Evidence**

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.

*Section 6.05: Preliminary instructions in jury case*

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.
3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.
4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

### **Burden of proof**

This is a civil case. The plaintiff has the burden of proving his [her] case by what is called the preponderance of the evidence. That means the plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not. To put it differently, if you were to put the plaintiff's and the defendant's evidence on opposite sides of the scales, the plaintiff would have to make the scales tip somewhat on his [her] side. If the plaintiff fails to meet this burden, the verdict must be for the defendant.

Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case; therefore, you should put it out of your mind.

### Summary of applicable law

In this case, the plaintiff claims that \_\_\_\_\_; the defendant claims that \_\_\_\_\_. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements which plaintiff must prove to make his [her] case: [here summarize the elements].

#### **NOTE**

A summary of the elements may not be appropriate in some cases.

### Conduct of the jury

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything touching on this case in any way. If anyone should try to talk to you about it, bring it to the court's attention promptly.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[If the court determines to allow note taking, add:]

If you wish, you may take notes. But if you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use.

### Course of the trial

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence.

*Section 6.05: Preliminary instructions in jury case*

Next, the plaintiff will present his [her] witnesses, and the defendant may cross-examine them. Then the defendant will present his [her] witnesses, and the plaintiff may cross-examine them.

After that, the attorneys will make their closing arguments to summarize and interpret the evidence for you, and the court will give you instructions on the law.

You will then retire to deliberate on your verdict.

**NOTE**

Some judges may wish to give some instructions before closing arguments. *See* Fed. R. Civ. P. 51.

**Other FJC sources**

Manual for Litigation Management and Cost and Delay Reduction 43–44 (1992)

Manual for Complex Litigation, Third 150–52 (1995)



## **6.06 General instructions to jury at end of civil case**

### **Introductory note**

Fed. R. Civ. P. 51 outlines the procedure for the submission and consideration of requests by the parties for specific jury instructions. It requires:

1. that the court inform counsel before closing arguments of its proposed action upon the instructions requested by counsel;
2. that the court give counsel adequate opportunity outside the presence of the jury to object to the court's instructions.

There is no prescribed method for the court to settle on its final set of instructions. Some courts hold an on-the-record charge conference with counsel during trial. At that conference the tendered instructions are discussed and are accepted, rejected, or modified by the court.

Other courts, without holding a charge conference, prepare a set of proposed instructions from those tendered by counsel. These courts then give a copy of the proposed instructions to all counsel and permit counsel to take exception to the instructions. Thereafter, the court may revise its instructions if convinced by counsel in their objections that the instructions should be modified.

Still other courts require counsel to confer during trial and to agree, to the extent that they can, on the instructions that should be given. The court then considers only those instructions upon which the parties cannot agree.

The court may, of course, give an instruction to the jury that neither party has tendered.

While the court is free to ignore tendered instructions and to instruct the jury *sua sponte*, the usual practice is for the court to formulate the final instructions with the assistance of counsel and principally from the instructions counsel tendered.

Local practice varies as to whether a written copy of the instructions is given to the jury for use during its deliberations.

*Section 6.06: General instructions to jury at end of civil case*

Many judges always give the jury a written copy of the instructions. Some courts have the instructions recorded as they are given in court and permit the jury to play them back in the jury room. Some courts do neither but will repeat some or all of the instructions in response to a request from the jury.

**Outline of instructions**

Instructions delivered at the end of a trial consist of three parts: Instructions on general rules that define and control the jury's duties; statement of rules of law that the jury must apply; and rules and guidelines for jury deliberation and return of verdict.

A. General rules

1. Outline the duty of the jury:
  - (a) to find facts from admitted evidence;
  - (b) to apply law as given by the court to the facts as found by the jury;
  - (c) to decide the case on the evidence and the law regardless of personal opinions and without bias, prejudice, or sympathy.
2. Discuss burden of proof in civil trials and explain how it differs from criminal trials.
3. Indicate the evidence to be considered:
  - (a) sworn testimony of witnesses;
  - (b) exhibits;
  - (c) stipulations;
  - (d) facts judicially noticed.
4. Indicate what is not evidence:
  - (a) arguments and statements of counsel;
  - (b) questions to witnesses;
  - (c) evidence excluded by rulings of the court.

B. Delineate with precision and with specific consideration of the law of your circuit each claim and defense of the parties that is to be submitted to the jury for their consideration.

C. Closing instructions

1. Selection and duty of the foreperson;

*Section 6.06: General instructions to jury at end of civil case*

2. Process of jury deliberation:
    - (a) rational discussion of evidence by all jurors for the purpose of reaching a unanimous verdict;
    - (b) each juror to decide case for himself or herself in the context of the evidence and the law, with proper consideration of other jurors' views;
    - (c) reconsider views if persuaded by rational discussion but not solely for the sake of reaching a unanimous verdict.
  3. Absent a stipulation, the verdict must be unanimous on the issue submitted (Fed. R. Civ. P. 48).
  4. Explain verdict form if used.<sup>1</sup>
  5. Jury communications with the court during deliberations must be in writing and signed by the foreperson.
  6. Jury must not disclose how it stands numerically or otherwise on issues submitted.
- D. Consider providing the jury with a written copy or transcript of the jury instructions.

**Other FJC sources**

Manual for Litigation Management and Cost and Delay Reduction 44–45 (1992)

Manual for Complex Litigation, Third 152–58 (1995)

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1. Consider whether to use a special verdict (Fed. R. Civ. P. 49). It can be a useful device to reduce the risk of having to retry the entire case.



## 6.07 Verdict—civil

### A. Reception of unsealed verdict

1. Upon announcement by the jury that it has reached a verdict, have all interested parties convene in open court to receive the verdict.
2. When court is convened, announce that the jury is ready to return its verdict(s), and instruct the deputy marshal (or bailiff) to have the jury enter and assume their seats in the jury box.
3. If not already known, inquire of the jury who speaks as its foreperson.
4. Ask the foreperson if the jury has unanimously agreed upon its verdict. (*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.)
5. Instruct the foreperson to hand the verdict form(s) to the clerk to be delivered to you for inspection before publication.
6. Inspect the verdict(s) to ensure regularity of form. (*Note:* If the verdict form(s) is (are) not properly completed, take appropriate corrective action before publication.)
7. Explain to the jury that their verdict(s) will now be “published”—that is, read aloud in open court.
8. Instruct the jury to pay close attention as the verdict(s) is (are) published; and explain that, following publication, the jury may be “polled”—that each juror may be asked, individually, whether the verdict(s) as published constituted his or her individual verdict(s) in all respects.
9. Publish the verdict(s) by reading it (them) aloud (or by having the clerk do so).
10. Upon request of any party, poll the jury by asking (or by having the clerk ask) each individual juror, by name or number, whether the verdict(s) as published constituted his or her individual verdict(s) in all respects.

11. If polling verifies unanimity, direct the clerk to file and record the verdict, and discharge the jury with appropriate instructions concerning their future service, if any.
12. If polling results in any doubt as to unanimity, or if there are inconsistent answers to a special verdict, make no further inquiry and have no further discussions with the jury; rather, confer privately with counsel and determine whether the jury should be returned for further deliberations or a mistrial should be declared.

B. Reception of a sealed verdict

(*Note:* On some occasions an indispensable party may not be available to receive a verdict when the jury reaches agreement. In such cases a sealed verdict may be delivered to the clerk for subsequent “reception” and publication in open court when the jury, the judge, and all necessary parties are present.)

1. Upon announcement by the jury that it has reached a verdict, have all interested and available parties convene in open court and on the record.
2. When court is thus convened, announce that the jury is ready to return its verdict(s), and explain that a sealed verdict will be taken in accordance with the following procedure:
  - (a) Instruct the deputy marshal (or bailiff) to usher the jurors into the courtroom to assume their seats in the jury box.
  - (b) If not already known, inquire of the jury who speaks as its foreperson.
  - (c) Inquire of the foreperson whether the jury has unanimously agreed upon its verdict. (*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.)
  - (d) Explain to the jury that a sealed verdict will be taken, and further explain why that procedure has become necessary in the case.
  - (e) Poll the jury on the record.

**NOTE**

In the event the jury will not be present at the opening of the verdict, it is recommended that each juror sign the verdict form(s).

- (f) Direct the clerk to hand a suitable envelope to the foreperson. Instruct the foreperson to place the verdict form(s) in the envelope, to seal the envelope, then to hand it to the clerk for safekeeping.
- (g) Recess the proceedings, instructing the jury and all interested parties to return at a fixed time for the opening and formal reception of the verdict. Instruct that, in the interim, no member of the jury should have any conversation with any other person, including any other juror, concerning the verdict or any other aspect of the case.
- (h) When court is again convened for reception of the verdict, have the clerk hand the sealed envelope to the jury foreperson.
- (i) Instruct the foreperson to open the envelope and verify that the contents consist of the jury's verdict form(s) without modification or alteration of any kind.
- (j) Follow the steps or procedures outlined in paragraphs A.5 through A.12.

### **Bibliography on polling the jury**

Wright & Miller, *Federal Practice and Procedure, Civil*, § 2504

Moore's *Federal Practice* ¶ 49.07 (2d ed.)

*Humphries v. District of Columbia*, 174 U.S. 190 (1899)

*Castleberry v. NRM Corp.*, 470 F.2d 1113 (10th Cir. 1972)

### **Other FJC sources**

Manual for Complex Litigation, Third 159–60 (1995)





## 6.08 Referrals to magistrate judges (civil matters)

Listed below are duties in civil matters covered in Section 2 of the *Benchbook* that may be referred to magistrate judges. Most districts have local rules or standing orders governing referrals to magistrate judges.

For a more comprehensive listing of the duties magistrate judges may perform, see the *Inventory of United States Magistrate Judge Duties*, prepared by the staff of the Judicial Conference Committee on the Administration of the Magistrate Judges System (February 1995). This inventory is available on request from the Administrative Office of the U.S. Courts and is also found at Chapter 3, “Jurisdiction,” of the *Legal Manual for United States Magistrate Judges*, prepared by the Administrative Office.

A magistrate judge may conduct:

1. All phases of a civil case with the written consent of the parties. 28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73. At the time of the referral, “the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals,” and thereafter to the court of appeals by petition only. 28 U.S.C. § 636(c)(4); Fed. R. Civ. P. 73(d), 74. Absent such consent, appeal is to the court of appeals as in any other civil case. 28 U.S.C. § 636(c)(3). See generally 5.01: Trial outline (civil case).<sup>1</sup>
2. Pretrial matters:
  - (a) A magistrate judge may conduct a Rule 16 pretrial conference and hear and determine nondispositive pretrial matters such as discovery disputes and requests for bifurcation or consolidation. Upon timely

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1. For an illustrative consent form and order of reference to a magistrate judge, see Manual for Litigation Management and Cost and Delay Reduction (Federal Judicial Center 1992), Sample Form 42 at 335.

Section 6.08: Referrals to magistrate judges (civil matters)

objection by a party, a district court shall consider such objections and modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

(b) A magistrate judge may hear and submit to the district court proposed findings of fact and recommended determinations of dispositive pretrial matters such as summary judgment motions. A district court must make a de novo determination of those portions of proposed findings and recommendations to which the parties object. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

See generally 5.01: Trial outline (civil case).<sup>2</sup>

3. Voir dire, if the parties consent. 28 U.S.C. § 636(c)(1); *Stockler v. Garratt*, 974 F.2d 730 (6th Cir. 1992); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363 (7th Cir. 1990). See 6.04: Standard voir dire questions—civil.
4. “[A]dditional duties [that] are not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. § 636(b)(3). For examples of additional duties and case law on § 636(b)(3), see the *Inventory of United States Magistrate Judge Duties* at 88–109.

### Other FJC sources

Manual for Litigation Management and Cost and Delay Reduction 51–54 (1992)

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2. For an example of an order of reference to a magistrate judge, see Manual for Litigation Management and Cost and Delay Reduction (Federal Judicial Center 1992), Sample Form 43 at 337.

## **7.01 Contempt—criminal**

### **Background**

The purpose, procedure, and penalty for criminal contempt differ from those for civil contempt. It is essential that the trial judge make clear on the record whether the proceeding is for civil or criminal contempt.

The purpose of criminal contempt is to punish a person for a past act of contempt. Criminal contempt has the characteristics of a crime, and the contemnor is cloaked with the safeguards of one accused of a crime. The purpose of civil contempt is to compel someone to do or not do a certain act.

Case law makes clear that the contempt power is one to be exercised with the greatest restraint and that, in exercising that power, a court should exert only the power needed to achieve the desired end.

### **Controlling statute and rule**

18 U.S.C. § 401 is the controlling statute for criminal contempt. It provides as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The applicable rule of procedure is Fed. R. Crim. P. 42. That rule provides as follows:

- (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The

order of contempt shall recite the facts and shall be signed by the judge and entered of record.

- (b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

### **Criminal contempt procedures**

Fed. R. Crim. P. 42 prescribes two different procedures, depending on whether or not the judge personally observes the contemptuous conduct and whether or not immediate action is required.

#### **Procedure when contemptuous conduct is personally observed by the court and immediate action is required**

When you see or hear contemptuous conduct, you may but are not compelled to proceed under Fed. R. Crim. P. 42(a).

This summary procedure is appropriate only when immediate action is needed. It is reserved for conduct that actually disrupts or obstructs court proceedings and for situations in which immediate action is necessary to restore the court's authority. The

conduct must be more flagrant than mere disrespect to the judge or an affront to the judge's sense of dignity.<sup>1</sup>

If the conduct (such as shouting in the courtroom) does interfere with court proceedings, proceed as follows:

1. First, warn the person that if a repetition occurs he or she may be removed from the courtroom or may be found in criminal contempt.
2. If marshals are not already in the courtroom, summon them, so that they will be present if the disruptive conduct is repeated.
3. If the offender repeats the disruptive conduct, order him or her removed from the courtroom.
4. If the conduct is so disruptive that removing the offender is inadequate to reestablish the authority and dignity of the court, follow the Fed. R. Crim. P. 42(a) procedure. (*Note:* In summary proceedings under Rule 42(a), the court may impose a sentence that does not exceed the punishment authorized for a petty offense, i.e., imprisonment of no more than six months or a fine of no more than \$5,000 if the contemnor is an individual, \$10,000 if the contemnor is an organization. If more severe punishment seems appropriate, the court must proceed by notice under Rule 42(b) and accord the contemnor the right to a jury trial. (Contempt fines exceeding the petty offense limit on organizations have been imposed without the right to a jury trial. See *Muniz v. Hoffman*, 422 U.S. 454 (1975); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 722 (1990); *United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982). These cases, however, did not involve summary proceedings under Rule 42(a).))
5. Before proceeding, be sure that an adequate number of marshals is in the courtroom.

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1. Summary procedure may also be appropriate when an already imprisoned witness refuses to testify during a criminal trial despite a grant of immunity. See *United States v. Wilson*, 421 U.S. 309 (1975).

*Section 7.01: Contempt—criminal*

6. Retire the jury. Have the offender brought before you. (The offender is not entitled to counsel in a summary proceeding.)
7. Advise the offender that you intend to find him or her in criminal contempt for obstructing the administration of justice by reason of (here describe the conduct).
8. Ask the offender if he or she would care to say anything in mitigation.
9. After hearing the offender out, impose sentence in words to this effect:

I find you in criminal contempt for so conducting yourself in this courtroom that you obstructed the administration of justice. The conduct for which I find you in criminal contempt was [here describe the conduct observed by you]. I sentence you to \_\_\_\_ hour(s) [day(s)] in jail [*or* I fine you \$\_\_\_\_] for that conduct. [In criminal contempt you cannot both imprison and fine.] The serving of this sentence shall commence at once [*or* shall commence at the conclusion of this trial].

- (a) No sentencing guideline has been prescribed for contempt because of the variety of behaviors covered. See U.S.S.G. § 2J1.1, Application Note. In the absence of a guideline, the court is to “impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553(a)(2),] . . . for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.” 18 U.S.C. § 3553(b).
  - (b) It is possible for the court to find a person in summary criminal contempt but to defer commencement of the sentence until the trial ends. In this case, however, using the Fed. R. Crim. P. 42(b) procedure rather than the summary procedure of 42(a) is probably best.
10. You must prepare, sign, and file an order of contempt. This order is intended to permit informed appellate review. The order must contain all that you saw or heard

that obstructed the proceedings and by reason of which you found defendant in contempt. Remember, for your action to be sustained on appeal, the conduct described in your order must constitute an obstruction to the administration of justice. Be sure, therefore, that the order fully and accurately recites all of the obstructive conduct that you saw or heard. The order of contempt must contain your certification that the described conduct was seen or heard by you and was committed in your presence. The form of the order of contempt may be as follows:

In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the following was committed in my presence and was seen or heard by me: [Here insert a detailed recital of the acts constituting the contemptuous conduct.]

Because of the foregoing conduct, which obstructed and disrupted the court in its administration of justice, I sentenced [name of contemnor] to \_\_\_ hours/days in jail, the said jail sentence to commence [at once/at the conclusion of the trial] [or I fined [name of contemnor] \$\_\_\_\_\_].

11. You must date and sign the order of contempt and file it without delay.

**Procedure when contemptuous conduct is not personally observed by the court or when the conduct is observed by the court but requires no immediate action**

If you become aware of conduct that is within the contemplation of 18 U.S.C. § 401 but that did not occur in your presence, or if you observed contemptuous conduct but it did not actually disrupt court proceedings, you must proceed under Fed. R. Crim. P. 42(b), which requires that the contempt be prosecuted by notice rather than summarily.

Section 7.01: Contempt—criminal

Under Fed. R. Crim. P. 42(b):

1. The notice may be given:
  - (a) orally by you in open court in defendant's presence;  
or
  - (b) by an order to show cause on the application of the U.S. attorney or of an attorney appointed by the court for that purpose; or
  - (c) by an order of arrest.
2. If giving oral notice to defendant in open court is not possible, you should ask the U.S. attorney to prepare for your signature an order to show cause directed to defendant and ordering defendant to show cause why he or she should not be found in criminal contempt because of the offending conduct.
3. The notice, whether oral or written, must set down a definite time and place for the hearing and must describe the conduct constituting the charged contempt and describe it as being criminal contempt. You must accord defendant a reasonable period in which to engage an attorney and prepare a defense.

Remember that under the rule another judge must conduct the trial if the contemptuous conduct involved criticism of or disrespect for yourself, unless defendant expressly waives the right to trial by another judge.
4. Because a person found guilty of criminal contempt may be imprisoned, defendant has a right to counsel. If defendant cannot afford counsel, you must appoint an attorney for him or her.
5. Defendant has a right to a jury trial unless before trial you, on your own motion or on the government's motion, limit the maximum sentence that you will impose to the maximum authorized for a petty offense, that is, imprisonment for six months or a fine of \$5,000 (for an individual; the fine limit on organizations for petty offenses is \$10,000 (but see *Muniz v. Hoffman*, 422 U.S. 454 (1975), *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 722 (1990)),



*United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982), allowing contempt fines on organizations in excess of those authorized for petty offenses, without the right to a jury trial)).

6. At trial, whether a bench or a jury trial, remember that defendant is being tried for a crime and is entitled to all the protections to which anyone accused of a crime is entitled. Defendant has a right to testify and to call witnesses on his or her own behalf but cannot be compelled to testify. Defendant is to be found guilty only if his or her guilt is proven beyond a reasonable doubt.
7. If found guilty, defendant should be sentenced in the same manner as any defendant convicted of a crime. You may wish to order a presentence report and to set down the sentencing for a later date.
8. If defendant has been afforded the right to a jury trial, there is no statutory maximum to the fine or imprisonment that may be imposed. However, you may not impose both imprisonment and a fine. Because of the variety of behaviors covered, no sentencing guideline has been prescribed for contempt. See U.S.S.G. § 2J1.1, Application Note. In the absence of a guideline, the court is to “impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553(a)(2),] . . . for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.” 18 U.S.C. § 3553(b)(2).

### **Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 51–68 (4th ed. 1996)



## 7.02 Contempt—civil

### Background

The purpose, procedure, and penalty for civil contempt differ from those for criminal contempt. It is essential that the trial judge make clear on the record whether the proceeding is for civil or for criminal contempt.

The purpose of criminal contempt is to punish a person for a past act of contempt. Criminal contempt has the characteristics of a crime, and the contemnor is cloaked with the safeguards of one accused of a crime. The primary purpose of civil contempt is to compel someone to do or not do a certain act.

Case law makes clear that the contempt power is one to be exercised with the greatest restraint and that, in exercising that power, a court should exert only the power needed to achieve the desired end.

Civil contempt serves one or both of the following purposes:

1. to coerce the contemnor into complying in the future with a court order; or
2. to compensate the complainant for damages resulting from the contemnor's past noncompliance.

### Controlling statute and rule

The only statute applying directly to civil contempt is 28 U.S.C. § 1826(a), which applies only to recalcitrant witnesses (see 5.04: Handling the recalcitrant witness). However, 18 U.S.C. § 401(3) does have some application to civil contempt, as follows:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

....

- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

### NOTE

If dealing with a recalcitrant witness, see 5.04: Handling the recalcitrant witness.

There is no civil rule comparable to Fed. R. Crim. P. 42. In a civil contempt proceeding, you should follow the procedure outlined in Fed. R. Crim. P. 42(b) to the extent that it applies, as follows:

- (b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the U.S. attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.

### **Civil contempt procedure**

The contempt will normally come before you on the petition of a civil litigant seeking the imposition of sanctions by reason of another party's failure to comply with a court order.

When one party petitions to have another found in civil contempt, you should proceed as follows:

1. Set down a time and place for a hearing on the petition. The respondent must be accorded a reasonable period in which to engage an attorney and prepare a defense.
2. Because a person found in civil contempt may be imprisoned, the respondent has a right to counsel. If the respondent desires an attorney but cannot afford one, you must appoint counsel for him or her unless waived (see 1.02: Assignment of counsel or pro se representation).
3. The respondent in a civil contempt proceeding has no right to a jury trial because the respondent, if imprisoned, can secure immediate release by complying with the court's order.
4. The hearing is to be by way of the live testimony of witnesses, not by way of affidavit. Note that the Federal

Rules of Evidence apply to contempt proceedings. See Fed. R. Evid. 1101(b).

5. The respondent is to be found in civil contempt only if his or her contempt is established by clear and convincing evidence. Unlike in criminal contempt, the respondent's guilt need not be proved beyond a reasonable doubt.
6. If the respondent is found guilty of civil contempt, you have wide discretion in fashioning a remedy.
  - (a) You may imprison the contemnor until he or she purges himself or herself of contempt by complying with the court's order, you may impose a prospective conditional fine (such as a certain monetary amount per day) until the contemnor complies with the court's order, or you may both commit *and* impose a conditional fine. (There is no statutory ceiling on a conditional fine. You must, however, weigh the financial circumstances of the contemnor in fixing a conditional fine.)
  - (b) You may in addition impose a fine on the contemnor to be paid to the aggrieved party, to reimburse the party for damages suffered because of the contemnor's conduct. This fine may not, however, exceed the actual damages suffered by the aggrieved party. It may, under certain circumstances, include an award to the aggrieved party of the attorney's fees and costs in bringing the contempt proceeding.
7. If you commit the contemnor or impose a conditional fine, advise the contemnor that he or she may purge himself or herself of contempt by complying with the court's order and that, upon complying, the contemnor will be released from jail and his or her fine, if one was imposed, will stop accumulating.
8. Prepare, sign, and file an Order in Civil Contempt, setting forth your findings of fact, your conclusions of law, and the precise sanctions you have imposed.

*Section 7.02: Contempt—civil*

**Other FJC sources**

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* 51–56 (4th ed. 1996)

## 7.03 Temporary restraining order

Fed. R. Civ. P. 65

### Background

Considering an application for a temporary restraining order (TRO) is, by definition, an emergency proceeding of such urgency that relief may be granted *ex parte*. At the outset, the court should be satisfied that there is truly an emergency and decline to consider the application if there is not.

### TRO without notice

Fed. R. Civ. P. 65(b) permits granting a TRO *without written or oral notice* to the adverse party or the party's attorney only if:

1. there are specific facts, shown by affidavit or verified complaint, indicating that immediate and irreparable injury will result to the applicant before the adverse party or his or her attorney can be heard in opposition; and
2. there is a written certification of the attorney's attempts, if any, to give notice, and an explanation of why notice should not be required.

Other factors the court may consider are:

1. probability of success on the merits;
2. balance of harm to other interested parties if TRO issues against harm to the applicant if relief is denied;
3. the public interest.

### TRO with notice

1. If notice is given, the standards governing issuance of a preliminary injunction are applicable.
2. The petition may be treated like one for a preliminary injunction if there is notice and a hearing, with adequate opportunity for developing legal and factual issues. The court should, however, consider the applicability of Fed. R. Civ. P. 6(d) (requiring five days' notice before hearing

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on motion, but granting court discretion to modify the time period).

3. If there is notice but no hearing, or a hearing that does not permit adequate opportunity for the development of legal and factual issues, no preliminary injunction may issue.

**Contents of order**

Fed. R. Civ. P. 65(b) provides that if the TRO is granted without notice, the order shall:

1. be endorsed with the date and hour of the issuance;
2. be filed forthwith in the clerk's office and entered on the record;
3. define the injury and state why it is irreparable and why the order was granted without notice; and
4. expire by its terms within such time after entry as the court fixes (but no more than ten days), unless within the time fixed by the court good cause is shown to extend the order for a like period, or unless the party against whom the order is directed consents to a longer period.

These requirements, particularly with regard to a restraining order's duration, should be applied to a TRO even when notice has been given. In addition, Fed. R. Civ. P. 65(d) provides that every restraining order shall:

1. set forth the reasons for its issuance;
2. be specific in terms;
3. describe in reasonable detail, and not by reference to complaint or other documents, the act or acts to be restrained; and
4. bind only the parties to the action; the parties' officers, agents, servants, employees, and attorneys; and persons in active concert or participation with the parties who receive actual notice of the order.



**Motion for dissolution after notice**

On two days' notice to the party that obtained the TRO without notice, or on such shorter notice as the court may prescribe, the adverse party may appear and contest a TRO that was issued without notice. Fed. R. Civ. P. 65(b).

**Security**

A TRO may not be issued unless the applicant gives such security as the court fixes. This security requirement does not apply to the United States. Fed. R. Civ. P. 65(c).

**The hearing record**

The hearing on an application for a TRO, including pleadings and evidence taken, becomes a part of the record in the later injunction hearing and need not be repeated.



## 7.04 Grand jury selection and instructions

Fed. R. Crim. P. 6; 18 U.S.C. §§ 3321, 3331–3333

### Procedure

The Jury Act, 28 U.S.C. § 1863(b)(7), states that the district jury plans required by that section may provide that the names of persons summoned for possible grand jury service be kept confidential. In addition, the Judicial Conference of the United States recommended at its session in September 1981 “that the district courts reexamine their jury selection plans . . . to consider whether the names of grand jurors should be excluded from public records.” *Report of the Proceedings of the Judicial Conference of the United States* 39–40 (1981). The jury plans of many of the district courts now provide, therefore, that the names of grand jurors be kept confidential. Accordingly, the grand jury must be selected in closed session with only necessary court personnel and attorneys for the government in attendance so that the jurors’ names will not be revealed in open court. Fed. R. Crim. P. 6(d) and (e)(5).

The grand jury consists of not less than sixteen (a quorum) and not more than twenty-three persons. 18 U.S.C. § 3321, Fed. R. Crim. P. 6(a)(1). Alternate grand jurors may be selected. Fed. R. Crim. P. 6(a)(2). After twenty-three persons have been selected as regular members of the grand jury, the usual practice in some districts is to call four to six alternates, who are sworn and instructed with the regular members. These alternates are then excused with the explanation that they will be subject to call, in the order in which they were selected, if it subsequently becomes necessary to excuse one of the regular members and replace that person with an alternate (to facilitate the assemblage of a quorum during the remaining life of the grand jury).

To accommodate the selection of alternates and the possibility of a few excusals for cause, the panel summoned to the courtroom for grand jury selection should consist of thirty to thirty-five persons.

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A regular grand jury may serve up to eighteen months followed by one extension of up to six months if necessary in the public interest. Fed. R. Crim. P. 6(g). The usual term varies from district to district. Special grand juries formed pursuant to 18 U.S.C. § 3331 et seq. may serve, with extensions, up to thirty-six months, and they have the added power of making certain reports under § 3333.

**Opening statement to the venire panel:**

It is a pleasure to welcome you on behalf of the judges of the United States District Court for \_\_\_\_\_, as potential members of the grand jury for the period \_\_\_\_\_ through \_\_\_\_\_.

Although my welcoming remarks are intended for all, only twenty-three of you, plus \_\_\_\_ alternates, will be selected to form this new grand jury. Also, although your term will be for the next \_\_\_\_ months, you will sit as a jury from time to time only when called on by the office of the U.S. attorney. I cannot tell you in advance how much time will be involved, but normally you can expect to be called an average of \_\_\_\_ days a month during your term of office.

Federal law requires that we select the grand jury from a pool of persons chosen at random from a fair cross-section of the district in which the grand jury is convened. At this time, you are the pool of persons from which that selection is to be made.

The grand jury is involved with criminal matters. It does not concern itself with civil matters. Generally speaking, a criminal matter is one in which the government seeks to enforce a criminal law. By contrast, a civil matter is a court proceeding in which one party seeks to recover money damages or other relief from another party. The trial jury in a criminal matter listens to the evidence offered by the prosecution and defense during trial and renders a verdict of guilty or not guilty. The functions of a grand jury are quite different from those of a trial jury. A grand jury does not determine guilt or innocence. Its sole function is to decide, after hearing the government's evidence and usually without hearing evidence from the defense, whether a person should be indicted and stand trial for a federal crime.

Since the grand jury performs such an important role in protecting rights guaranteed by the Constitution, you should view it as a real privilege and honor to have an opportunity to serve.

We will now proceed with the selection of the grand jury. As the first step in the process I am going to ask the Clerk to call you forward in groups of \_\_\_ [usually 12] persons at a time so that I might ask each of you a few questions concerning your possible service as members of the grand jury.

### **Voir dire examination of the panel**

1. Please state your name, occupation, and employer.  
[This information may aid you later in choosing and designating a foreperson and deputy foreperson pursuant to Fed. R. Crim. P. 6(c).]
2. Have any of you ever had, or are any of you currently having, any experience with a grand jury or with other aspects of the criminal justice system—as a witness, a victim, or an indicted person, for example—which might now make it difficult for you to serve impartially if you are selected?
3. Do any of you have any other reason why you cannot or should not serve on the grand jury?  
[Excuse any members of the panel whose responses to the voir dire questions dictate that they should be excused for cause.]

### **Selection and oath**

1. Have the Clerk call at random the names of twenty-three to twenty-nine persons from the remaining members of the panel. The first twenty-three shall constitute the regular members of the grand jury, and the others (one to six) shall constitute the alternates. After the grand jury and alternates have been chosen, excuse the remaining members of the panel.
2. Designate and appoint a foreperson and deputy foreperson under Fed. R. Crim. P. 6(c).

3. Have the Clerk administer the oath:

Do each of you solemnly swear [affirm] to diligently inquire into and make true presentment or indictment of all such matters and things touching your present grand jury service that are given to you in charge or otherwise come to your knowledge; to keep secret the counsel of the United States, your fellows, and yourselves; and not to present or indict any person through hatred, malice, or ill will, nor to leave any person unrepresented or unindicted through fear, favor, or affection or for any reward or hope or promise thereof, but in all your presentments and indictments to present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding? If so, answer “I do.”

**Grand jury charge**

Give the court’s charge or instructions to the grand jury (including the alternates):<sup>1</sup>

It is my responsibility at this time to instruct you on the law that will govern your services as grand jurors.

As members of the grand jury you are going to exercise authority and perform a public responsibility of the highest importance. Indeed, you will carry out a function that is expressly provided for in the Constitution itself.

The Fifth Amendment to the Constitution of the United States, part of the Bill of Rights, provides in part that “no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . .”

An infamous crime is a serious crime that may be punished by imprisonment for more than one year. An “indictment” is simply a written charge or accusation that a person has committed a crime.

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1. A grand jury charge in substantially the same form as the one that follows was approved by the Judicial Conference of the United States at its March 1986 session.

### ***Nature of the grand jury***

We have two kinds of juries in the federal courts. First, there is the grand jury; then, later, there is the *trial* jury, sometimes known as the petit jury. The trial jury, consisting of twelve members, determines whether a person accused of a crime is guilty or not guilty of the crime charged. Federal jury trials take place in the courtroom, in the presence of the judge, the jury, the attorneys, and the public, where the accused may confront the witnesses against him or her and may be convicted only when each juror is convinced of guilt beyond a reasonable doubt.

The other type of jury is the grand jury. It functions at the beginning of the investigative or prosecutorial process and consists of sixteen to twenty-three persons who have the responsibility of investigating charges of crimes committed against the laws of the United States and, if the result of the investigation justifies it, of making an accusation against a person by returning an indictment against him or her. The decision to indict is normally based solely on the government's evidence without the accused person having any opportunity to present his or her side of the case.

If an indictment is returned against an accused person, he or she becomes a defendant and in due course will be given the opportunity to plead guilty or not guilty to the indictment. If the person pleads not guilty, he or she will then have a trial in open court before a trial jury.

Thus, the purpose of the grand jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is “probable cause” to believe the person committed a crime. If law enforcement officials were not first required to submit evidence of a person's guilt to an impartial grand jury, they would be free to arrest suspects and bring them to trial no matter how little evidence existed to support the charges.

As members of the grand jury, then, you stand in a very real sense between the government and the accused. A federal grand jury must never be made an instrument of private prejudice, vengeance, or malice. It is your duty to see to it that indictments are returned only against those who you

find probable cause to believe are guilty of a criminal offense under federal law.

The cases that come before you will arise in various ways. Frequently, suspects are arrested on the scene, so to speak, during or shortly after an alleged crime is committed. They are taken before a judicial officer, known as a magistrate judge, before you become involved in the case. The United States magistrate judge holds a preliminary hearing to determine whether there is probable cause to believe that a crime was committed and that the accused committed it. If the magistrate judge finds such probable cause, the accused will be held for the action of the grand jury, so that *you* can consider whether probable cause exists and an indictment should be issued.

Other cases will come to you *before* an arrest but after an investigation has been conducted by a governmental agency, such as the Federal Bureau of Investigation, the Treasury Department, postal authorities, or other federal law enforcement officials. These cases are then brought to your attention by the U.S. attorney or an assistant U.S. attorney, or attorneys employed by the Department of Justice.

Sixteen of the twenty-three members of the grand jury constitute a *quorum* for transacting business. If fewer than sixteen members are present, even for a moment, the proceedings of the grand jury must stop. This shows how important it is that each of you conscientiously attend the meetings. If an emergency prevents your personal attendance at a meeting, you must promptly advise the grand jury foreperson, who has the authority to excuse you from attendance. If your absence will prevent the grand jury from acting, you should, if humanly possible, attend the meeting. You have the right to regulate your sessions to accommodate, within reason, the convenience of yourselves and the government attorneys, but you have the overall obligation to be available for duty at all times during the term for which you have been selected.

The U.S. attorney and Department of Justice attorneys represent the government in the prosecution of parties charged with committing offenses or crimes against the laws of the United States. These government attorneys will present the accusations that the government desires to have you consider. They will point out to you the laws that the govern-



ment believes have been violated, and they will subpoena for you such witnesses as they may consider important and also such other witnesses as you may request. In other words, the government attorneys will act as your legal advisors in the performance of your duties.

The evidence you will consider will normally consist of oral testimony of witnesses, and written documents. Each witness will appear before you separately. When the witness first appears before you, he or she will be sworn in by the grand jury foreperson. After being sworn, the witness may be questioned. Ordinarily, the government attorney questions the witness first. Next, the foreperson may question the witness, followed by the other members of the grand jury, if they so desire.

Witnesses should be treated *courteously* when they appear before you. Questions should be put to them in an orderly fashion. If you have any doubt about the propriety of any question, you should seek the advice of the government attorney. If necessary, a ruling may be obtained from the court.

As you listen to witnesses presented to you in the grand jury room and hear their testimony, remember that *you* are the judge of each witness's credibility. You may believe the witness's testimony, or you may *not* believe it, in whole or in part. Determining the credibility of a witness involves a question of fact, not a question of law. It is for *you* to decide whether you believe the person's testimony. You may consider in that regard whether the witnesses are personally interested in the outcome of the investigation, whether their testimony has been corroborated by other witnesses or circumstances, what opportunity they have had for observing or acquiring knowledge concerning the matters about which they testify, the reasonableness or probability of the testimony they relate to you, and their manner and demeanor in testifying before you.

Hearsay testimony, that is, testimony as to facts not known by a witness through personal knowledge but *told* to the witness by others, may be considered by you and may provide a sufficient basis for returning an indictment against an accused party. You must be satisfied only that there is evidence against the accused showing probable cause, even if

such evidence is composed of hearsay testimony that might or might not be admissible in evidence at a trial.

Witnesses are not permitted to have counsel with them in the grand jury room. However, the law does permit witnesses to confer with their counsel *outside* the grand jury room. You should draw *no* adverse inference if a witness chooses to exercise this right to confer with counsel outside the grand jury room. An appearance before a grand jury may present complex legal problems *requiring* the assistance of counsel. There are also other rights that every witness before a grand jury possesses. These include the Fifth Amendment right to refuse to answer any question if the answer might tend to be incriminating, and the right to know that anything the witness says may be used against him or her.

Frequently, charges are made against more than one person. It will be your duty to examine the evidence as it relates to *each* person, and to make your finding as to *each* person. In other words, where charges are made against more than one person, you may indict all of the persons or only those persons who you believe properly deserve indictment.

After you have heard the evidence in a particular matter, you will then proceed to deliberate as to whether the accused person or persons should be indicted. No one, other than your own members, may be present while you are deliberating or voting.

After all persons other than the grand jury members have left the room, you should fully discuss and then vote on the question of whether the evidence persuades you that a crime has *probably* been committed by the person or persons accused and that an indictment should be returned.

To return an indictment charging an individual with an offense, it is *not* necessary that you find that the accused is guilty beyond a reasonable doubt. Remember, you are *not* a trial jury, and your task is *not* to decide the guilt or innocence of the person charged.

Your task is to determine whether the government's evidence is sufficient to conclude that there is *probable cause* to believe that the accused is guilty of the offense charged—that is, whether the evidence presented to you is sufficiently strong to cause a reasonable person to believe that the accused is probably guilty of the offense charged.

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Each grand juror has the right to express his or her view on the matter under consideration. Only after all grand jurors have been given an opportunity to be heard will the vote be taken.

Remember, at least sixteen jurors must be present at all times, and at least twelve members must vote in favor of an indictment before one may be returned.

The foreperson should designate another juror to serve as secretary, and the secretary should keep a record of the number of jurors concurring in the return of every indictment. The voting record for each indictment shall *not* include the *names* of the jurors but must indicate the *number* of affirmative votes.

If, after deliberation, twelve or more members of the grand jury believe that an indictment is warranted, then the government attorney should be requested to prepare the formal written indictment (assuming a proposed indictment has not already been prepared). The indictment will be in the name of the United States, will designate the defendant or defendants, will set forth the date and place of the alleged offense, will assert the circumstances making the alleged conduct criminal, and will identify the criminal statute violated. The foreperson will endorse the indictment as a “true bill” and sign it in the space followed by the word “foreperson.” It is the duty of the foreperson to endorse every indictment voted for by at least twelve grand jurors, whether the foreperson voted for or against the indictment. The grand jury will then return the indictment to the court for action.

If *less* than twelve members of the grand jury vote in favor of an indictment, the foreperson will endorse the indictment with the words “not a true bill” and return it to the court, and the court will impound it.

Indictments will be presented to a judge or magistrate judge in open court by your foreperson at the conclusion of each deliberative session.

#### ***Independence of the grand jury***

Just as the English grand jury was independent of the king, the federal grand jury under the United States Constitution is independent of the U.S. attorney, as well as other government lawyers. The grand jury is not an arm of the Federal

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Bureau of Investigation; it is not an arm of the Internal Revenue Service; it is not an arm of the U.S. attorney's office. While you would perform a disservice if you did *not* indict where the evidence justifies an indictment, you would violate your oath if you merely "rubber-stamped" indictments brought before you by the government representatives.

As a practical matter, however, you must work closely with the government attorneys. The government lawyer will provide you with important service in helping you to find your way when confronted with complex legal or factual matters. It is entirely proper that you should receive this assistance and advice.

If you should ever have a question for the court or desire to return an indictment to the court, then you will assemble in the courtroom for those purposes. However, each juror is directed to report immediately to the court any attempt by any person who, under any pretense whatsoever, tries to approach you for the purpose of gaining any information of any kind concerning the proceedings of the grand jury, or to influence you in any manner.

***The obligation of secrecy***

Your proceedings are secret and must remain secret unless the court determines that the proceedings should be revealed in accordance with the law.

There are *several* important reasons for this secrecy requirement: First, a premature disclosure of grand jury action may frustrate the investigation by giving the accused an opportunity to escape and become a fugitive or to destroy evidence. Second, if the witness's testimony is disclosed, the witness may be subject to intimidation, retaliation, or other tampering before testifying at trial. Third, the secrecy requirement protects an innocent person who has been investigated and cleared by the grand jury. In the eyes of some, investigation alone suggests guilt. Thus, a great injury can be done to the good name and standing of anyone, even though they are not indicted, if it becomes known that there was an investigation about them. And fourth, the secrecy requirement helps protect the members of the grand jury themselves from improper contact by those under investigation.

For all these reasons, therefore, the secrecy requirement is of the utmost importance and must be regarded by you as an absolute duty. You must be careful to preserve the secrecy of your proceedings by abstaining from communicating grand jury business to your families, friends, representatives of the news media, or *any* other persons. Grand jurors may discuss these matters *only* among themselves and *only* in the grand jury room. However, you *may* disclose matters that occur before the grand jury to attorneys for the government for such attorneys to use in performing their duties. The *content* of your deliberations and the *vote* of any juror may not, however, be disclosed, even to the government attorneys.

[The remainder of the charge should be given only if the grand jury is a special grand jury being impaneled pursuant to 18 U.S.C. §§ 3331 et. seq.]

### **Additional powers of a special grand jury**

As stated to you earlier, you are being impaneled as a special grand jury, as distinguished from a regular grand jury.

A regular grand jury is subject to two important restrictions: (1) its term or life is limited to a period of eighteen months, and (2) it can indict someone, on a finding of probable cause, or vote not to indict, but that is the extent of the action it can take; it cannot issue a report concerning its findings.

You, as a special grand jury, will be governed by a different set of rules or laws. First, while your term of service is also fixed at eighteen months (unless a majority of the jury sooner determines that your work has been completed), that term may be extended by the court for up to eighteen additional months. Second, unlike a regular grand jury, you are authorized under certain conditions at the end of your term to submit to the court, if a majority of you so desire, a report concerning your findings as to certain matters.

Specifically, the United States Code, title 18, section 3333, provides as follows:

- (a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members,

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may, upon completion of its original term, or each extension thereof, submit to the court a report—

- (1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or
- (2) regarding organized crime conditions in the district.

The U.S. attorney will explain to you in more detail your powers and duties under this law. As you approach the end of your term, the court will give you additional instructions if you request, or answer any questions you might have.

**Concluding matters**

1. Excuse the alternates, subject to later call, if needed, and suggest that the grand jury go to the grand jury room to confer with the U.S. attorney and commence its proceedings.
2. Adjourn court.

## 7.05 Foreign extradition proceedings

- A. Ascertain:
1. the identity of the detainee as the individual being demanded by a foreign nation;
  2. whether the detainee is represented by counsel (see 1.02: Assignment of counsel or pro se representation). 18 U.S.C. § 3006A(b).
- B. Inform detainee:
1. of the charge or charges upon which extradition is sought and by which foreign nation;
  2. of the right to a public extradition hearing, 18 U.S.C. § 3189;
  3. under what circumstances the United States will pay the costs for subpoenaing material witnesses for the detainee's defense to extradition, 18 U.S.C. § 3191;
  4. that at the hearing it will be determined:
    - (a) whether the detainee is charged with a crime or crimes for which there is a treaty or convention for extradition between the United States and the demanding country, 18 U.S.C. §§ 3181, 3184; see also *Collins v. Loisel*, 259 U.S. 309 (1922);
    - (b) whether the warrants and documents demanding the prisoner's surrender are properly and legally authenticated, 18 U.S.C. § 3190; and
    - (c) whether the commission of the crime alleged is established by probable cause such as would justify commitment for trial if the offense had been committed in the United States, 18 U.S.C. § 3184.
- C. Obtain waiver of hearing, hold hearing, or grant continuance if necessary (see 1.03: Release or detention pending trial).
- D. If a hearing is held, determine whether the detainee is extraditable.
- E. If the detainee is found extraditable:

### NOTE

Federal Rules of Criminal Procedure are not applicable to extradition proceedings. Fed. R. Crim. P. 54(b)(5).

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1. Commit the extraditee to jail under surrender to the demanding nation, unless “special circumstances” justify his or her release on bail. *Wright v. Henkel*, 190 U.S. 40 (1903); *Hu Yau-Leung v. Soscia*, 649 F.2d 914 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981).
  2. Notify the Secretary of State by filing a certified copy of your findings and a transcript of the proceedings.
- F. If the detainee is found not extraditable, notify the Secretary of State by filing an appropriate report certifying to that effect.



## **7.06 Naturalization proceedings**

The Immigration Act of 1990 changed the naturalization process from a judicial proceeding to an administrative proceeding. Following is a brief outline of current naturalization practice. Note that the role of the district court has been curtailed.

### **Procedure**

1. Applicant for naturalization commences proceeding by filing an application for naturalization with the Immigration and Naturalization Service (INS).
2. An INS employee examines the applicant and determines whether to grant or deny the application. The INS employee may invoke the aid of a district court in subpoenaing the attendance and testimony of witnesses and the production of books, papers, and documents. 8 U.S.C. § 1446(b), (d).
3. If the INS denies the application, the applicant may request a hearing before an immigration officer. 8 U.S.C. § 1447(a).
4. If the immigration officer denies the application, the applicant may seek de novo review in the federal district court. 8 U.S.C. § 1421(c).
5. If the INS fails to make a determination on the application within 120 days of the applicant's interview, the applicant may apply to a district court for a naturalization hearing. The court may determine the matter or remand the matter to the INS with appropriate instructions. 8 U.S.C. § 1447(b).
6. If an application is approved, a district court with jurisdiction under 8 U.S.C. § 1421(b) may administer the Oath of Allegiance.

### **Oath of Allegiance**

The following oath is designed for use with groups of petitioners and encompasses various alternatives to bearing arms.

Do you solemnly swear [affirm] to support the Constitution of the United States; to renounce and abjure absolutely and

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entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of which you have previously been a citizen or subject; to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; to bear true faith and allegiance to the same; and to bear arms on behalf of the United States when required by law [*or to perform noncombatant service in the Armed Forces of the United States when required by law, or to perform work of national importance under civilian direction when required by law*]? Do you take this obligation freely without any mental reservation or purpose of evasion?

8 U.S.C. § 1448(a).

An individual may be granted an expedited judicial oath administration ceremony upon demonstrating sufficient cause.

In determining whether to grant an expedited judicial oath administration ceremony, a court shall consider special circumstances (such as serious illness of the applicant or a member of the applicant's immediate family, permanent disability sufficiently incapacitating as to prevent the applicant's personal appearance at the scheduled ceremony, developmental disability or advanced age, or exigent circumstances relating to travel or employment).

8 U.S.C. § 1448(c).

If petitioner possesses any hereditary title or orders of nobility in any foreign state, he or she must expressly renounce such title or orders of nobility in open court. 8 U.S.C. § 1448(b).

Address (or designate some member of the community to address, or invite some of the newly naturalized citizens to address) the naturalized citizens on the general topic of the meaning of U.S. citizenship and the importance of each citizen's participation in the workings of a democracy. 36 U.S.C. § 154.

**NOTE**

If petitioner refuses to bear arms or do non-combatant service in the armed forces, ascertain whether there is "clear and convincing evidence" that the refusal is based on "religious training and belief." 8 U.S.C. § 1448(a).

## 7.07 Excluding the public from court proceedings

- A. Closure is appropriate upon the court's own motion:
  - 1. in proceedings other than an actual trial, for the court to receive testimony from or about grand jury proceedings, argument using such testimony, or discussions of such testimony;
  - 2. when the court receives testimony or argument on grand jury evidence or other sensitive information that is the subject matter of the closure motion;
  - 3. when the law requires closure to protect some phase of a juvenile delinquency proceeding (18 U.S.C. § 5038).
- B. The steps in closing trial or pretrial proceedings upon motion by a party are:
  - 1. Notice of motion

Ensure that interested parties, including the media, are given notice and opportunity to defend against the motion in court. If public notice was given of a scheduled hearing, further notice is not necessarily required. If the motion is *ex parte* or at an unusual time, the court should delay the hearing until interested parties have been notified.
  - 2. The hearing
    - (a) Burden is on the movant seeking closure to show:
      - (1) that an overriding interest is likely to be prejudiced if closure is *not* granted. Such interests include:
        - (i) defendant's right to a fair trial;
        - (ii) government's interest in inhibiting disclosure of sensitive information (the court may, *sua sponte*, close the hearing to receive the preliminary information or proffer);

*Section 7.07: Excluding the public from court proceedings*

- (2) that alternatives to closure cannot adequately protect the overriding interest the movant is seeking to protect;
  - (3) that closure will probably be effective in protecting against the perceived danger.
3. Decision by the court
  - (a) In a pretrial proceeding, when the moving party asserts that defendant's right to a fair trial will be prejudiced if hearings are conducted publicly, the court should consider:
    - (1) the nature and extent of the publicity to date;
    - (2) the size of the jury pool;
    - (3) the ease of change of venue;
    - (4) the ability to cure any harm through voir dire;
    - (5) whether the public already has the information; and
    - (6) the impact of further publicity on the publicity that has already occurred.
  - (b) In deciding whether alternatives to closure can adequately protect the overriding interest that the movant seeks to protect, the court should consider the following alternatives:
    - (1) granting a continuance;
    - (2) granting severance;
    - (3) change in venue;
    - (4) change in venire;
    - (5) voir dire questioning;
    - (6) additional peremptory challenges;
    - (7) sequestering the jury; and
    - (8) admonishing the jury.
4. Findings and order:
  - (a) If the court decides to order closure:
    - (1) it must make findings that:

*Section: Excluding the public from court proceedings*

- (i) without closure, there is a substantial probability that defendant's right to a fair trial would be impaired;
  - (ii) steps less drastic than closure would be ineffective in preserving defendant's right to a fair trial; and
  - (iii) closure would achieve the desired goal of protecting defendant's right to a fair trial.
- (2) the closure must be as narrow as possible;
  - (3) findings must be on the record; and
  - (4) findings must be adequate to support an order of closure.
- (b) The order must:
- (1) be no broader than is necessary to protect the interest asserted by the moving party;
  - (2) be tailored to ensure that proceedings that are closed encompass no more than is actually necessary to protect the interest asserted by the moving party.
- (c) Determine whether the order itself should be sealed or not.

**Other FJC sources**

*Recent Developments Regarding Standards and Procedures for Barring the Public from the Courtroom During a Criminal Trial*, Bench Comment 1984, No. 2



## 7.08 Oaths

### **Affirmation in lieu of oath**

Any person who has conscientious scruples about taking an oath may be allowed to make affirmation. See, e.g., Fed. R. Civ. P. 43(d); Fed. R. Crim. P. 54(c). Substitute the word “affirm” for the words “solemnly swear” at the beginning of the oath and delete the words “so help me God” at the end. (If appropriate, courts may wish to substitute “this I do affirm under the pain and penalties of perjury” for “so help me God” at the end.)

### **Sample oaths**

Following are suggested oaths for several situations. A statutory cite after an oath indicates that the oath is taken directly from the statute.

#### ***Oath to attorneys***

(admission to practice before the court)

I, \_\_\_\_\_, do solemnly swear [*or affirm*] that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney, proctor, and solicitor of this court uprightly and according to law, so help me God.

#### ***Oath to clerks and deputies***

(to be made by each clerk of court and all deputies before they assume their duties)

I, \_\_\_\_\_, having been appointed \_\_\_\_\_, do solemnly swear [*or affirm*] that I will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God. [28 U.S.C. § 951]

Section 7.08: Oaths

***Oath to crier (bailiff)***

(may be administered in those districts where a temporary court crier is employed)

Do you solemnly swear [or affirm] that you will faithfully, impartially, and to the best of your ability discharge the duties of crier [bailiff] of this court, to which office you have been appointed, and will strictly obey all orders of the court and your superiors as crier [bailiff] during the session now being held, so help you God?

***Oath to crier (bailiff) to conduct jury to view place***

Do you solemnly swear [or affirm] that you will, together with the United States Marshal, keep this jury together and permit no one to talk to them, aside from the guides, nor talk to them yourself regarding the case under consideration, until discharged by the court, so help you God?

***Oath to guides to conduct jury to view place***

Do each of you solemnly swear [or affirm] that you will guide this jury on an inspection of the \_\_\_\_\_ involved in this action and that you will permit no one to talk to them, nor talk to them yourselves, regarding the case under consideration, except as instructed by the court, so help you God? If so, answer “I do.”

***Oath to crier (bailiff) to keep jury during adjournment***

Do you solemnly swear [or affirm] that you will keep the jurors composing this panel together until the next meeting of this court, and during all other adjournments of the court during the trial of this case; that you will permit no person to speak or communicate with them, nor do so yourself, on any subject connected with the trial; and that you will return them into court at the next meeting thereof, so help you God?

***Oath to crier (bailiff) and marshal after cause is submitted***

Do you solemnly swear [or affirm] that you will keep this jury together in some private and convenient place and not permit any person to speak to or communicate with them, nor to do so



yourself unless by order of the court, nor to ask whether they have agreed on a verdict, and to return them to court when they have so agreed, or when ordered by the court, so help you God?

***Oath to defendant***

(as to his or her financial ability to employ counsel)

Do you solemnly swear [*or affirm*] that all of the statements you are about to make relative to your financial ability to employ counsel will be the truth, the whole truth, and nothing but the truth, so help you God?

***Oath for deposition***

Do you solemnly swear [*or affirm*] that all the testimony you are about to give in the matter now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

***Oath to grand jury foreperson and deputy foreperson***

Do you, as foreperson and deputy foreperson of this grand jury, solemnly swear [*or affirm*] that you will diligently inquire into and make true presentment or indictment of all public offenses against the United States committed or triable within this district of which you shall have or can obtain legal evidence; that you will keep your own counsel and that of your fellows and of the United States and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, or anything which you or any other grand juror may have voted on in any matter before you; and that you shall present or indict no person through malice, hatred, or ill will, nor leave any person unrepresented or unindicted through fear, favor, or affection or for any reward or for the promise or hope thereof, but that in all your presentments or indictments shall present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding, so help you God?

***Oath to other grand jurors***

Do each of you solemnly swear [*or affirm*] that you shall diligently inquire into and make true presentment or indictment of all such matters and things touching your present grand jury

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service that are given to you in charge or that otherwise come to your knowledge; to keep secret the counsel of the United States, your fellows, and yourselves; and not to present or indict any person through hatred, malice, or ill will or to leave any person unrepresented or unindicted through fear, favor, or affection or for any reward or for the hope or promise thereof, but in all your presentments and indictments to present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding, so help you God?

*or*

Do each of you solemnly swear [*or affirm*] that you will well and truly observe on your part the same oath that your foreperson and deputy foreperson have now taken before you on their part, so help you God?

***Oath to venirepersons***

(to be administered at juror qualification or voir dire)

Do you solemnly swear [*or affirm*] that you will truthfully answer all questions that shall be asked of you touching your qualifications as a juror in the case now called for trial, so help you God?

***Oath to interpreter***

(The interpreter's duties include interpreting the oath to the witness, the verbatim questions of the court and counsel, and the answers thereto.)

Do you solemnly swear [*or affirm*] that you will justly, truly, fairly, and impartially act as an interpreter in the case now before the court, so help you God?

***Oath to interpreter for a deaf juror<sup>1</sup>***

Do you solemnly swear [*or affirm*] that you will accurately interpret from the English language into the sign language understood by the juror, who is deaf, and from that language as used by the juror into the English language; that, while you are present in the jury room during the jury's deliberations, your communications with that juror and the other jurors will be limited to translating for the deaf juror what the other jurors say and for the others what the deaf juror says, so that you will not express any of your own ideas, opinions, or observations or otherwise participate yourself in the jury's deliberations; and that you will keep secret all that you hear in the jury room and will not discuss with anyone the testimony or merits of the case unless ordered differently by the court or authorized by the deaf juror after the trial is finished to disclose anything he or she said during the deliberations, so help you God?

**NOTE**

In addition to the initial oath, the Tenth Circuit has stated that "before the verdict is announced, [the court] should inquire . . . whether the interpreter abided by her oath to act strictly as an interpreter and not to participate in the deliberations. Ideally, the judge should then question the jurors to the same effect." *U.S. v. Dempsey*, 830 F.2d 1084, 1092 (10th Cir. 1987).

***Oath to jurors in civil cases (including condemnation cases)***

Do each of you solemnly swear [*or affirm*] that you will well and truly try the matters in issue now on trial and render a true verdict according to the law and the evidence, so help you God?

***Oath to jurors in criminal case***

(This oath may also be administered to alternate jurors by substituting for the first line: "Do you, as an alternate juror.")

Do each of you solemnly swear [*or affirm*] that you will well and truly try, and true deliverance make, in the case now on trial and render a true verdict according to the law and the evidence, so help you God?

***Oath to master***

Do you solemnly swear [*or affirm*] that you will well and truly hear and determine the facts and true findings according to the evidence, so help you God?

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1. This sample oath is taken largely from *New York v. Green*, 561 N.Y.S. 2d 130 (N.Y. County Ct. 1990). It is provided as one example of the form for such an oath.

Section 7.08: Oaths

***Oath to reporter or stenographer***

(for grand jury proceedings, to be administered by the grand jury foreperson)

Do you solemnly swear [*or affirm*] that you will well and truly take and record the evidence about to be presented to this grand jury; that you will translate such testimony as required; and that you will keep secret all information you receive as reported at these grand jury proceedings, except on order of the court, so help you God?

***Oath to witness***

Do you solemnly swear [*or affirm*] that all the testimony you are about to give in the case now before the court will be the truth, the whole truth, and nothing but the truth, so help you God?

***Oath of allegiance***

(naturalization proceedings, 8 U.S.C. § 1448(a))

I, \_\_\_\_\_, do solemnly swear [*or affirm*] to support the Constitution of the United States, to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of which or to whom I have previously been a subject or citizen; to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and to bear true faith and allegiance to the same; and to bear arms on behalf of the United States when required by law [*or to perform noncombatant service in the Armed Forces of the United States when required by law*] [*or to perform work of national importance under civilian direction when required by law*], so help me God.

**NOTE**

If the petitioner refuses to bear arms, ascertain whether there is “clear and convincing evidence” that the refusal is based on “religious training and belief.” 8 U.S.C. § 1448(a).

***Oath to justices, judges, and magistrate judges***

I, \_\_\_\_\_, do solemnly swear [*or affirm*] that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God. [28 U.S.C. § 453]

**Oath to public officials**

(given to all individuals, except the President, who are “elected or appointed to an office of honor or profit in the civil service or uniformed services,” 5 U.S.C. § 3331)

I, \_\_\_\_\_, do solemnly swear [*or affirm*] that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God. [5 U.S.C. § 3331]

**Table of authorities**

Following is a brief compilation of authorities with respect to the taking of an oath or affirmation

<b>affirmation</b> —in lieu of oath	Fed. R. Civ. P. 43(d) Fed. R. Crim. P. 54(c)
<b>authority to administer</b>	5 U.S.C. § 2903
<b>bankruptcy</b> — authority to administer	11 U.S.C. § 343
<b>clerks and deputies</b> — oath of office authority to administer oaths	28 U.S.C. § 951 28 U.S.C. § 953
<b>deposition</b> — taken before an officer or other person so appointed	Fed. R. Civ. P. 28 (a)
<b>grand jury foreperson</b> — authority to administer oaths	Fed. R. Crim. P. 6(c)
<b>interpreter</b> —to take oath	Fed. R. Evid. 604
<b>interrogatories</b> — to answer under oath	Fed. R. Civ. P. 33(b)(1)

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<b>jurors, alternate—</b> to take same oath as regular jurors	Fed. R. Crim. P. 24(c)
<b>justices and judges—</b> oath of office authority to administer oaths	28 U.S.C. § 453 28 U.S.C. § 459
<b>magistrate judge—</b> oath of office authority to administer oaths	28 U.S.C. § 631(g) 28 U.S.C. § 636(a)(2)
<b>master—</b> may administer oath	Fed. R. Civ. P. 53(c)
<b>naturalization proceedings—</b> oath of allegiance	8 U.S.C. § 1448(a)
<b>perjury</b>	18 U.S.C. § 1621
<b>public officer—</b> oath of office	5 U.S.C. § 3331
<b>reporter—</b> to take oath	28 U.S.C. § 753(a)
<b>waiver of oath</b>	<i>Wilcoxon v. United States</i> , 231 F.2d 384 (10th Cir. 1956)
<b>witness—</b> required to take oath	Fed. R. Evid. 603

## **Appendix: FJC publications**

The Federal Judicial Center publishes numerous manuals, reference works, monographs, periodicals, and research reports on criminal litigation and the sentencing process, civil litigation, case management, the history of the federal court system, and federal judicial administration. In addition to this *Benchbook*, the Center sends selected publications and periodicals to new circuit and district judges upon their nomination and to new bankruptcy and magistrate judges upon their appointment. Some of these publications are listed below.

The Center also sends its *Annual Report* and its publications and media catalogs to all judges. The *Catalog of Publications* lists more than 150 Center publications, including reports of the Center's empirical research and monographs on substantive areas of law such as bankruptcy, copyright, employment litigation, patent, and securities litigation. All items listed in the catalog may be obtained from the Center's Information Services Office. Many Center publications can also be downloaded from the Center's World Wide Web site on the Internet at the address <http://www.fjc.gov>. Some are also available on-line through WESTLAW in the database file "fjc." The *Catalog of Audiovisual Media Productions* lists more than 800 media programs, including Center-produced audiotapes and videotapes and commercially produced instructional media programs. These materials are available on loan through the Center's media library. Many judges find particularly helpful the audiocassette recordings of presentations at Center seminars and workshops. The collection is continually updated.

New district judges also receive a pamphlet from the Center entitled *Individual Orientation for Newly Appointed District Judges*. This pamphlet contains a checklist of subjects on which new district judges most commonly need help and guidance, with annotations to Center publications and media programs, Administrative Office publications, and other materials that bear on the particular subject. This checklist may also serve as a useful reference list for other judges, and may be obtained by re-

requesting the *Individual Orientation* pamphlet from the Center's Information Services Office.

***Select publications, by topic***

**Bankruptcy**

*Case Management Manual for United States Bankruptcy Judges* (1995) (a publication of the Judicial Conference Committee on the Administration of the Bankruptcy System, produced with the assistance of the Center and the Administrative Office of the U.S. Courts) (distributed to circuit and district judges by the Center; to bankruptcy judges by the Administrative Office)

**Case management (mainly civil)**

*Awarding Attorneys' Fees and Managing Fee Litigation* (1994)

*The Elements of Case Management* (1991)

*Manual for Complex Litigation, Third* (1995)

*Manual for Litigation Management and Cost and Delay Reduction* (1992)

**Criminal litigation and sentencing**

(The following publications are distributed to circuit, district, and magistrate judges.)

*The Bail Reform Act of 1984* (2d ed. 1993)

*Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* (updated annually)

*Guideline Sentencing Update* (periodical summarizing recent appellate decisions on guideline sentencing issues)

Donald S. Voorhees, *Manual on Recurring Problems in Criminal Trials* (4th ed. 1996)

**Evidence**

*Reference Manual on Scientific Evidence* (1994)



**Federal judicial administration and history**

*Chambers Handbook for Judges' Law Clerks and Secretaries*  
(1994)

*Creating the Federal Judicial System* (2d ed. 1994)

*A Guide to the Preservation of Federal Judges' Papers* (1996)

*Origins of the Elements of Federal Court Governance* (1992)

**Opinion writing**

*Judicial Writing Manual* (1991)

**Prisoner litigation**

*Resource Guide for Managing Prisoner Civil Rights Litigation*  
(1996)

*Habeas & Prison Litigation Case Law Update* (periodical summarizing selected federal court decisions interpreting the 1996 federal legislation on habeas petitions and prison litigation) (distributed to circuit, district, and magistrate judges)

**Other periodicals**

*Bench Comment* (analyses of emerging areas of appellate case law)

*Chambers to Chambers* (case and chambers management innovations)

*FJC Directions* (occasional journal reporting Center research and education activities)



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