

# FEDERAL CRIMINAL TACTICS AND TOOLS

Pretrial release strategies, alternatives to prosecution, discovery angles, plea bargaining and agreement suggestions, sentence negotiation tactics, recent case-based examples, dozens of pretrial motions with memoranda, hundreds of practice tips, and much more.

U.S. Attorneys' offices have become more aggressive. Prosecutors are more frequently:

- Refusing to produce witness statements before a detention hearing
- Loading the proffer letter with exceptions
- Requiring in plea agreements that your client waive his rights to (a) request downward departures at the time of sentencing, and (b) appeal any sentencing issues

You can effectively counter many of these challenges by employing the tips, arguments, and forms in Barry Boss and Ed Marek's wonderful book. *Federal Criminal Practice* is loaded with valuable advice like this:

## Pretrial Release or Detention

"Be creative in recommending conditions of release for your client. When both flight and danger to the community are concerns of the court or prosecutor, consider having your client..." §4:15

"If the defendant is ordered released in the criminal case but remains detained because of an ICE or other detainer or because the other agency takes the defendant into custody, the defendant will not automatically receive credit for time served. File a motion to modify the conditions of release and to impose a nominal financial bond. In that circumstance, the defendant will be held because of his failure to post the bond and will continue to receive credit towards any ultimate sentence of imprisonment." §4:32

## Alternatives to Prosecution

"Over the years, federal prosecutors have carved out more and more exceptions in the form proffer letter, and these exceptions result in the client actually receiving very limited protection. For example, the government can use the statements not only to impeach your client's testimony at trial, but also to refute any defense evidence that is offered during your case-in-chief. In light of these provisions, you should not proceed with a

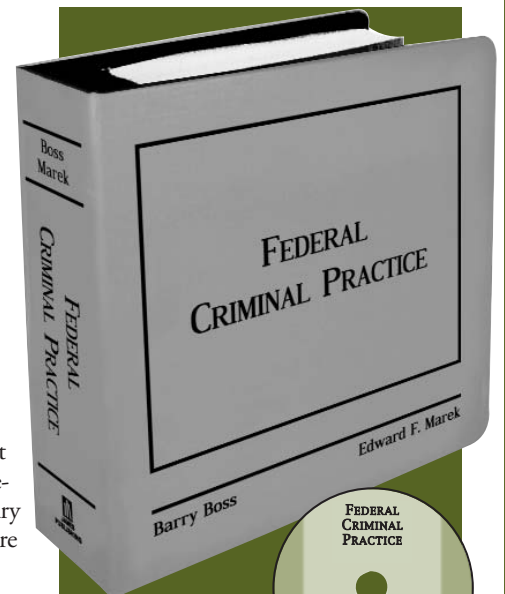
proffer session if a pretrial resolution of the case is unlikely." §7:46.2

## Grand Jury Proceedings

"Hesitate before providing a prosecutor with exculpatory evidence of which the government is not already aware in the hope that the prosecutor will present the evidence to the grand jury or that it will prevent an indictment. Disclosure of the evidence may..." §8:61

"Thus, *Hubbell* would seem to support the proposition that the witness could resist a compelled handwriting exemplar because the inherent authentication is testimonial in nature. A sample motion to quash an order requiring a handwriting exemplar is attached as Form 8A." §8:78

"It is not unusual for a co-defendant or alleged co-conspirator to enter into a cooperation agreement with the government during an investigation or after the grand jury has returned an indictment. Statements made by a client to an individual who later decides to cooperate with the government may be used against the client at trial or sentencing if the client is convicted. Often, it is the statements made by the client post-investigation that do the most damage be-



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*Continued inside...*

# 69 Forms

## Initial Appearance and Choice of Counsel

- Entry of Appearance
- Motion and Memorandum Requesting a Hearing on Motion to Withdraw Plea
- Appointment of and Authority to Pay Court Appointed Counsel
- Financial Affidavit
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- Request and Authorization for Expert Services

## Pretrial Release or Detention

- Motion for Modification of Conditions of Release to Permit Travel
- Motion to Modify Conditions to Permit Relocation
- Motion for Temporary Modification of Conditions of Release
- Motion to Amend Conditions by Reducing Amount of Cash Bond
- Motion to Revoke Pretrial Detention Order
- Motion in District Court to Review Detention Order Following Appeal of Magistrate Order

## Alternatives to Prosecution

- Pretrial Diversion Operations Agreement
- Prosecutor's Referral Letter to Pretrial Services
- Letter to Alleged Offender
- Candidate's Approval to Institute Pretrial Diversion Investigation
- Recommendation for Pretrial Diversion
- Pretrial Diversion Agreement
- Certification of Completion of Pretrial Diversion Program
- Sample Proffer Letter

## Grand Jury Proceedings, Indictment and Information

- Opposition to State's Motion to Compel Saliva, Hair, and Handwriting Exemplars
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- Motion to Dismiss Duplicitous Count
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- Motion and Memorandum to Dismiss Count Due to Lack of Jurisdiction over Local Offense
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- Defendant's Motion and Memorandum for Specific Performance of Plea Agreement
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- Motion and Memorandum for Attorney Participation in Voir Dire
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- Sentencing Table
- Legal Authority for Self-Surrender
- Notice of Filing PSI Objections

## DOZENS OF MOTIONS.

Form 4D FEDERAL CRIMINAL JUSTICE

### Form 4D: Motion to Amend Conditions of Release—Reduce Cash Bond

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA  
v. \_\_\_\_\_

Cr. No. \_\_\_\_\_

#### MOTION TO AMEND CONDITIONS OF RELEASE

Undertant \_\_\_\_\_, by and through counsel, respectfully moves this Court, pursuant to 18 U.S.C. §3142(c)(3), to amend the conditions of release previously set on [date]. In support of this motion, the defendant wishes see follow:

1. On [date], [Undertant] was arrested on a complaint charging bank fraud, 18 U.S.C. §1344.
2. On [date], the defendant was presented before Magistrate \_\_\_\_\_. Although the government did not request pretrial detention, the court set conditions of release which included a \$25,000 surety bond and, upon the posting of that bond, release to a halfway house.
3. Magistrate \_\_\_\_\_'s imposition of the financial bond was based in large part on the fact that [Undertant] disclosed to the court the owned property in which he had approximately \$100,000 in equity, although he had no other significant savings or assets. The defendant stated that he believed that the property was owned jointly with his co-wife.
4. After conducting an examination of the title records in the District of Columbia, we have discovered that [Undertant] was incorrect. The property at \_\_\_\_\_ is owned by [Undertant] and his co-wife as tenants by the entirety with a right of survivorship.
5. As a result, [Undertant] has not been, and probably will not be able to use the property for purposes of posting collateral or obtaining funds for purposes of paying a bail bondsman. In fact, we have contacted a bondsman on [Undertant's] behalf, and the bondsman's collateral requirements and fees were far in excess of [Undertant's] abilities.
6. As a result of his inability to post the surety bond, [Undertant] has been detained at the U.S. Jail since [date]. Yet, the Bail Reform Act states that the "judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. §3142(b)(7). According to the legislative history of that statute, the detention provisions of Section 3142 were designed to replace the existing practice of detaining defendants through the use of high money bonds. See *United States v. Olin*, 780 F.2d 887, 890 (8th Cir. 1985).
7. [Undertant] is 50 years old, the pretrial services report indicates that he has no prior criminal record. He is not accused of committing any acts of violence, and there is no reason to believe that he represents a danger to the community. Furthermore, although the government has proffered that [Undertant] traveled frequently to Massachusetts to visit his children and has traveled on multiple occasions to the Caribbean, there is no basis for concluding from such travel that he presents a risk of flight.
8. While we respectfully request that the conditions of release be modified so that [Undertant] is released on his personal promise to re-appear, we request that at a minimum the surety bond requirement be modified so that [Undertant] can be transferred to a halfway house. Certainly, any concern that the Court or the government may have regarding a risk of flight is satisfied by requiring [Undertant] to reside at the halfway house.

With the UNL, for the foregoing reasons, and any others which may appear just and proper to the Court, it is respectfully requested that the defendant's motion be granted, and [Undertant's] conditions of release modified.

Dismiss counts, modify conditions, compel election, sever defendants, dismiss, early disclosure, specific performance of plea agreement, and more. Includes supporting memoranda.

## LEGAL MEMORANDA.

Form 10E

### Form 10E: Legal Memorandum re: Early Production of Brady/Jencks Material

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

Division \_\_\_\_\_

UNITED STATES OF AMERICA,

Plaintiff,

v.

Defendant.

Criminal No. \_\_\_\_\_

#### MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR EARLY DISCLOSURE OF JENCKS MATERIAL AND TIMELY DISCLOSURE OF BRADY/GIGLIO MATERIAL

Early disclosure of Brady/Giglio and Jencks should be a matter of routine practice by the government in order to insure that a defendant has an adequate opportunity to prepare his or her defense. See The American Bar Association Standards for Criminal Justice, §11-2.2 (The Prosecution Function) (1980). The government has indicated that its position is that Jencks and witness specific Brady/Giglio information (i.e., criminal records or other impeachment material) will be made available on the first day of trial (or at any hearing at which the witness testifies).<sup>1</sup> However, the government's contemplated disclosure schedule provides the defendants with no meaningful relief because it will not provide sufficient opportunity for counsel to investigate the disclosed information.

This is so even with literally thousands of documents and other forms of tangible evidence. Although the defense has not yet completed discovery, we have already reviewed an enormous number of documents, computer files, memoranda, and other items presently in possession of the government. Investigators and prosecutors for trial is truly a daunting task, particularly given the fact that all defense counsel have significant responsibilities in other cases. In order for the defense to be prepared, all Brady/Giglio material should be disclosed immediately, and all Jencks material should be disclosed no later than two months before trial.

In this case, there is no secret about the identity of many of the government's witnesses, and there are no safety considerations which would suggest a government interest in the disclosure of Jencks material. The only reason for late disclosure in this case is to provide the government with a strategic advantage, even beyond the advantage that it has gained by having investigated this case for approximately two years before deciding to seek an indictment.

#### I. EARLY DISCLOSURE OF JENCKS MATERIAL

Jencks Act material should be provided to the defense so as to furnish the defendants and defense counsel with sufficient time to examine and utilize this material in a meaningful manner before and dur-

Use the authors' proven arguments and citations in your documents. You may copy and paste directly from the CD using your favorite word processor. You need not learn any new software.

cause they reflect ‘consciousness of guilt.’” §8:104

**Indictment and Information**

“When a count of an indictment fails to allege an essential element, move to dismiss rather than moving for a bill of particulars. The government may not use a bill of particulars to cure an indictment lacking an essential element. File the motion to dismiss prior to trial.” §9:35.2

“The government will often argue that any multiplicity can be cured at the time of sentencing, through merger, i.e., the defendant can be sentenced concurrently on the multiplicitous counts to avoid any incremental punishment. However, the error does not become harmless to the defendant simply because the sentences are ordered to run concurrent to one another. The presence of multiple convictions may....” §9:69

**Pretrial Discovery**

“Argue for exclusion of non-disclosed evidence when you can show that non-compliance is part of a pattern of failure to provide discovery by the investigative or prosecuting office.” §10:33

“Request all government agents’ notes of interrogations of your client. Include in your request all handwritten notes from which computer reports or notes are prepared. There may be important differences between handwritten notes taken at the time of the interview and reports or notes composed days later.” §10:44

“In your discovery letter or motion, ask the prosecutor to identify the documents, data and tangible objects (including audio and video recordings) separately, by category. In a case with voluminous documents, data and objects, this will greatly assist you in trial preparation by allowing you to readily separate those materials the government intends to use in evidence at trial, as well as those referred to or relied upon by government witnesses.” §10:55

“Successful use of the material-to-the-defense clause requires that you make your request or motion as defense-specific as possible. You must often disclose the nature of your defense to make effective use of this ground for discovery.” §10:58

“The grounds or basis for a government expert’s opinion will provide details about the government’s case that you

may not otherwise have discovered until the expert testified at trial. For example, you may learn....” §10:74

“If your defense centers on challenges to the credibility of key government witnesses, focus your request on impeachment evidence, such as the witness’ prior criminal record; specific instances of conduct probative of untruthfulness under FRE 608(b); the payment of compensation or promises or grants of leniency or immunity; written plea agreements; and prior inconsistent statements. Your request should also include....” §10:97

**Guilty Plea Agreement and Plea Bargaining**

“In recent years many U.S. Attorneys’ offices have become more aggressive in their stock plea agreements. In many jurisdictions, the prosecutors will require that your client waive his right to appeal any sentencing issues and waive his right to request any downward departures at the time of sentencing. Consider....” §13:1

“Attempt to limit your client’s exposure under the relevant conduct sentencing guidelines by negotiating a stipulation from the prosecutor that the government cannot ‘readily prove’ some or all of the conduct and, therefore, the court should not count it. In addition....” §13:47

**Trial**

“When the trial court gives some form of an Allen charge, request the court to remind the jury that the government has the burden of proof in a criminal case, and failure of the government to prove each element of the offenses charged beyond a reasonable doubt entitles the defendant to acquittal.” §14:68

“Many judges have a practice of meeting in private with counsel for both parties to discuss the proposed jury instructions in a more collegial setting. During the informal conference, keep careful track of the instructions the court is refusing to give or the ones that are given over your objection, so that you can make formal, specific objections on the record when given the opportunity.” §14:74

“To overcome a relevancy objection by a prosecutor, you need not demonstrate with certainty that cross-examination will elicit an admission of bias or facts which directly show bias. You need only demonstrate that....” §14:113

**§1:15 Least Restrictive Conditions**

The magistrate judge must choose the least restrictive condition or combination of conditions that reasonably assure the defendant’s appearance and the safety of other persons and the community. 18 U.S.C. §1187(c)(1)(B) Conditions of release may include 18 U.S.C. §3142(c)(1)(B).

- Restrictions on place of residence and travel
- Probation-like regular reporting to a pretrial services officer
- Psychological counseling
- Drug testing and counseling
- House detention with electronic monitoring
- Residence in a halfway house with regular outside working hours
- Bail bond with solvent sureties
- Deposit of assets, such as money or property, with the court under an agreement to forfeit the assets on defendant’s failure to appear as required
- Agreement to forfeit a specified amount of money, collateralized by real estate owned by the defendant or another, on determination by the court of a violation of any condition of release

**CAUTION:**

*Carefully Consider Forfeiture Of Money Or Property*

Conditions of release may be numerous and strict [18 U.S.C. §3142(c)(1)(B)] and an agreement to forfeit assets for violation of any condition may be strictly enforceable [see United States v. Panizza, 948 F.2d 789, 793 (1st Cir. 1991) (agreement to forfeit property for violation of any condition of release valid under contract laws)]. Therefore, carefully discuss with your client (or recommending or appearing to) forfeiture of money or property for a violation of any condition of release. Consider this condition only when your client cannot obtain release without it.

**CAUTION:**

*Do Not Propose Real Estate Bond Without Proof*

Do not propose a real estate bond of real estate owned by your client or another person with-

out a title search and appraisal of the property demonstrating equity. The bond without proof of equity does not demonstrate to the court that the proposed property to be pledged would provide a monetary guarantee, and the court would likely reject such a bond. In addition, be wary of having a real estate bond conditioned by a family member, such as a parent, spouse or child, because an investigation into the source of funds used by the family member may prove incurring either to the family member and/or to your client.

The statutory list of conditions of release (§4-15) is not exhaustive. The magistrate judge may impose any other condition “reasonably necessary” to assure the defendant’s appearance or protect the community. 18 U.S.C. §3142(c)(1)(B)(ix). However, conditions must be relevant to the goals of assuring appearance and community safety. See, e.g., United States v. Korman-Propoy, 787 F.2d 35, 36 (1st Cir. 1985) (condition allowing psychiatric examination of defendant not related to purposes of Bail Reform Act); United States v. Kelly-Fleming, 3 F.3d 1391, 1393 (9th Cir. 1993) (unwarranted warrantless search of defendant’s person and residence to assure safety of community valid); United States v. Gonzalez, 813 F.2d 697, 701 (1st Cir. 1986) (condition prohibiting defendant from cooperating with government invalid).

**PRACTICE TIP:**

*Release to Responsible Person*

Consider suggesting that the court release your client into the custody of a responsible person, possibly with conditions, such as electronic monitoring, agreement to permit unannounced search of the premises, etc. Come prepared with an affidavit from the “responsible person” or with the person himself, and a written commitment to accept responsibility as the person to whom the court will release your client. Present information to the court to justify the court’s confidence in that person. Also, prepare the potential third party (including (i) an accept responsibility for doing everything in his power to insure that the defendant complies with his conditions of pretrial release, and (ii) to promise the judge that he will report to pretrial services any violation of the court’s conditions.

Barry Boss and Ed Marek have filled their book with sophisticated, practical, and annotated advice. Almost every page has a highlighted tip, and several are each worth the \$119 book price.

**PRACTICAL FOCUS.**

**§1:9 Role of Counsel**

As counsel, you have three tasks:

• Present information to the magistrate judge and recommend release conditions.

- For release conditions, see §4:13 et seq.
- Be prepared to provide relevant information through proffer (i.e., an oral or written assertion of fact by the attorney based on a good faith belief that the fact exists), or through live witnesses, or to respond to information presented by the government regarding:
  - The nature and circumstances of the offense charged
  - The defendant’s character and physical and mental condition
  - The defendant’s family and community ties, and employment history
  - The defendant’s history of drug or alcohol abuse
  - The defendant’s criminal history and recent concerning appearance at court proceedings
- If necessary to obtain your client’s release, recommend a combination of conditions of release enumerated in 18 U.S.C. §3142(c)(1)(B).

Review the pretrial services report.

On the day of initial appearance, the pretrial services officer will provide you and the prosecutor a copy of the officer’s report. The report will contain information relevant to the pretrial release decision and, often times, the officer’s recommendations concerning conditions of release or detention.

**PRACTICE TIP:**

*Arrange for Third Party Verification of Information Provided by Client in Pretrial Services Interview*

As part of the pretrial services interview process, the pretrial services officer will attempt to verify the information provided by your client during the interview. Usually, the officer will ask your client for the name and phone number of someone who can serve this verification function. If you speak with your client before the pretrial services interview is conducted, discuss who would be appropriate to serve in this role. Select somebody who will be accessible by telephone and someone who is in a position to verify the

information provided by the client. If possible, all the pretrial services will ask him to the fact that someone from the court will be calling him, and to emphasize the importance of being cooperative and accurate. Whether or not helpful information is “verified” in the pretrial services report can be a significant role in determining what, if any, release conditions will be imposed upon your client.

**PRACTICE TIP:**

*Arrive Early to Review Report*

In some jurisdictions, you cannot take the report from the courtroom, so arrive early enough to take detailed notes as to its contents. The information regarding your client’s criminal history, for example, may prove valuable in preparing for trial or sentencing [Chapter 15] as well as the release or detention decision.

Talk with the pretrial services officer before the initial appearance about the officer’s recommendations to:

- Alert you to problem areas
- Take the opportunity to furnish additional information to the officer favorable to your client
- Take the opportunity to suggest conditions of release that may not have been considered by the officer

**PRACTICE TIP:**

*Talk with AUSA Handling Initial Appearance*

In addition to speaking with the pretrial services officer, attempt to speak with the Assistant United States Attorney who is handling the initial appearance. Find out if the AUSA intends to request detention. If so, your client in all likelihood will be detained for at least three days, until a detention hearing (at which point he could be released without pending trial). Take the opportunity to negotiate conditions of release with the AUSA, so that the AUSA will back off of the request for a detention hearing. If you can avoid the AUSA making a request for detention at the initial appearance, it will be much more difficult (although not impossible) for the government to seek detention at a later point in time. See §4:13. If the AUSA is not seeking a detention hearing, you should still

Federal Criminal Practice directly addresses issues that affect negotiations and outcomes, and leaves the academic matters to treatises.

**§7:8 Divertible Offenses**

There is no statutory limitation on the type of offense subject to diversion. 18 U.S.C. §3154(f). The Department of Justice expressly excludes only offenses related to national security and foreign affairs. DEPARTMENT OF JUSTICE MANUAL, §9-22.100 (1997). See §7:15 for additional criteria.

Pretrial diversion usually is not granted for serious offenses, such as:

- Firearms or drug offenses carrying mandatory minimum terms of imprisonment (see, e.g., 18 U.S.C. §924(c)(1); 21 U.S.C. §§818(b)(1)(A), (b)(1)(3)).
- Crimes of violence.
- Sophisticated fraud offenses.
- Offenses involving serious abuse of a position of trust.

**§7:9 Diversion Candidates**

Potential diversion candidates include persons accused of:

- Theft or fraud involving relatively small amounts of money.
- False statement and minor counterfeiting offenses.
- Offenses lacking moral turpitude, such as disclosure of unlawfully intercepted telephone communications by a person not involved in an illegal interception or ephitany, see §7:15, 7:16.

**B. Proposing Diversion****§7:10 Obtain Operations Agreements**

Contact the pretrial services agency at your district, or the Probation Office if there is no pretrial services agency, to determine whether a pretrial diversion operations agreement exists between the pretrial services agency and the United States Attorney. 18 U.S.C. §3154(f)(1); see §7:15; see also Form 7-A, Pretrial Diversion Operations Agreement. If it is available, review the agreement to determine whether it specifies:

- Procedures and eligibility for referrals of candidates.
- Investigation of candidate's background by pretrial services officer.
- Terms of supervision.
- Filing violation notices.
- Setting time frames.

**§7:11 Confer With Pretrial Services Officer**

Request an informal conference with a pretrial services officer to discuss referral policy, eligibility requirements [§7:15, 7:16] and investigation practices of the United States Attorney to determine whether your client is a potential candidate.

**§7:12 Review Sample Agreements With Client**

Review with your client a sample pretrial diversion agreement like the one your client must sign if accepted into a program. Review the conditions of supervision your client must follow. See Form 7-A, Pretrial Diversion Agreement.

**§7:13 Contact Prosecutor or Obtain Referral by Pretrial Services Agency**

Normally, you will initiate a discussion of pretrial diversion with the prosecutor. However, the pretrial services agency may also refer a candidate to the United States Attorney. Referral by a pretrial services officer may impose your client's chances of being accepted into the program. The prosecutor is likely to give weight to the officer's referral. Take the opportunity when making your initial inquiry of the pretrial services officer. See §7:10, 7:12 to lobby the officer for a diversion referral for your client. See Form 7-B Recommendation for Pretrial Diversion.

**§7:14 Helpful Factors**

Factors helpful to your client in obtaining diversion include:

- Cooperation throughout the judicial process, such as keeping court dates.
- Willingness to accept responsibility for his or her conduct in the offense.
- Ability and willingness to pay restitution.
- Ability and willingness to participate in a community service program.
- Lack of past criminal history (if your client has more than two felony convictions, your client is not eligible under Department of Justice criteria [§7:12]).
- Absence of a likelihood of involvement in future criminal activity.

Bulleted lists, short paragraphs, and frequent headings take you quickly to the needed information.

that do not actually increase the statutory maximum as that phrase had been traditionally understood prior to *Blakely*. Thus, it is clear that aggravating sentencing facts, other than those required by *Apprendice*, need not be pleaded in the indictment. Indeed, since they are not elements of the offense, such sentencing allegations must be stricken from the indictment. See *United States v. Corvino*, 776 F.3d 11, 77 (13th Cir. 2015); see also Form 94E Motion to Strike. For a full discussion of *Blakely* and *Booker* and the implications for sentencing, see §§17:1 et seq.

**PRACTICE TIP****Move to Dismiss**

When a court of an indictment fails to allege an essential element, move to dismiss. [FRCP 56], rather than moving for a bill of particulars [Chapter 10, §§10:1-15 et seq.]. The government may not use a bill of particulars to cure an indictment lacking an essential element. *Rummel v. Estelle*, 369 U.S. 749, 770-71 (1962); *United States v. Fleming*, 715 F.3d 930, 935 (9th Cir. 2013) (recognizing that bill of particulars cannot cure invalid indictment, but holding indictments valid where essential element was not explicitly stated but could be inferred from entire indictment). To allow a court or prosecutor to amend an indictment to add an element would be to deny the defendant the right to have the grand jury consider all of the elements of the charged offense. See §60:24 et seq.

**PRACTICE TIP****File Motion to Dismiss Prior to Trial**

File the motion to dismiss prior to trial. Although you may raise the objection that the indictment fails to state an offense at any time during the pendency of proceedings [FRCP 12(b)(3)(B)], if you wait until appeal to assert the challenge, you then demonstrate no prejudice, the appellate court will read the indictment liberally and sustain the conviction, unless the error is so defective that it does not, by any reasonable construction, charge the offense for which your client was convicted. *Fay, United States v. Fitzgerald*, 80 F.3d 218, 221 (5th Cir. 1996) (finding that caption of indictment, which contained an essential element, can cure a defect in the body, which lacked the essential element). The court uses a more relaxed standard to review the sufficiency of the

indictment when you fail to object prior to trial. *United States v. Pines*, 712 F.3d 86, 92-93 (7th Cir. 2013) (because defendant objected to indictment before trial, he was entitled to more exacting review of indictment than a defendant who waited until after trial to object). *United States v. Condon*, 535 U.S. 625, 631-32 (2002), where the defense argued that the omission of a material element in the indictment deprived the trial court of jurisdiction, the Supreme Court applied a plain error rule because the defendants had not made a timely objection, and upheld the conviction because the error did not affect the outcome of the case.

**PRACTICE TIP****Consider Filing Motion to Strike Blakely Sentencing Enhancements as Surplusage**

Following the Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296 (2004), prosecutors began including in the indictment enhancements under the Sentencing Guidelines. As a result of *Booker*, consider filing a motion to strike these allegations as judicial surplusage under Federal Rule of Criminal Procedure 71(f). The inclusion of guideline factors as "elements" to be passed on by the grand jury violates the separation of powers doctrine because it would turn the United States Sentencing Commission into a legislative body. See *Milwaukee v. United States*, 488 U.S. 361, 396 (1989) (finding that Sentencing Reform Act did not violate the nondiscrimination or separation of powers doctrines because Congress, in establishing the Sentencing Commission, provided it only with the authority to create guidelines binding on judges, rather than the legislative responsibility "for establishing minimum and maximum penalties for every crime"). Thus, you can argue that no statute or rule authority supports the inclusion of guideline factors in an indictment that including these allegations within an indictment is "surplusage"; and the allegation should be stricken; and that permitting the indictment to contain such "elements" would render the entire sentencing scheme subject to a constitutional challenge based on the nondelegation and separation of powers doctrines. See *United States v. Corvino*, 776 F.3d 11, 25 (13th Cir. 2015) (striking allegations, which do not allege elements of the charged offenses and are matters only for a

The authors provide paths around defenses and traps, and tell you when your problem is serious and when it is not.

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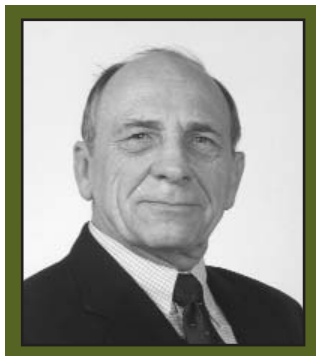
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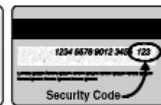
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