MEDIA HANDBOOK

A Quick Reference Guide

On the Federal Courts and Federal Law Practice

Prepared by
Lawyer Representatives to the Ninth Circuit Conference
from the Eastern District of California

2003

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Acknowledgments

This Media Handbook is the outgrowth of numerous discussions among Lawyer Representatives to the Ninth Circuit Conference from the Eastern District of California. The meetings, which were enhanced by the regular participation of Chief Judge Emeritus William B. Shubb, took place in person and by video conference connecting Sacramento and Fresno over the course of more than five years. Initially, Lawyer Representatives pondered occasional instances of what they perceived as inaccurate reporting of federal litigation matters. In most instances, the perceived inaccuracies appeared in articles written by reporters who were not assigned to the federal courthouse as their regular "beat." Over time, as a general matter, the Lawyer Representatives determined that a constructive and useful task would be to provide the kind of summary information presented here, with references on where reporters can go for more in-depth material as well. We hope the Handbook serves its purpose of providing essential, clear information about the federal courts and federal law practice, to reporters who are working on a deadline without the benefit of knowing our special legal niche well.

Many people have contributed to the Handbook in one form or another. Authors of the Handbook's various sections include: Kathleen Bales-Lange; Steven Goff; Kim Mueller, now a Magistrate Judge; Malcolm Segal; John Timmer; and Peg Carew Toledo. Judge Mueller and Peg Carew Toledo also served as editors, and all authors assisted with final proofing and editing. Patti Andrews, judicial assistant in the Eastern District of California, provided substantial word processing and proofreading assistance. Lawyer Representatives who contributed to the discussions leading up to and inspiring the Handbook include: Judy Holzer-Hersher, now a Sacramento Superior Court Judge; Charles J. Stevens; Roger Nuttall; and Al Berryman. The Sacramento Chapter of the Federal Bar Association facilitated a complementary activity during the Handbook's development, in hosting a panel discussion of media issues among lawyers, public relations professionals and a seasoned reporter.

The law firm of Orrick, Herrington & Sutcliffe LLP deserves special thanks for publishing the final version of the Handbook, completely *pro bono*.

MEDIA HANDBOOK

I. Introduction

This Media Handbook is designed to provide reporters with quick access to basic information about the federal courts and the nature of law practice in these courts. Our hope is that the Handbook will facilitate the reporters' job of providing accurate information when called on to report on federal cases.

II. The Organization Of The Federal Bench: Overview

A. Courts and Judges

1. District Courts

United States **District Courts** are the most numerous of the federal courts. As of this writing, Congress has divided the country into 94 districts, and there is a District Court for each one. In many cases, in large or populous districts, a District Court may be **in session** in more than one location. (For instance, the Eastern District of California, which is large geographically, is in continuous session at Sacramento and Fresno, and court may also be held in Redding.)

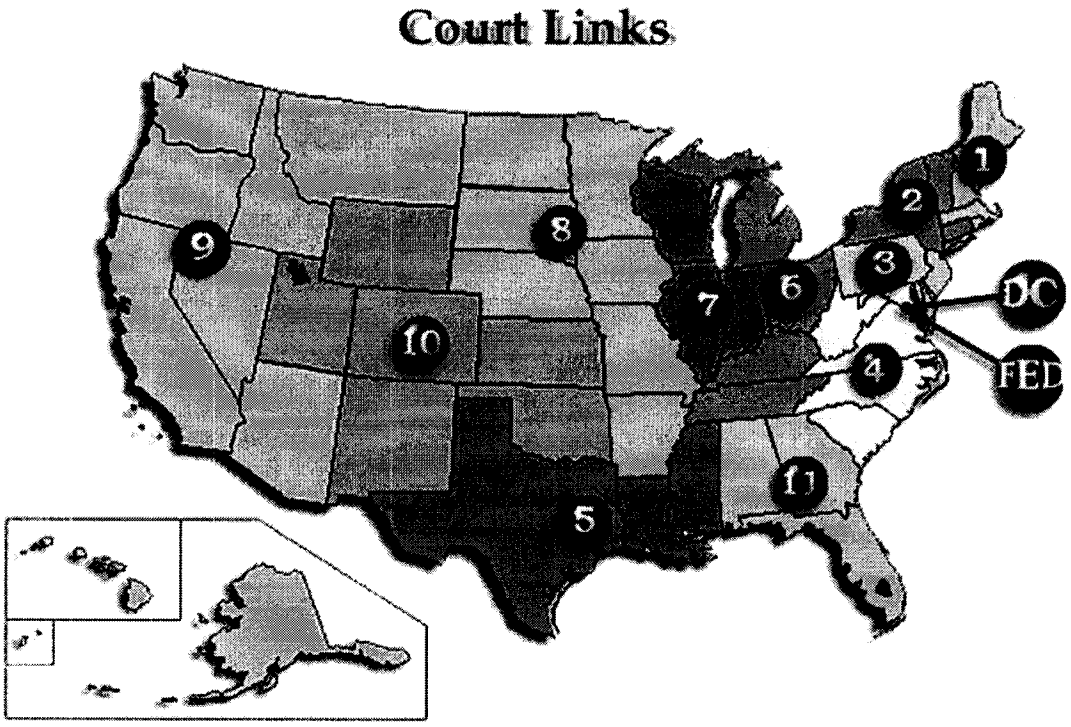
a. Federal Trial Courts

District Courts are the federal trial courts - where federal cases initially are filed, and where they are tried, where witnesses testify and juries serve. The 94 districts are divided into 12 regional circuits, which roughly correspond with regions of the country. A 13th circuit, the Federal Circuit, hears cases from all over the country related to patents, customs, taxes, and other specialized areas.

A map of the circuits is provided on page 2.

b. District Court Judges

i. Federal **District Judges** are appointed directly by the President, and must be confirmed by the U.S. Senate. Once a judge is appointed and approved, he or she serves for life (or until voluntary retirement) and may be removed from office only through impeachment by Congress. A District Judge also is protected from pay decreases of any kind.



The above map is reprinted from the web page of the Administrative Office of the Courts. See www.uscourts.gov.

The protections and conditions of a District Judge's job are provided for by Article III of the United States Constitution. These protections ensure a fair and independent judiciary resistant to influence and interference by outside parties. The Article III provisions are consistent with the separation of powers embodied in the Constitution. District Judges often are referred to as "**Article III judges**."

ii. Each District Court has a **Chief District Judge**, who is responsible for the court's overall administration and works closely with the Clerk of the Court. The Chief District Judge serves for a set term, usually seven (7) years, and is chosen based on seniority from the active District Judges who are no more than 64 years old, have served as a judge for more than one year, and have not previously served as Chief District Judge.

iii. At age 65, District Judges are eligible to retire at their current salary or assume **senior status** after serving for 15 years. (The "Rule of 80" (65+15) is often used to refer to the senior status age and service minimums.) A judge on senior status continues to hear cases, although typically he or she hears fewer cases than active judges. In district courts with large caseloads, however, a senior judge may carry a full caseload. Judges on senior status have the same authority to determine cases as active District Judges.

c. Magistrate Judges

Magistrate Judges are appointed to eight (8) year terms by the District Judges in the court where they serve. Magistrate Judges are authorized by federal statute and are exempt from the protections of Article III of the United States Constitution. Depending on the practice of their local court, Magistrate Judges may handle any number of pre-trial matters delegated by District Judges. For example, they may hear discovery disputes; make Findings and Recommendations on prisoner civil rights' litigation, habeas petitions, and death penalty cases for use by District Judges in deciding a case; hold settlement conferences; and preside over arraignments and detention hearings in criminal cases. Magistrate Judges also may preside over

misdemeanor trials and certain civil trials in which the parties agree to a trial by a Magistrate Judge.

d. Bankruptcy

i. Within each of the 94 federal judicial districts, there is a **Bankruptcy Court**, which administers the bankruptcy laws. These laws enable people or businesses that can no longer pay their creditors as their debts come due to reorganize their affairs, liquidate their debts, or create a plan to pay them off.

ii. **Bankruptcy Judges** are appointed to 14-year terms by the U.S. Court of Appeals for the respective circuit. Like Magistrate Judges, they do not have protection under Article III of the United States Constitution. Bankruptcy Judges decide matters arising under the Bankruptcy Code, which sets out how parties involved in a bankruptcy case should proceed. For more on bankruptcy cases, see pages 7-9 and 20-22 below.

2. Appellate Courts

a. For each of the 12 regional circuits in the country, there is a **Court of Appeals**. Like District Judges, Circuit Court Judges are nominated by the President, confirmed by the Senate and serve lifetime appointments. Like the District Courts, a Court of Appeals has a Chief Judge who serves on the basis of seniority.

b. The **Ninth Circuit Court of Appeals**, is authorized to have 28 judgeships and currently has 26 active circuit judges plus two vacancies. In addition, there are 21 senior circuit judges serving on the court. For more on the Ninth Circuit, see pages 33-34 below.

c. If a party loses a case in District Court, and wishes to question the ruling, it can take the case to the Circuit Court for the region within which the District Court sits. Appellate courts also may review decisions made by federal agencies.

d. Appellate Courts do not try a case over from the beginning, but rather review the District Court's decision on legal grounds. The Appellate Court may overturn or "reverse" the decision of a District Court, uphold or "affirm" it, or

remand it. If a case is remanded, then it is sent back to the District Court for further proceedings consistent with the Appellate Court's opinion and, in some cases, retried.

e. In 1982, Congress created the **Federal Circuit Court of Appeals**, which is based in Washington, D.C., but hears cases from all over the country based on subject matter. Cases that come before the Federal Circuit deal with patents, customs, taxes, and other specialized areas.

f. A **panel of three judges** hears most appeals from District Courts. However, for some important proceedings, the entire appeals court will be asked to vote to hear the appeal, which is known as **en banc review**. A majority vote is required for en banc review to occur.

3. Supreme Court

a. The **U.S. Supreme Court** is the final court of appeals in the federal system, as well as the highest court in the nation. While the Supreme Court only hears a small percentage of the cases filed before it, its decisions in the cases it does hear set precedents that all other federal and state courts must follow. Its decisions may only be overturned by amendments to the Constitution or federal law, or a later Supreme Court ruling. For more on the Supreme Court's hearing of cases, see page 35 below.

b. In addition to determining appeals in civil cases tried by District Courts, the Supreme Court has the right to evaluate laws and to decide their constitutionality, a process known as **judicial review**.

c. The Supreme Court's nine members are appointed by the President, for life, and must be approved by the Senate before they take office. Every Supreme Court justice hears every case, unless a justice recuses himself or herself based on a potential conflict of interest.

B. Administrative Support For The Courts

1. Administrative Office Of The Courts

The **Administrative Office of the Courts** (the "AO"), based in Washington, D.C., provides support for all branches of the federal judicial system, in the form of administrative support, program management, and policy development. The AO also helps to implement the policies of the Judicial Conference of the United

States and supports Conference committees. As part of fulfilling its role, the AO publishes statistical reports regarding court caseloads and case management, which are available to the public.

2. The Federal Judicial Center

The **Federal Judicial Center** ("FJC"), also based in Washington, D.C., is the education and research agency for the federal courts. The FJC publishes materials related to current issues of judicial concern, hosts training sessions for new judges, and maintains a database of judicial biographies.

3. Office Of The Clerk

a. In each District Court, a **Clerk of the Court** is appointed by all the District Judges on the court. The Clerk works closely with the Chief Judge in the court's overall administration, helping to manage the flow of cases through the court. The Clerk also maintains court records, handles financial matters for the court, and provides other administrative support to the court as needed.

b. In each courtroom – of a District Judge, Magistrate Judge and Bankruptcy Judge – a **Courtroom Clerk** typically sits near the judge. The Courtroom Clerk, also known as the courtroom deputy, schedules the judge's hearing calendar, calls court into session, administers oaths to witnesses, marks exhibits, and helps keep hearings and trials running smoothly.

c. Additionally, each courtroom is assigned a **Court Reporter**. The Court Reporter transcribes all proceedings in the courtroom, and makes copies of the transcript available to parties in civil actions upon request for a cost. In some Magistrate Judge courts, the Court Reporter operates an electronic recording system and can make audio tapes of the proceedings available.

III. Types Of Cases Heard In Federal Court

A. Civil Cases

1. Only certain kinds of civil cases are tried in federal courts. To be eligible for federal court, a case must invoke **federal jurisdiction**. Cases where federal jurisdiction applies can include those involving the United States as a party, cases involving application of federal statutory law, or cases involving citizens of different states where at least $75,000.00 is at stake. Examples of cases involving federal law and where exclusive federal jurisdiction

applies include bankruptcy cases, and cases involving copyrights, patents, and maritime law.

2. It is the complaining party's responsibility to bring a civil case to court. The party, or plaintiff, does this by filing a **complaint** with the court. The complaint states **claims for relief** based on the defendant's alleged wrongful acts, and requests remedies, which can include damages, injunctive relief, and fees and costs. In response to the complaint, once served, the defendant must respond with an **answer** or **motion** in order to avoid default.

3. Civil cases are decided differently than criminal cases, applying a different **standard of proof**. Instead of proving the defendant's guilt beyond a reasonable doubt, the plaintiff in a civil case generally need only show a preponderance of evidence supports its case. There may be anywhere from six to twelve jurors, who must render a unanimous verdict, unless the parties have agreed before the trial that they will accept a verdict that is not unanimous. For more on civil cases, see pages 12-19 below.

B. Bankruptcy

1. Bankruptcy Cases

A bankruptcy case begins with the filing of a petition with the clerk of a bankruptcy court. Two kinds of petitions may be filed: voluntary and involuntary.

a. Voluntary Petitions

A **voluntary petition** is filed by the debtor, and constitutes an "order for relief." Upon filing, an **automatic stay** is put in place. It prevents those who are owed money by the debtor from collecting, and temporarily prevents persons who have filed a lawsuit against the debtor from continuing with the suit. The stay lasts until the bankruptcy case is closed, a discharge of the debts is granted, or, in cases where acts against property of estate are stayed, when the property is no longer a part of the estate. If creditors knowingly attempt to violate the stay, they face serious penalties.

b. Involuntary Petitions

An **involuntary petition** is filed by creditors in an attempt to force a debtor into bankruptcy. This kind of filing occurs most commonly when a debtor has made a transfer of property in order to defraud its creditors or makes a large

payment to another creditor that makes the debtor insolvent. Transfers such as these can be recovered in a bankruptcy case. Only certain creditors as specified by statute may file an involuntary bankruptcy case. For example, creditors whose unsecured debts aggregate more than $11,625 may file involuntary petitions. Involuntary petitions may not be filed against farmers, railroads, or most non-profit organizations, such as churches, schools, and charitable foundations.

The debtor in an involuntary case may file an answer to the petition opposing the filing of the involuntary case. If the court finds that the petition was improperly filed, the court will dismiss the involuntary case and may enter judgment against the petitioning creditor for the debtor's attorneys' fees and costs.

2. Group And Individual Filings

Groups and individuals file under different chapters of the Bankruptcy Code for different reasons, as summarized below.

a. Chapter 7

Chapter 7 involves a full-scale liquidation of the debtor's assets (except for certain exempt property) by a third party, known as a **trustee**, appointed by the U.S. Trustee's Office. For individuals, the conclusion of Chapter 7 brings a discharge of most debts. Alimony, child support, student loans, or fraudulent debts may not be discharged, and neither can consumer debts from purchases and cash advances undertaken within 60 days of the filing. Also, if the debtor violates certain parts of the Bankruptcy Code, his/her debts will not be discharged. Chapter 7 generally is used in cases in which debtors are ineligible for Chapter 11 or fail to follow their Chapter 12 or 13 payment plan. (See pages 20-22 below).

b. Chapter 13

Chapter 13 has distinct advantages over Chapter 7 for individuals. The debtor is allowed to keep all assets while paying incurred debts over a period of time, and some creditors are forced to accept these installment payments. A Chapter 13 plan, which contains the debtor's strategy for paying off the creditors, must be filed within 15 days of the filing of the petition. Payments must commence within

30 days after the plan is filed. A third party **trustee**, appointed by the U.S. Trustee's Office, is responsible for making sure the plan is followed in a timely manner. Every plan must contain certain components. First, it must provide for the submission of future income to the trustee for the payment of debts. Second, it must provide for payment in full for the claims with priority, such as tax claims. Third, it must provide for the payment of an equal percentage to all claims grouped in the same class. Fourth, it must put substantially similar debts in a class, and must not discriminate unfairly against any class.

c. Chapter 11

Chapter 11 gives bankruptcy court protection to a debtor while it reorganizes its affairs. A **trustee** is appointed to take control of the estate only if the court so orders, and the court will comply with the request only if the moving party proves that the debtor has engaged in fraud, dishonesty and the like, or if the appointment of a trustee is in the best interests of the creditors. If the court refuses to appoint a trustee, it may be asked to hire an "examiner," who is charged with investigating the affairs of the debtor. The court must appoint an examiner if the unsecured debts of the debtor are greater than five million dollars ($5,000,000.00). Whether or not the unsecured debts are less than $5 million, the court may appoint an **examiner** if it concludes that such action is in the best interests of the creditors.

After the petition is filed, the debtor is given 120 days to propose a **plan for reorganization**. If a plan is proposed within that length of time, no creditor can propose another plan until 180 days have passed from the filing of the petition. A creditor may propose a plan sooner if either a trustee has been appointed or if the debtor has not filed a plan in the first 120 days. The plan must designate classes of claims, treat all claims within a class equally, state whether each class is "impaired" (the legal, equitable, or contractual rights of the creditor have been altered), specify how to treat the impaired claims, and provide means for implementing the plan. The proponent of the plan also must file a "disclosure statement," which explains and summarizes the plan. This statement is provided to all creditors after it is approved by the court. The debtor invariably will negotiate acceptance of the plan with each class of creditors. In order for the court to approve the

plan, the plan must be accepted by the creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims in that class. Those classes not impaired by the plan are required to accept it.

C. Criminal Cases

1. Criminal Matters

Only criminal matters in which a federal law has been violated may be brought before a federal court. There are three ways the government can bring formal charges against a defendant: an indictment, an information, or a complaint.

a. The **indictment process**, usually only used for serious felony cases, begins when a lawyer for the executive branch of the U.S. government – usually the U.S. Attorney or an Assistant U.S. Attorney – informs a Federal Grand Jury about evidence that indicates a person committed a crime. The U.S. Attorney will try to convince the Grand Jury that **probable cause** exists to believe that a crime was committed and that the person or persons targeted by the proceeding should be formally accused of the crime. If the Grand Jury agrees that probable cause exists, it issues a formal statement, called an **indictment**. The indictment contains a list of the offenses suspected of each person indicted. Each offense is alleged as a different count in the indictment.

b. A **complaint** is filed without the involvement of a grand jury, and is a formal, written statement made under oath before a Magistrate Judge stating the essential facts constituting the offense(s) charged. The complaint is usually accompanied by a supporting affidavit prepared and signed by the investigating agent and approved by the U.S. Attorney or an Assistant U.S. Attorney.

c. Another way to bring charges against a defendant is through the filing of an **information**, which also is filed without the involvement of a Grand Jury. Because an information cannot be used in lieu of an indictment in serious felony cases absent express waiver by the defendant, an information usually is used for cases involving minor felonies or misdemeanors, and is filed by the U.S. Attorney or an Assistant U.S. Attorney.

2. Arraignment

If the suspect is formally accused and arrested on an indictment or information, or appears subject to a summons at the discretion of the U.S. Attorney, he or she is then **arraigned**. At the arraignment, the defendant is advised of the charges and may plead "guilty," "nolo contendere" (no contest), or "not guilty." If the plea is "guilty" or "nolo contendere," a time is set for the defendant to return to court to be sentenced. If the defendant pleads "not guilty," or refuses to enter a plea, a time is set for trial.

3. Preliminary Examination

If, however, the suspect is formally accused and arrested on a complaint, or appears subject to a summons issued in connection with the complaint at the discretion of the U.S. Attorney, he or she is then entitled to a **preliminary examination** within 10 days (if in custody) or 20 days (if not in custody). The purpose of the preliminary examination is to determine the existence of probable cause for the charge(s) alleged in the complaint. (Preliminary examinations are not required for charges brought by indictment because the grand jury has already established probable cause by returning an indictment.)

4. Jury

In a criminal trial, the 12 person **jury** must unanimously decide beyond a reasonable doubt that the defendant is guilty of the crime(s) charged. If the jury is unable to reach a unanimous decision resulting in a **hung jury**, the government has the option of re-filing the charges at a later date.

D. Habeas Corpus

State and federal prisoners may, under certain circumstances, seek court review of whether their imprisonment or sentence violates Constitutional standards by petitioning in federal court for a **writ of habeas corpus**. While generally considered a civil petition, a petition for habeas corpus seeks **collateral review** of the conduct of the criminal trial resulting in a finding of guilt and a prison sentence or penalty of death. Review is **collateral** in the sense that the Court can look beyond the trial record and may take evidence and inquire into facts through an **evidentiary hearing**. Common claims made in such a petition include ineffective assistance of counsel, juror misconduct and other types of due process violations.

IV. Federal Civil Procedure Explained

A. Complaint

1. A civil lawsuit is commenced by the filing of a **complaint**. A complaint typically sets forth the basis for the court's jurisdiction over the case, the reasons the specific court is the proper venue for the case, background facts, and claims for relief. The complaint also sets forth remedies sought in the closing "prayer." Remedies can include money damages, as well as injunctive or declaratory relief, attorneys' fees, and costs. If the plaintiff seeks to have his or her case heard by a jury, the complaint also includes a jury demand.

2. A **filing fee** usually is required at the time a complaint is filed. However, an impoverished plaintiff may seek in forma pauperis status in order to have the fee waived or, in the case of an inmate plaintiff, paid in installments.

3. Upon filing, a civil complaint is assigned randomly to a District Judge and a Magistrate Judge. A complaint must be served on the defendant, typically within 120 days. The defendant is then required to respond with an **answer** or other responsive pleading, usually within 20 days of service. (Sometimes, particularly when a defendant is located at some geographical distance from the plaintiff, the plaintiff may ask the defendant to "waive service" to save costs, in exchange for a longer period of time – 60 to 90 days – to answer or respond to the complaint.) Also upon the filing of a complaint, the Clerk of the Court provides the plaintiff's attorney with a number of documents for service on the defendant. These documents relate to the management of the case and include the pre-trial scheduling order of the judge assigned to the case.

B. Monetary Relief

1. Damages

a. Typically a plaintiff seeks money damages or "**actual damages**" to compensate for financial loss incurred as alleged in the complaint. The amount of actual damages is subject to proof, which may involve the use of expert witnesses.

b. Certain actions are based on statutes that provide for **statutory** or "**lump sum**" **damages** as an alternative or in addition to actual damages. For instance, in a copyright case, a plaintiff with a timely copyright registration may opt any time before trial to seek statutory damages varying

from $750 to $30,000 per infringement, with the potential for higher amounts if the infringement is willful. Requesting statutory damages avoids the need to prove actual damages.

2. Attorneys' Fees

Generally, attorneys' fees are available in two situations: (a) if a contract that is the subject of litigation provides for fees; or (b) a statute under which the litigation is brought expressly provides for fees. Even then, fees are awarded to the prevailing party after the main case is decided. The prevailing party files a motion for fees, and the amount awarded is determined by the Court.

3. Costs

Certain litigation costs also may be awarded by the Court to the prevailing party in response to a motion and as provided by statute.

C. Injunctions And Other Non-Monetary Relief

1. Injunctive Relief

a. Generally, a petition for **injunctive relief** asks the court to direct a party to do something, or to stop doing something. For example, in a copyright infringement case, a plaintiff may seek an injunction to permanently stop an infringer from selling or distributing infringing works.

b. To obtain an injunction, the party seeking it must show an irreparable injury if the relief requested is not granted, and must also show that other legal remedies are not adequate to protect against that injury. Injunction is an equitable remedy, and a court is not required to grant it, even on a showing that a law has been violated.

c. At times a party may ask for a temporary restraining order ("TRO") and a **preliminary injunction** early in a case, before an actual trial of the case on the merits. The decision to grant such early relief also is discretionary with the court, and involves the court weighing the interests of the parties. Generally, the party seeking a preliminary injunction must show that it is likely it will win the case on the merits, that there is a significant risk it will suffer an irreparable injury, and that this injury will happen very soon if relief is not granted. The granting of a preliminary injunction is not a final decision on the request for permanent injunctive relief. If a party succeeds on

obtaining an injunction before trial, the injunction will not take effect until the posting of a bond to insure against the possibility the injunction was improperly granted.

2. Declaratory Relief

a. Under the **Declaratory Relief Act**, interested parties may ask the Court to "declare" their legal rights and duties on a matter over which they disagree (a "matter in controversy"). This declaration may be requested by itself, or with a request for damages or other relief. Declaratory relief may be available even when another remedy would be just as effective.

b. There are several purposes for declaratory relief: it may allow the parties to determine their rights and duties without the threat of other litigation for damages; it allows a party to determine what action it should take to avoid or cut off liability for damages; it promotes judicial economy by avoiding a number of lawsuits on the same subject; and if filed first, it can preempt a suit against the party seeking declaratory relief. For example, a party threatened with a suit for infringement may decide to first file an action for declaratory relief, asking the court to declare it as a non-infringement.

c. To obtain declaratory relief, the parties must show there is a genuine dispute (an "actual controversy") on a matter within the jurisdiction of the federal court. However, declaratory relief is an equitable remedy, and the court has discretion to allow the action to go forward or not, and may abstain from hearing the action if it determines, for example, that a pending state action involving similar issues to be resolved exists.

d. Declaratory relief is different from injunctive relief in that:

i. The parties only have to show an actual controversy; no showing of irreparable harm is required, as would be required for injunctive relief.

ii. A court ruling only determines the rights and duties of the parties; it does not direct that an action be taken or not taken, as injunctive relief does.

D. Dismissal

1. A **motion to dismiss** made before trial is a challenge to a pleading on technical legal grounds. Grounds for dismissal may include lack of federal subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient service of process, failure to join a required party, or failure to state a claim that would justify relief. This last ground, referred to as "failure to state a claim upon which relief may be granted," is probably the most common ground on which motions to dismiss are made. Motions to dismiss on this basis are often referred to as "**12(b)(6) motions**," as that is the rule number in the Federal Rules of Civil Procedure providing for a dismissal motion for failure to state a claim.

2. Federal judges always have the basic or "**inherent**" power to dismiss any case before them as a sanction for bad faith of any party, or for willful disobedience of a court order. Either party may make such a motion at any time during the proceedings, or the court on its own motion may make this decision.

E. Civil Discovery

1. Generally, each party to a civil action will seek "**discovery**" of the other party. In addition to taking depositions of parties or witnesses, each party may ask that the other party provide written information in response to interrogatories, and documents or other evidence in response to written document requests. Generally, discovery requests should not resemble "fishing expeditions" but should be focused on information relevant to the claims or defenses made by any party or reasonably calculated to lead to the discovery of relevant material.

2. Sometimes the material asked for in a discovery request is very sensitive and personal, qualifies as confidential business information, or asks for a great deal of material that would be difficult to produce. In such cases, the responding party may ask for a **protective order** from the court to protect the responding party "from annoyance, embarrassment, oppression, undue burden or expense." In considering the request for such an order, the judge balances the interests and needs of the various parties. Some judges decline to issue orders that could result in the filing of many documents with the court "under seal," because of the administrative burden on the court and clerk's office, or based on a policy that public courts should not be used to protect private secrets. If an order is issued, it may take many forms, including imposing limitations on the time, place or manner of discovery, or sealing certain responses to discovery as confidential.

3. Certain information must be provided to the other party in a civil action without a formal request. The Federal Rule of Civil Procedure requiring early exchange of certain discovery – **Rule 26** – generally requires each party to identify and disclose all witnesses and documents it may use to support its claims or defenses.

F. Summary Judgment And Judgment As A Matter of Law

1. A motion for **summary judgment** provides a procedure for determination of an action before a trial. In cases in which there is no triable issue of material fact, a party may be entitled to judgment as a matter of law. The question the judge must decide is whether the evidence presents a sufficient factual disagreement to require submission to a jury or other factfinder, or whether key facts are undisputed or so one-sided that one party must prevail as a matter of law. In a summary judgment motion, the evidence presented is all in written form, and may consist of verified documents, declarations, and transcribed deposition testimony.

2. A kind of summary judgment motion may also be made during trial at the conclusion of the plaintiff's case, or at the conclusion of all the evidence, on the ground that after presentation of all the evidence the plaintiff has failed to prove its case. In this situation, a party may make a **motion for judgment as a matter of law**, and the judge may grant the motion as to the entire case, or as to certain issues in the case. A motion for judgment as a matter of law formerly was known as a "motion for directed verdict" and some practitioners will still refer to it in that way.

G. Rulings And Orders

1. During the course of a civil action, a judge may make certain **rulings** on questions of law or procedure, and issue certain orders regarding these questions. The judge may also issue rulings concerning the admissibility of evidence at trial. These rulings or orders will direct how the lawsuit will proceed. Such interim rulings and orders generally are not appealable; the general exception to this is a final dismissal of an action.

2. Rulings and orders are distinguishable from a **judgment**, which is the entry of a final decision by the judge or a jury on the claims and defenses presented in the civil action. A judgment is appealable. For more on appeals, see pages 19, 33-35 below.

H. ADR And Settlement

1. Each federal court is required to offer **alternative dispute resolution** ("**ADR**") procedures for use in civil actions. Such procedures may include, but are not limited to, mediation, early neutral evaluation, mini-trial and non-binding arbitration. Each court is permitted to devise its own ADR procedures, and courts may give their procedures and programs different names. For instance, the Eastern District of California has a Voluntary Dispute Resolution Program through which parties may be assigned to an experienced attorney who volunteers as a mediator.

2. **Early neutral evaluation** ("**ENE**") and mediation are similar. Both programs involve presentations to a neutral third party in a non-binding, informal format. ENE programs usually refer cases to the neutral third party shortly after the action starts. ENE is intended to help identify the disputed issues and provide the parties with feedback on the strengths and weaknesses of their cases. Through ENE, parties may realize the value to the other parties of significant gestures unrelated to any monetary settlement, such as an apology.

3. **Mediation**, which may be utilized at any stage of the proceedings, is intended to bring about a settlement. While mediation may be facilitated by a third party, generally a settlement is only achieved through mediation if both parties agree to all terms.

4. **Non-binding arbitration** requires the consent of the parties. It is a more formal proceeding, including, at the discretion of the arbitrator, the testimony of witnesses and the issuance of subpoenas. In the event that either party disagrees with the award of the arbitrator, that party may seek a trial before the court (a "trial de novo").

5. Regardless of the method used, settlement is encouraged by the courts to resolve a matter before trial, or sometimes during or even after trial, but before appeal. In a settlement, both parties reach an agreement as to what each will do to resolve the dispute. A **settlement agreement** will often include dismissal of the litigation; in some cases, continued jurisdiction of the court over the settlement will be a term of the agreement proposed by the parties, subject to the court's approval. Settlements usually do not include any admission of liability, and often, but not always, include a payment of money by one party to the other. Settlement agreements may require that their terms remain confidential; not all courts, however, will allow confidential settlements to be filed

with the court. Similarly, some courts will not agree to retain jurisdiction over confidential settlements.

6. Settlement procedures vary between judges. However, there are two standard procedures that do not vary.

   a. At some point in the life of a case, the parties will be referred to a **settlement conference**, usually with a judge other than the trial judge. The settlement conference judge attempts to facilitate a settlement agreement between the parties.

   b. In addition, the parties have available to them a technique that can lead to settlement if all other efforts fail: the ability to make a statutory offer of judgment up to 10 days before trial. This offer allows judgment to be taken against the offering party for a specific amount of money, including costs. If the other party accepts, judgment is entered according to the terms of the offer. If the other party does not accept, and a later judgment for that party is found by the court to be not as good as the statutory offer, the party must pay all the other party's costs incurred after the offer was made. This is known as a "**Rule 68" offer**, after the Federal Rule of Civil Procedure that provides for the procedure.

7. Once a **settlement agreement** has been made, it may be breached by the action of either party to the agreement. If this happens, the other party may file a new legal action for breach of contract or, if court jurisdiction was retained in the case, may file a motion to enforce the settlement.

8. Settlement proceedings and what is said during them are not admissible during trial of a matter. Once a settlement offer has been made, evidence of it is not admissible in any other proceeding to prove the offeror's liability; however, a Rule 68 offer is admissible in support of a claim for costs incurred after the making of the offer. The reason settlement discussions and offers generally are privileged is to encourage free discussions during ADR and any kind of settlement proceedings.

I. Civil Trial

1. In a civil trial, the plaintiff generally must prove its case by a preponderance of the evidence. At the beginning of a trial, the parties generally file trial briefs highlighting key facts and summarizing relevant law for the trial judge, as well as explaining

why their positions should prevail. The trial briefs and all other documents filed with the Court in a civil matter are available for public review in the case file maintained by the Clerk of the Court. Additionally, many courts now offer electronic access to copies of case dockets and certain case documents through an on-line service known as PACER.

2. Either party in a case may, but need not, demand a jury. (If there is no jury, a bench trial is conducted before the assigned judge.) **Juries** in federal civil cases are comprised of anywhere from 6 to 12 members selected under local rule from the population of the district in which the trial is conducted. Jurors, therefore, may travel substantial distances to serve on a federal jury. For instance, jurors called to serve in Sacramento for the Eastern District of California may come from as far north as the northern border of California, and as far south as Tracy. Jurors are selected through a process known as "**voir dire**," during which the presiding judge or the parties' attorneys ask questions of the jurors to determine their ability to consider the facts of a case fairly and openly.

3. Prior to the start of trial, the parties may file **in limine** motions asking the judge to rule in advance on issues expected to arise during the trial. Motions in limine may seek, for example, to exclude evidence or witness testimony or limit a party's claims for relief.

4. After a jury is chosen and motions in limine addressed both sides typically make **opening arguments**. The **plaintiff** then presents its "**case-in-chief**" wherein it offers all its witnesses and evidence to support its claims for relief. Following the plaintiff's presentation, the **defendant** proceeds with its "case-in-chief." The plaintiff then has a chance to **rebut** the defense's case-in-chief. After both sides have concluded their presentation of witnesses and evidence, the parties make their **closing arguments** in the same order.

5. After closing arguments in a jury trial, the judge provides the jury with **jury instructions** as to the law applicable to the facts of the case. Following instructions by the judge, the jury deliberates, acting as the fact finder, and decides upon a verdict. In civil cases, the jury must decide whether the defendant is liable, and if so, whether and what amount of damages the plaintiff should receive. The jury decides for itself how much weight to place upon specific evidence and witness testimony. The **jury verdict** must be a unanimous decision, unless the parties agree otherwise in advance.

6. If a plaintiff seeks non-monetary relief, such as an injunction, this remedy is decided by the judge alone.

J. Appeal

If a party is dissatisfied with the result of either a bench or a jury trial it may appeal to the Circuit Court of Appeals for the district where trial was held. For more on appeals, see pages 33-35 below.

V. Bankruptcy Procedure Explained

A. Eligibility To File For Bankruptcy Relief

Only certain individuals and entities are eligible to be debtors under the Bankruptcy Code. **Chapter 7**, in which the nonexempt assets of the debtor are liquidated for the benefit of his/her/its creditors, is available to all individuals and most businesses except for municipalities, railroads, banks, and other financial institutions. Only municipalities may file under **Chapter 9**, and **Chapter 12** is reserved for farmers. Both of these chapters involve a restructuring of debts. **Chapter 13**, which permits individuals to pay their debts over time, is available only to individuals with regular income and with unsecured debts less than $290,525.00 and secured debts less than $871,550.00. Such amounts are adjusted annually. Railroads and all those eligible for Chapter 7 (except stockbrokers and commodity brokers) are eligible under **Chapter 11**, pursuant to which the debtor attempts to reorganize while continuing to conduct its business.

B. Automatic Stay And Relief From The Stay

1. If a party in a pending civil case files a bankruptcy case, the civil case is subject immediately to an **automatic stay**. Thus, in the event of a case pending before the District Court, all actions would be stayed upon the bankruptcy filing. Foreclosure actions against a party also are subject to the **automatic stay**. Actions by governmental entities enforcing their police powers are not stayed.

2. **Creditors** may seek **relief from stay** in order to protect their interests by filing a motion in the bankruptcy court. Thirty days after the motion is made or hearings on the issue begin, the motion is granted unless it has been expressly denied. The motion will be granted unless the creditor is afforded "**adequate protection**" of its interest in the debtor's property or the debtor has equity in the property. In the case of a stayed District Court action, the nondebtor litigant may seek relief from the stay or, if such party is an unsecured creditor, may determine that the best it will be able to do is to file a claim in the bankruptcy case and try to collect some portion of the amount owed, if any.

C. Dismissal Of The Bankruptcy Case

1. Bankruptcy judges have broad discretion to **dismiss** bankruptcy cases, but dismissals are the exception rather than the rule. There are several possible bases for **dismissal**. First, a petition can be dismissed because the debtor is **ineligible** for relief under the particular chapter under which he/she/it filed. Second, a petition may be dismissed if **unreasonable delays** by the debtor result in prejudice to the creditors. Third, bankruptcy judges may dismiss petitions if they find that granting relief would be a "**substantial abuse**" of the provisions of the Bankruptcy Code. Fourth, the petition may be dismissed if the debtor had a **previous petition** dismissed or a voluntary dismissal after a request for relief from an automatic stay occurred within the past six months. Fifth, dismissal may follow if the debtor fails to make payments according to its confirmed plan. Sixth, dismissal is appropriate if the filing was made in an attempt to stall or gain **unfair advantage** over creditors.

2. Instead of **dismissing** a Chapter 11 or 13 case, the bankruptcy judge may **convert** the case to one under Chapter 7, thus resulting in the liquidation of the debtor's nonexempt assets. The ability to convert a Chapter 13 case to a Chapter 7 case, however, is limited.

D. Plan Confirmation

1. When the bankruptcy court is deciding whether to confirm a Chapter 13 plan, it must consider whether the plan satisfies each of **six conditions**. First, it must make sure the plan complies with the Bankruptcy Code. Second, the bankruptcy court must verify that all the amounts required to be paid prior to confirmation are paid. Third, it must ensure the plan is filed in good faith. Fourth, it must verify that, under the plan, the creditors will receive at least as much as they would under Chapter 7. Fifth, the creditors must either (a) accept the plan, (b) be given their collateral as payment, or (c) be paid no less than the allowed amount of the claim. Sixth, the plan must be **feasible**.

2. The bankruptcy court cannot confirm a Chapter 11 plan unless each holder of an **impaired** claim has accepted the plan or receives as much as would be received under a Chapter 7 liquidation. A claim is **impaired** when the plan alters the holder's nonbankruptcy rights against the debtor. The court will confirm a plan if either each impaired class has accepted it or if the court deems it "**fair and equitable**." Confirmation under such circumstances is known as **"cramdown."** In order to confirm a cramdown plan, the court must find that certain standards have been met; the standards are

different for the cramdown of holders of secured debt, holders of unsecured debt and holders of equity interests.

E. Discharge

1. Most individuals file under Chapter 7 in order to obtain a **discharge** of their debts. Not all debts may be discharged, however. Among others, the following are exempt from discharge: alimony; child support; student loans; most tax debt; and debts incurred in connection with intentional torts. In addition, debts may be declared **nondischargeable** if a creditor files a lawsuit in the bankruptcy court and the bankruptcy judge finds that certain enumerated conduct (such as **fraud**, **conversion**, etc.) has occurred. Also, debts incurred because of "loading up" (spending large amounts of money on "luxury goods or services" within 60 days of the bankruptcy filing) may not be discharged. Finally, the court can decline to issue a discharge if, among other things, the debtor has or has attempted to delay or defraud a creditor by secreting property, or the debtor has intentionally misstated his or her financial condition; acted illegally; refused to obey orders or testify; or been granted a discharge within the last six years. If the discharge is denied, the debtor's property is liquidated but none of his/her debts are discharged.

2. Almost all debts are discharged under confirmed and consummated Chapter 11 and Chapter 13 plans.

VI. Overview Of Federal Criminal Procedure

There are a number of stages in a federal criminal case, including: (1) grand jury, return of indictment, and other charging procedures; (2) initial appearance and arraignment; (3) bail and detention; (4) discovery and investigation; (5) motion practice; (6) plea and plea bargaining; (7) trial; and (8) sentencing and application of the federal sentencing guidelines.

A. Grand Jury, Return Of Indictment, And Other Charging Procedures

There are three ways to bring formal charges against the defendant in federal court: an indictment, an information, or a complaint.

1. The **indictment process**, usually only used for serious felony cases, begins when a lawyer for the executive branch of the U.S. government – usually the U.S. Attorney or an Assistant U.S. Attorney – informs a Federal Grand Jury about evidence that indicates a person committed a crime. The U.S. Attorney will try to convince the Grand Jury that **probable cause** exists to believe that a crime was committed and that the person or persons who are the **subject(s) or target(s)** of the proceeding should be formally

accused of the crime. If the Grand Jury agrees that probable cause exists, it issues a formal statement, called an indictment. The **indictment**, which is itself not evidence in the case, contains a list of the offenses suspected of the person indicted. Each offense is alleged as a different count in the indictment.

a. The **Grand Jury** is authorized by the Fifth Amendment to the United States Constitution, and is comprised of 16 to 23 citizens. In addition to the authority to summon witnesses before it, the Grand Jury also has the power to subpoena relevant documentary evidence for its review. Should 12 or more members of the Grand Jury find probable cause, an indictment is issued. All Grand Jury proceedings (with limited exceptions) are confidential pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

b. Federal Grand Jurors often conduct long-term criminal investigations with the assistance of the United States Attorney's Office and traditional law enforcement agencies, such as the FBI. Rule 6(r) of the Federal Rules of Criminal Procedure mandates the secrecy of such proceedings and the public and press may not attend the proceedings, nor may the Grand Jurors or the United States Attorney comment on the content or subject of the proceedings.

c. Grand Jury witnesses, including **targets** and **subjects**, can refuse to answer questions asserting a Fifth Amendment privilege against self-incrimination; however, the privilege must be claimed, or it will be deemed waived. A **target** is a person as to whom the prosecutor or the Grand Jury has substantial evidence linking him or her to the commission of the crime and who, in the judgment of the prosecutor, is likely to be a defendant; a **subject** is a person whose conduct is within the scope of the Grand Jury's investigation, and who may or may not be a likely future defendant. Should a witness refuse to testify voluntarily, the U.S. Attorney may consider providing the witness with immunity and require the witness's testimony.

d. Private attorneys are not permitted to attend the Grand Jury sessions with or on behalf of clients, but may be permitted to wait outside the Grand Jury room to consult with their clients, for example, on matters relating to the assertion of the Fifth Amendment privilege. While witnesses are not precluded from commenting on the proceedings, except

under limited circumstances, they are often asked, and agree, to maintain the secrecy of the investigation.

e. **Indictments** are returned to a Magistrate Judge, or to the District Court when necessary, in open court and, once unsealed, are thereafter a matter of public record. A Grand Jury serves until discharged by the Court, but generally does not serve for more than 18 months.

2. A **criminal complaint** is filed without the involvement of a Grand Jury, and is a formal, written statement made under oath before a Magistrate Judge stating the essential facts constituting the offense(s) charged. The complaint is usually accompanied by a supporting affidavit prepared and signed by the investigating agent and approved by the U.S. Attorney or an Assistant U.S. Attorney. Once filed, a complaint, if not sealed by the Court pending execution of an arrest warrant, is thereafter a matter of public record.

3. A third way to bring charges against a defendant is through the filing of an **information**, which is also filed without the involvement of a Grand Jury. Because an information cannot be used in lieu of an indictment in serious felony cases absent express waiver by the defendant, an information is usually used for cases involving minor felonies or misdemeanors, and is filed by the U.S. Attorney or an Assistant U.S. Attorney. Once filed, an information, if not sealed by the Court pending execution of an arrest warrant, is thereafter a matter of public record.

B. Initial Appearance, Arraignment, And Preliminary Hearing

1. After the defendant is accused and arrested, or if he or she appears subject to a summons at the discretion of the United States Attorney, the defendant is brought before a Magistrate Judge, usually within the first 24 hours, for an **initial appearance** and is then **arraigned**. The role of the Magistrate Judge at the initial appearance is to determine whether or not the person named in the complaint, indictment, information, or the arrest warrant is the person who has been brought before the court. The Magistrate Judge will advise the defendant of the charges and explain the person's rights, including the right to counsel. If the person cannot afford to retain counsel, the Court will appoint an attorney from the Federal Defender's Office or a panel attorney authorized to accept appointments under the Criminal Justice Act. The appointment of counsel is predicated upon the completion of a financial affidavit signed under the penalty of perjury. That affidavit is not a public document.

2. At **arraignment**, which in the Eastern District of California usually occurs at the time the defendant makes his or her initial appearance before the Magistrate Judge, the charges will be read in open court or the defendant will waive reading thereof. The defendant will be asked to enter a plea – of guilty, not guilty, or no contest. In almost all cases, the defendant will plead "not guilty." If however, the plea is "guilty" or "no contest," a time is set for the defendant to return to court to be sentenced.

3. If the defendant pleads "not guilty," a time is set for further proceedings (usually an initial **status conference**) before the District Court Judge assigned to hear the case and the case will be set for trial. Along with preserving the defendant's legal rights, this allows defense counsel the opportunity to investigate the prosecutor's case. The District Judge will handle most stages of the case following arraignment.

4. If however, the suspect is formally accused by complaint rather than an indictment or information, of any offense other than a petty offense, the suspect is entitled to a **preliminary examination** within 10 days (if in custody) or 20 days (if not in custody) prior to entry of a plea at arraignment. The purpose of the preliminary examination is to determine the existence of probable cause for the charge(s) alleged in the complaint. Preliminary examinations are not required for charges brought by indictment because the Grand Jury has already established probable cause by returning an indictment.

C. Bail And Detention

1. The conditions of pre-trial release will generally be determined before a Magistrate Judge at the time of the initial appearance. The Judge is authorized under the Bail Reform Act to **detain** a person until trial, permit the posting of **bail**, or **release** the defendant on other conditions, including his or her own recognizance. That determination will take place at the initial appearance if the prosecution requests detention, or at a **detention hearing** held within five court days following the initial appearance if the defendant's attorney requires more time to prepare.

2. In determining whether or not to **release** a defendant, the Judge will consider **factors** such as the defendant's prior record, if any, ties to the community, employment, and any prior failures to appear in court. These factors are considered as part of the determination of whether a defendant is a danger to the community or a serious flight risk. Repeat offenders, as well as those charged

with certain drug-related charges and crimes of violence, have a "presumption of detention." The United States Attorney typically will seek detention in such cases and the Court will sustain that request unless the defendant can provide credible evidence to the Judge that the defendant's family, employment, financial situation or background is sufficient to overcome the presumption that the defendant is a flight risk or danger to the community.

3. Typically before a **detention hearing**, a Pretrial Services Officer will interview the defendant and gather information concerning the defendant's background and certain personal circumstances and write a report for the Judge, including a recommendation as to whether or not the defendant should be released or the conditions of release. That report is not a public document and copies provided to the prosecutor and defense counsel are collected following the proceeding.

4. If a detention hearing is held, the defendant has the right to discovery and the right to testify, and to present and cross-examine witnesses. The Rules of Evidence do not apply at a detention hearing and the prosecution may therefore present hearsay information and testimony. Ordinarily, the prosecution, which is the **moving party** who bears the burden of proving the defendant is a flight risk or danger to the community, will proceed via a **proffer**. A proffer is a procedure where the government provides the court with factual information without evidence to support it, which if not accepted by the defendant, permits the defendant to demand evidence and an opportunity to cross-examine witnesses.

5. If the Magistrate Judge imposes detention, the defendant will be remanded to the custody of the United States Marshal and, in the Eastern District of California, will probably be held in the Sacramento County main jail or the Fresno County jail, unless other arrangements are mandated by the unavailability of space. The defendant, however, may seek prompt review of the Magistrate Judge's detention order with the District Court Judge, or alternatively, may ask the Magistrate Judge to reconsider the detention order at a later date based upon changed circumstances or the collection of new information regarding the defendant's family ties or ability to make bail.

6. If the Judge decides to permit the defendant to **post bond**, the defendant may be required to post cash or property, surrender a passport or comply with restrictions on travel or residence. The Court may permit the defendant to be released pending the posting of property or bond or may release the defendant pending the posting of the collateral. The Court may also set conditions for the

defendant to follow until the case is concluded, including drug testing or specific residential requirements. The conditions of release are a public record and are maintained in the Court file.

7. There are also occasions when prisoners are arrested because of **warrants** issued in another District. Under those circumstances, the principal issue before the Magistrate Judge will be the identity of the person brought before the Court. The defendant may not contest the charges that have been filed in the other District but may challenge the warrant on the grounds he or she is not the person charged. Bail and other conditions of release will be determined by the Magistrate Judge, but with deference to a previously set bail or detention order issued in the other District. In cases where identity is disputed, a hearing is set and evidence taken on that issue.

8. Because the issue before the Court is so narrow, typically questions concerning arrest warrants issued in other Districts are more properly addressed to the law enforcement authority or Court in that District. Nonetheless, the identity hearing and bail conditions in the District are part of a publicly held judicial proceeding open to the public and press.

D. Criminal Discovery And Trial Preparation

1. Discovery is the process of obtaining information from the other side in a criminal proceeding. As in civil cases, the criminal discovery process permits each side, the prosecution and the defense, to obtain the information needed to prosecute or defend the case.

2. As there is no constitutional right to discovery in a criminal case, discovery is governed by **Rule 16** of the Federal Rules of Criminal Procedure and by case decisions designed to make sure the defendant is afforded due process. Typically the prosecution's due process duties are described as its **Brady obligation**, which requires the government to disclose all evidence favorable to the defendant which is material either to guilt or to punishment.

3. Rule 16 is intended to be a self-executing obligation of the parties and requires the government to provide copies of documents it plans to use against the defendant at trial in its case-in-chief or that are important to the preparation of the defense. The documents to be provided include statements of the defendant, the defendant's prior criminal record, documents and other tangible things important to the preparation of the defense, scientific and other test results and other physical evidence the government plans to use,

and expert witness reports. Rule 16 and Local Court Rules impose similar obligations on the defense by way of reciprocal discovery requirements.

4. Unlike the state courts in California, federal rules do not require the prosecution to provide the defendant with witness statements, except as required by Title 18, section 3500 of the U.S. Code. Such witness statements often are referred to in Court as **Jencks Act statements**. Prosecutors, under section 3500, are not required to provide witness statements in federal court until after the witness testifies at trial. Because of the practical difficulty of providing such statements without interrupting the orderly flow of a trial, and in order to permit the jurors to hear cases promptly, prosecutors often provide the defendant with such witness statements at an earlier date close to trial.

5. Criminal discovery materials, which are exchanged between the parties, are not made available to the public and are rarely discussed in any public forum other than within the confines of the Court during judicial proceedings. Because of the potential prejudice to the prosecution or defense case, neither party will generally comment on the evidence or the defendant's previous criminal record, if any, or any other evidentiary aspect of the case. Discovery materials are not part of the Court file unless made an exhibit to a written motion.

E. Criminal Motion Practice

1. A **motion** is simply a formal request for relief, generally in writing, made to the Court by the prosecution or defense. The motion may, for example, seek a stay of the proceedings, access to discovery, or restrictions on the use of evidence. After one party makes a motion, either verbally or in writing, the other side always has an opportunity to respond to the motion. The Court will schedule a time to hear and decide the motion but may, at its discretion, decide the motion without a hearing based on the written documents submitted by the attorneys.

2. The District Judge assigned to the case will decide most motions in the case but certain motions are heard by the Magistrate Judge. Typically the Magistrate Judge hears motions on pre-trial discovery matters, with a right of appeal to the District Judge.

3. One typical motion that may be filed prior to trial is a **motion to suppress**. This motion asks the Court to preclude the use of evidence or statements of the defendant based upon the illegality of its seizure or the illegal circumstances in which the statement was

rendered. Evidence gathered illegally will not be presented to the jury under the **exclusionary rule**, except under defined circumstances, such as for impeachment should the defendant testify at trial.

4. Evidence may be illegally seized because of the lack of a warrant, the lack of probable cause, disputes as to the accuracy of statements made in the affidavit in support of a seizure warrant, or for other reasons that have previously been determined by the courts to be valid. The moving and response papers are public documents, as are the exhibits attached to the papers, and may be reviewed at the Clerk's Office during business hours. Because filed documents take time to be placed in the judicial file or because the Court may have the file under active consideration, request for motion papers should be made at the Clerk's Office with the understanding it may take some time to make them available.

5. Other motions typically heard by the District Court in connection with criminal trials are **motions to sever** one defendant's case from another, **motions to dismiss** on legal grounds, and **challenges to the evidence**. The latter are known as ***in limine* motions**. *In limine* motions, which are filed close to the time of trial, may be filed by an attorney to seek to introduce or exclude evidence for various legal reasons.

F. Plea And Plea Bargaining

1. A **plea bargain** is a contractual agreement between a defendant and the prosecutor to resolve the case, without trial, on specific terms. By law, namely Rule 11 of the Federal Rules of Criminal Procedure, judges are not involved in plea negotiations. Almost 95 percent of all federal criminal cases are disposed by way of a plea.

2. **Plea negotiations** may occur during any stage of a federal criminal case. Some cases are resolved during the investigation phase of a case, before formal charges are filed. In other instances, plea negotiations begin at the first hearing or immediately before the trial is set to begin. All cases are generally resolved before or at the trial confirmation hearing.

3. Should a plea bargain be reached, the judge is informed of the agreement upon the filing of the **written plea agreement** setting forth the terms of the agreement. Under Rule 11, typical terms of a plea agreement may include that, in exchange for the defendant's plea of guilt to one or more charges, agreement to cooperate with

the government, and waiver of the right to appeal or collaterally attack the sentence, the prosecution will: move to dismiss other charges; recommend or agree not to oppose the defendant's request for a specific sentence; recommend or agree not to oppose the defendant's request that a particular sentencing range or application of the **Sentencing Guidelines** is applicable; or, affirmatively agree that a specific sentence or sentencing range is the appropriate disposition of the case. The plea agreement also will usually be accompanied by a **factual basis**, setting forth the facts the government would prove if the case were to go to trial.

4. The plea agreement is part of the official court record. In most cases, unless the government affirmatively agrees that a specific sentence or sentencing range is the appropriate disposition of the case, the judge is not bound by the agreement between the parties and retains discretion to impose a different sentence than that agreed upon.

5. Assuming a plea agreement has been reached between the parties, the next step is a court appearance for the **change of plea**. The purpose of this hearing is for the defendant to change his or her plea from not guilty to guilty. Before the Judge will accept the change of plea, he or she will ask a series of questions, or **colloquy**, designed to ensure the plea is voluntary, and that the defendant understands the consequences of the plea and the rights he or she is waiving or receiving by the plea agreement. The District Judge must approve the plea, unless it is in a misdemeanor case and the parties have consented to the Magistrate Judge's approval.

6. At the conclusion of the hearing, the Judge will generally accept the guilty plea, adjudicate the defendant guilty, and order that a **pre-sentence investigation report** be prepared by the United States Probation Officer assigned to the case. The Judge either will remand the defendant to custody at that time, alter the terms of the release, or permit the defendant to remain released under the previously set bail conditions pending a **sentencing hearing**.

G. Criminal Trial – Overview

1. The United States Constitution guarantees a defendant the **right to trial by jury**, except in certain misdemeanor or other cases involving petty offenses. At trial, and because the defendant enjoys a **presumption of innocence**, it is the task of the Assistant United States Attorney to affirmatively prove the defendant's guilt beyond a reasonable doubt.

2. **Juries** in federal criminal cases are comprised of 12 members selected under local rule, as with civil juries, from the entire population of the Eastern District. Jurors, therefore, may travel substantial distances to serve on a federal jury and may be of diverse political and socio-economic backgrounds. A defendant has the right to waive his or her right to a jury trial and have his or her case decided by a Judge; this is commonly known as a court or "bench" trial.

3. The **Speedy Trial Act** requires a defendant to be tried no earlier than 30 days and no later than 70 days after his or her first appearance. There are exceptions under the Local Rules, which can be granted at the request of the parties at the discretion of the Judge. The exceptions generally relate to the complexity of the case or the need for counsel to prepare for trial.

4. Before trial, attorneys often file a **trial memorandum or trial briefs** describing the case and applicable standards of law for judicial consideration. The court does not generally rule on issues presented in the trial memoranda but simply views the documents for the purpose of obtaining a preview of the issues to be presented at trial, often using the documents to plan ahead and dispose of issues so as to save valuable juror time and keep the trial flowing forward in a logical manner. The trial briefs are public documents.

5. The trial itself encompasses several stages. After a jury of 12 (generally with two alternates) is chosen during the process known as **voir dire**, the government and the defendant present their **opening statements** which provides the jury with a general overview of the evidence to be introduced and their respective theories of the case. Opening statements are not evidence.

6. Following **opening statements**, the government then presents its **case-in-chief**, wherein it offers all its witnesses and evidence to support the charges alleged against the defendant. Following the government's presentation, the **defense** will then proceed with its **case-in-chief** where it offers evidence to support a defense to the charges. A defendant enjoys a constitutional right not to be called to testify by the government, and frequently will decline to testify in his or her case-in-chief. The government will have the chance to **rebut** the defense's case-in-chief.

7. After both sides have concluded their presentation of witnesses and evidence, the parties will present **closing arguments** in the same order. The Judge will then instruct the jury as to the applicable law. Following instructions by the Judge, the jury will deliberate and decide upon a verdict. The jury decides for itself how much

weight to place upon specific evidence and/or the testimony and credibility of witnesses.

8. The **jury verdict** must be a unanimous decision. If the jury is unable to reach a unanimous decision resulting in a **hung jury**, the government has the option of re-filing the charges at a later date.

H. Sentencing And Sentencing Guidelines

1. In 1987, the **United States Sentencing Guidelines** took effect. The Guidelines were created to achieve the goal of similarly situated offenders convicted of like crimes in different jurisdictions receiving comparable sentences. Parole was abolished and the Guidelines adopted the philosophy that the sentence received is the sentence to be served.

2. Additionally, the Guidelines were created to engender certainty, such that a person convicted of an offense would have a clear idea of the range of the possible sentences he or she would receive in approximately 10 to 11 weeks following preparation of the Pre-Sentence Report by the United States Probation Officer.

3. The Guidelines work by assigning mathematical scores to two different aspects of a defendant and his or her case. First, the defendant's criminal record is calculated by assigning points to each prior conviction, and then by categorizing the sum of those points into a **Criminal History Category**, ranging from I-VI. Second, the particular offense for which the defendant will be sentenced is given an **Offense Level**, ranging from 1 to 43 based upon seriousness of offense and various other factors such as the amount of loss resulting from the criminal conduct and the defendant's role in the offense. The sentencing chart provided by the Guidelines then, by cross-reference, selects the **range of sentence** that the Court may impose.

4. In most cases, the Court will order that a **pre-sentence investigation report** (also known as the Pre-Sentence Report or "PSR") be prepared by the United States Probation Officer assigned to the case, to aid the Court in assessing the appropriate sentence under the Sentencing Guidelines. Prior to preparation of the **PSR**, the defendant will be asked to complete a detailed questionnaire, which includes among other items, questions related to the defendant's financial condition and his or her version of the offense. The defendant also will be interviewed by the Probation Officer in the presence of counsel.

5. After the **PSR** is prepared, the defendant and the government are offered the **right to challenge** the Guidelines computations, or the facts from which the Guidelines are computed. By Local Rule, an informal meeting or exchange of correspondence will be conducted with the Probation Officer. If the parties fail to resolve the dispute, a written motion will be filed and the matter resolved by hearing before the sentencing Judge. The written motion is part of the public Court file; the PSR is not.

6. Under the Guidelines, the Court is required to impose a sentence of the kind, and within the range, specified in the Guidelines, absent a valid ground for departure. Departures are authorized when the Court finds there exists an aggravating or mitigating circumstance of a kind not adequately taken into consideration in the Guidelines that should result in a sentence different from that described. This is known as a **downward departure**.

7. Following the **sentencing hearing**, the Court will prepare a final **judgment** setting forth the terms of the defendant's sentence. The judgment is a part of the public Court file.

8. If a defendant is sentenced to prison, the Judge may recommend how and where the sentence is served. However, the Bureau of Prisons ultimately decides where to place the defendant consistent with security determinations and the availability of space. While there is no parole in the federal criminal system, an inmate may earn up to 54 days of "good behavior" credit toward his or her sentence each year. The average prisoner may be expected to serve at least 85 percent of the sentence imposed.

VII. Appellate Process

A. Civil Appeals

1. Notice of Appeal: The losing party in a federal civil case has a right to appeal its case to the United States Court of Appeals for the District Court in which judgment was entered. An appeal from the Eastern District of California is heard by the Ninth Circuit Court of Appeals. An appeal is initiated by the losing party filing a **Notice of Appeal** in the District Court. In most civil cases, when the United States is not a party, the deadline for filing a Notice of Appeal is 30 days after entry of the judgment or order that is being appealed.

2. Briefing: The Ninth Circuit sets a briefing schedule for the appeal. The party filing the appeal, the appellant, files an **opening brief** on the date specified in the briefing schedule along with excerpts from

the District Court record in support of the appeal. The District Court record includes the docket sheet, the clerk's record (consisting of pleadings and other documents maintained in the court's file), and the reporter's transcript (consisting of a type-written account of all oral proceedings before the court). The party opposing the appeal, the appellee, files an **opposition brief**. The appellant may then file an optional **reply brief**. A copy of a brief or an appellate case file is available from the Clerk's Office for the Court of Appeals. The Clerk's Office in the Ninth Circuit will copy any document 10 pages and under for 50 cents per page. Documents also may be copied by going to the Clerk's Office at 95 Seventh Street, San Francisco, California and copying documents for 20 cents per page on the public copy machine.

3. Oral Argument: **Oral arguments** are normally conducted at the Ninth Circuit court houses in San Francisco, Pasadena, Portland and Seattle. Most appeals are heard in the first instance by a **panel** of three appellate judges. For civil appeals, oral arguments are scheduled approximately 8 to 10 months after the completion of briefing.

4. Submission Without Argument: Not all fully briefed cases are scheduled for oral argument. Some cases are decided based on the briefs without oral argument.

5. Decision By The Court Of Appeals: After the submission of briefs and oral argument, the three appellate judges discuss the case privately and reach a decision. At least two of the three judges on the panel must agree with the decision. One of the judges in the majority is chosen to write an **opinion**, which announces the decision and explains the reasoning for it. It usually takes anywhere from six weeks to six months from the time the Court conducts oral argument until a written decision is rendered by the panel. There is no time limit in which the Court must render its decision.

6. Petition For Rehearing: The losing party can challenge the Ninth Circuit's decision by requesting a **rehearing** by the same panel or rehearing **en banc**. In order for a case to be reheard by an en banc court, a majority of all active non-recused judges must vote yes for en banc review. Only about 20 cases a year receive en banc review. In the Ninth Circuit, the en banc Court consists of 11 judges (the Chief Judge and 10 active judges chosen randomly from among other active judges). There is no time limit for the Court to decide a petition for rehearing.

7. Public Access To Decisions: All Ninth Circuit decisions are available to the public. A copy of any decision can be obtained from the Ninth Circuit by sending a written request with a check for $2.00 to the "Clerk, U.S. Court of Appeals" with a self-addressed letter-size envelope. If the decision is "For Publication," it is available on the Ninth Circuit's website: http://www.ca9.uscourts.gov/ca9/newopinions.nsf.

B. Criminal Appeals

1. **Criminal appeals** are filed, briefed, heard and decided through the same general process as civil appeals. Criminal appeals receive priority over civil appeals so many of the deadlines are shorter in criminal appeals than in civil appeals. There are a few other differences in criminal appeals.

2. The government may not appeal if a defendant in a federal criminal case is found not guilty. The **double jeopardy clause** of the Fifth Amendment to the United States Constitution precludes an appeal by the government. The government, however, may appeal a sentencing determination.

3. A defendant may appeal his or her conviction if the case goes to trial or a conditional plea is entered. Otherwise, except in certain limited circumstances, a guilty plea will waive any appeal of conviction or pretrial motions.

4. For a criminal appeal, it takes approximately four to five months from the completion of briefing until oral argument.

C. Petitioning the United States Supreme Court

1. A party who loses at the Ninth Circuit can file a **petition for writ of certiorari** with the United States Supreme Court. Each year approximately 7,000 petitions are filed, but the Supreme Court selects only about 80 cases to review.

2. The Supreme Court begins its term on the first Monday of each October. The term lasts until the Court has announced its decisions in all the cases in which it has heard oral argument. During the term, the Court sits for two weeks at a time and hears oral argument on Monday through Wednesday. Most Supreme Court decisions are released in late spring and early summer.

ADDITIONAL RESOURCES

Federal Courts

Supreme Court of the United States
Public Information Officer
One First Street, N.E.
Washington, D.C. 20543
Phone: (202) 479-3211 (Reporters press "1")
http://www.supremecourtus.gov

U.S. Court of Appeals for the Ninth Circuit
Public Information Officer
P.O. Box 193939
San Francisco, CA 94110-3939
Phone: (415) 556-6177
Fax: (415) 556-6179
http://www.ca9.uscourts.gov

Eastern District of California
United States District Court
Sacramento Division
501 "I" Street, 4th Floor
Sacramento, CA 95814
Phone: (916) 930-4000

Fresno Division
1130 "O" Street, Rm. 5000
Fresno, CA 93721
Phone: (559) 498-7483
http://www.caed.uscourts.gov/caed/staticOther/page_455.htm

For information on other circuits and District Courts, see the links available at the web site for the Administrative Office of the Courts at http://www.uscourts.gov/links.html.

Federal Offices and Agencies Related to the Courts (with an emphasis on the Eastern District of California)

Administrative Office of the Courts
Office of Public Affairs
Administrative Office of the U.S. Courts
Washington, D.C. 20544
Phone: (202) 502-2600
www.uscourts.gov

Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington D.C. 20002-8003
Phone: (202) 502-4000

The United States Pretrial Services Agency
Eastern District Of California
United States Court House
501 "I" Street, Room 2400
Sacramento, California 95814
Phone: (916) 930-4350

United States Court House
1130 "O" Street, Suite 3454
Fresno, California 93721
Phone: (559) 498-7552

Chief Pretrial Services Officer: Robert J. Duncan

The Pretrial Services Agency, as an arm of the Judiciary, collects, verifies, and reports bail-related information to the Court. The agency focuses on satisfying the statutory requirement that the judicial officer reviewing the potential release of a person charged with a federal crime must order a defendant released on his or her own recognizance, an unsecured bond, other more tangible financial conditions, and/or additional non-financial conditions, unless the judicial officer determines that such a release will not reasonably assure the court appearance of the person as required or will endanger the safety of the community. Typically, questions concerning release arise during the initial appearance before a Magistrate Judge, although the issue may arise at any time during the case, including the period after trial but before imposition of sentence and while an appeal is pending.

The Pretrial Services Officer prepares a confidential report concerning a defendant's background, assets, community ties and other issues, with copies provided to counsel and the judicial officer. The report is not available to the public or media and may not be used by the parties as evidence in the criminal case. The Pretrial Services Officer may not discuss the report or the case with the media, or make any statements regarding the case.

The Pretrial Services Agency also monitors the defendant's conduct in the community to verify compliance with release conditions. Conditions of release can include, but are not limited to: travel and residential restrictions; restrictions on associations; employment issues; drug testing; outpatient and inpatient substance abuse treatment; mental health counseling; house arrest; curfew; electronic monitoring; acquisition of locally-provided resources; and, compliance with all laws. Violations of these conditions are reported to the United States Attorney's Office and the Court for hearing and appropriate resolution.

United States Probation Office
Eastern District of California
501 "I" Street, Suite 2500
Sacramento, California 95814-2322
Phone: (916) 930-4323

1130 "O" Street, Suite 1001
Fresno, California 93721
Phone: (559) 498-7477

Chief U.S. Probation Officer: Sue H. Sorum
Deputy Chief U.S. Probation Officer (Sacramento): Joe E. Glaspie
Deputy Chief U.S. Probation Officer (Fresno): Jay Craddock

In the Eastern District of California, the Probation Office has a staff of 220 in nine offices, including Bakersfield, Visalia, Fresno, Yosemite (part-time), Modesto, Elk Grove, Sacramento, Roseville, and Redding. They are charged with preparing pre-sentence investigation reports and supervising convicted offenders placed on probation, supervised release, and mental competency cases under conditional release. The Probation Office is responsible for: making sure specific orders and conditions imposed by the judge are fulfilled; protecting the community and ongoing assessments of risk, including third parties and the correctional treatment of the offender; providing drug and mental health services; residential treatment; and placement for offenders.

In judicial proceedings, the Probation Officer assists the Judge in determining a sentence consistent with federal Sentencing Guidelines. After a guilty plea or verdict, a Probation Officer obtains a copy of the main pleadings in the case including the indictment and plea agreement, and then obtains a copy of the defendant's criminal record and schedules an interview with the defendant. The defendant completes a detailed worksheet in advance of the meeting. During the interview, the defendant is asked about the offense, family history, employment history, physical and mental condition as well as substance abuse history, and finally, financial condition. Once the Probation Officer has obtained all relevant information, he or she prepares a Pre-Sentence Report for the judge, providing a general summary of the case, the defendant's background, and the Probation Officer's calculation of the applicable Sentencing Guidelines. All of the information, including the report, is confidential and the Probation Officer may not discuss the case with the press or public. The Probation Officer's discussions with the judge are also private. However, since the parties are offered the opportunity to contest the report at sentencing, disputes concerning some aspects of the report may become part of the public record in written motions or during the sentencing proceedings. Similarly, the Probation Officer may be asked to provide information in open court and such comments are "on the record."

Office Of The Federal Defender
Eastern District Of California
801 "I" Street, 3rd Floor
Sacramento, California 95814
Phone: (916) 498-5700
Fax: (916) 498-5710

2300 Tulare St., Suite 330
Fresno, California 93721
Phone: (559) 487-5561
Fax: (559) 487-5950

Federal Defender: Quin Denvir
Chief Assistant Defender: Daniel J. Broderick

Authorized under 18 U.S.C. § 3006A of the Criminal Justice Act (CJA), to provide legal representation services to persons financially unable to retain counsel in federal criminal and related proceedings. Confidential Financial Affidavits are filed with the court under penalty of perjury to determine whether a person qualifies for appointment of counsel under the CJA. The CJA also defines the situations in which counsel can be assigned and mechanisms for obtaining investigative, expert, and other services. A defense team includes investigators, paralegals, research assistants, interns, and legal secretaries, all of whom work with the assigned attorney. If a case has more than one defendant requiring appointed counsel, or in the case of legal conflicts, the Court may appoint a private attorney on the District's panel to serve as counsel. The Federal Defender administers the panel, along with a Panel Committee, and selects skilled federal criminal practitioners to serve on the Panel of conflict attorneys.

The Federal Defender is appointed by the Ninth Circuit Court of Appeals for a four-year term and is statutorily responsible for the operation of the office, management of the office caseload, and the supervision of attorneys and other personnel.

The Capital Habeas Unit represents state death row inmates in federal habeas corpus proceedings at both the federal trial and appellate levels.

Department Of Justice
The United States Attorney
United States Attorney's Office
Eastern District Of California
501 "I" Street, Room 10-100
Sacramento, California 95814
Phone: (916) 554-2700
Fax: (916) 554-2900

United States Attorney: McGregor Scott

United States Attorneys are appointed by, and serve at the discretion of, the President of the United States, with advice and consent of the U.S. Senate. Each U.S. Attorney is the

chief federal law enforcement officer of the United States within his or her particular jurisdiction, serving under the U.S. Attorney General. United States Attorneys conduct most of the trial work in which the United States is a party. They have three statutory responsibilities under title 28, section 507 of the United States Code: (1) the prosecution of criminal cases brought by the federal government; (2) the prosecution and defense of civil cases in which the United States is a party; and (3) the collection of debts owed the federal government that are administratively uncollectible.

Each District has every category of case and handles a mix of simple and complex litigation. Each U.S. Attorney exercises wide discretion in the use of his or her resources, and has been delegated full authority and control in the areas of personnel management, financial management, and procurement. In the Eastern District, the Sacramento and Fresno offices are generally divided into Civil and Criminal Divisions and then further separated into practice groups directed at a portion of the caseload. Assistant United States Attorneys may be assigned, for example, to the affirmative or defense sections of the Civil Division or to the White Collar Crime or Drug sections of the Criminal Division. Each section is supervised by an experienced Assistant United States Attorney who serves as a Deputy Chief of the Division.

The office regularly issues press releases in its cases and is available for comment on cases consistent with the needs of its cases and ethical responsibilities.

The United States Marshals Service
Eastern District Of California
501 "I" Street, Room 5-600
Sacramento, California 95814
Phone: (916) 930-2030

1130 "O" Street, Room 4210
Fresno, California 93721
Phone: (559) 498-7205
Fax: (559) 498-7202

U.S. Marshal: Antonio Amador

Under the direction of the U.S. Marshal for the District, Deputy Marshals provide protection for judges, jurors, and other persons present during judicial proceedings. They ensure security and maintain decorum within the courtroom itself, and provide personal protection for judicial officers, witnesses, and jurors away from the court facilities when warranted. In the Eastern District of California, the agency also operates the court security officer program for Sacramento at the state Capitol; this program comprises specially deputized officers who have full law enforcement authority.

The Marshals Service is also responsible for apprehending federal fugitives and operates the federal witness security program. It assumes custody of individuals arrested by federal agencies and is responsible for the housing of federal prisoners for federal, state, and local jails. It also transports prisoners throughout the United States and the world;

between judicial districts, correctional institutions, and foreign countries; and manages and disposes of seized and forfeited properties.

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