

WINNING YOUR CASE PRE-INDICTMENT

Stacey MacDonald

Assistant Federal Public Defender -SDOH

Stages of Pre-Indictment Representation

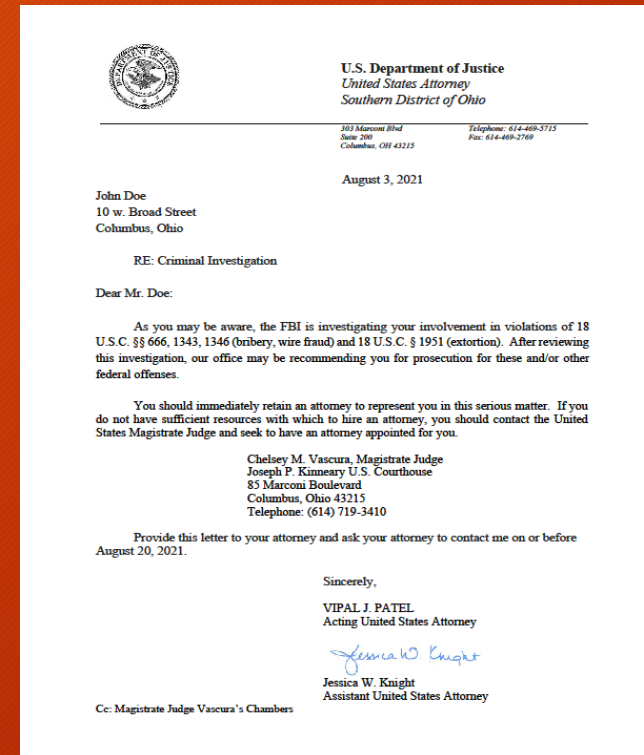
- Target Letters
- Initial Appearances
- Detention Hearings
- Preliminary Hearings

Target Letters

- Prosecutors use target letters mainly to encourage unrepresented targets to retain counsel and begin plea or cooperation discussions.
- Target Letters may also be used when a target has been subpoenaed to testify before a federal grand jury. *DOJ Criminal Resource Manual - Section 160*
- These letters can be used in any types of federal crimes.

Target Letters

A target letter is the means by which the federal government informs individuals that they are targets of criminal prosecution.



Target Letters Generally Include:

The recipient's status as a target in a federal grand jury investigation;

The crime or crimes that the recipient is suspected of committing;

The recipient's right to assert the Fifth Amendment; and

Information for obtaining court appointed counsel.

Pre-Indictment Advocacy

- Client Relationships - Finding Out Your Client's Story
- Mitigation Investigation and Demonstrative Evidence
- Beginning the Factual Investigation
- Negotiations and Plea Bargaining

What's the Client's Story

“You never really understand a person until you consider things from his point of view...until you climb in his skin and walk around in it.”

- To Kill a Mockingbird

Finding Our Client's Story

- We need to tell our clients' stories, including stories of how they came to this point in their lives; what influenced the decisions they made that led them to us; what was lacking in their past; what strengths they have; what they will need to succeed in the future... We need to tell the stories of human beings who must not be defined solely by their crime.



Mitigation Investigations

- Medical History
- Family and Social History
- Educational History
- Military Service
- Employment and Training History
- Prior juvenile and adult Correctional Experiences
- Social Media, photos, videos and letters
- *ABA Guidelines 10.7 (Investigation Capital Defense)*

Factual Investigation

- Get Investigation Materials from the AUSA
- Conduct your own investigation from your Client's Story
- Sending FOIAs or SDTs to Other Agencies
- Interview Potential Witnesses

Negotiating Skills are Communication Skills

UPON SITTING DOWN, JIM REALIZED HE WASN'T SUPPOSED TO BRING AN ACTUAL BULLDOG TO THE NEGOTIATION



WHEN ATTORNEYS AND DOGS GET MIXED UP

Negotiations

- There are 3 Main Areas of Plea Bargaining
 - Charge Bargaining
 - Sentence Bargaining
 - Fact Bargaining

Negotiations Tips & Tactics

1. Ask Open-Ended Questions and Listen
2. Win/Win can be a flawed paradigm
3. Anchoring and Making the First Offer
4. Harness the Power of Silence
5. Strategic Information Exchange
6. Invent Options for Mutual Gains - expand the pie then divide it

Anchoring in Negotiations

- The first offer in negotiations serves as an anchor and can thus advantage the negotiator willing to make the initial move.
- For the defense perspective - there is an advantage of making an initial offer low. Even if the offer is unrealistically low, as long as it is defensible, it works in the client's favor in terms of the ultimate outcome of the negotiations.

Initial Appearances

At the Defendant's first appearance:

- The Magistrate Judge will advise the defendant of their rights,
- Advise the Defendant of the charges,
- Appoint counsel after review of their financial affidavit,
- Set the Detention Hearing (if applicable) and Preliminary Hearing, and
- Have the Government advise the defendant of the maximum statutory penalties

FRCrP 5

Detention Hearings

- Detention Hearings are within three days of the initial appearance or five days upon defense request;
- You may present witnesses, documents and/or proffer information
- 18 USC § 3142



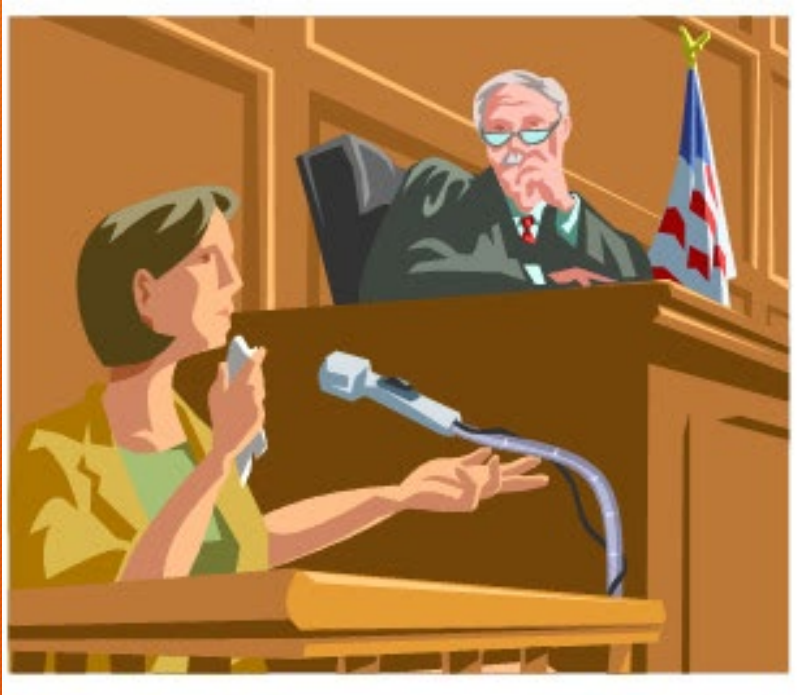
Preliminary Hearings

The Magistrate Court must hold a preliminary hearing within 14 days of the initial appearance unless the defendant is indicted or waives the hearing

FRCrP 5.1



Preliminary Hearings



Mini Trials with witness testimony and cross examination

Can start documenting testimony for motions and/or negotiations leverage

Building client trust by seeing you advocate for them

Additional Sources/Materials

- Getting to Yes: Negotiating Agreement Without Giving In - Roger Fisher, William L Ury
- Getting Past No: Negotiating in Difficult Situations - William Ury
- Start with No: The Negotiating Tools that the Pros Don't Want You to Know - Jim Camp
- Podcasts:
 - The Original Trial Lawyers College
 - Elawvate: Where Trial Lawyers Learn, Share and Grow
 - Negotiation Innovation
 - Negotiations Ninja