

## THE FEDERAL CRIMINAL LEGAL PROCESS

### Overview

This is a chronological explanation of the Federal Criminal Legal Process in summary format. For more details on the Federal Legal Process, as experienced by a Federal White Collar Defendant, please consult the FCDC Legal Guide: [The Federal White Collar Criminal Defense Guide](#). Understanding how the Federal Legal Process works is the first step in putting together a solid White Collar Defense Strategy. Also, as a White Collar Defendant, you may be wondering what comes next in your legal struggles. This summary will do just that – giving you a clear idea where you currently are in the Legal Process and what is coming down the road.

### Investigation

The Feds do most of their investigations upfront. This is often accomplished undercover and unbeknownst to the targeted suspect. In my particular circumstance as a Financier, I was investigated by the FBI and IRS, without my knowledge, for almost a year before they served me with a search warrant.

The Feds are extremely thorough in their Preliminary Investigation, and they use this approach to intimidate you from the outset when you are formally served or charged. During this investigation period the Feds sometimes give you an opportunity to speak with them before they conduct a Raid and Serve a Warrant. However, if you are the main target of the investigation, then this is typically not offered.

### Federal Raid & Serving the Search Warrant

After their upfront investigation, the Feds will raid the suspect's Office and / or House, serving the suspect with a Search Warrant and / or an Arrest Warrant. The Feds will seize anything they deem necessary to aid in their investigation. Experiencing a Federal Raid is shocking, and it is a challenge to keep your cool. Whatever you do, be respectful, ask questions, but do not speak with Feds concerning the investigation. Wait until you have retained Legal Counsel before discussing your case with the Feds. The Feds should give you a copy of the Search Warrant, which denotes what can be seized, and when it can be served. They should also furnish you an Inventory of all the seized items.

At this time, the Feds can serve you with an Arrest Warrant and take you in custody until you can appear before a Federal Magistrate, who will decide if you are to be detained or released on bond. In my particular case, the Feds didn't arrest me until after the Indictment, but this isn't always the case.

### Additional Investigation

The Feds will continue to investigate you all the way up to Trial and can add on charges as they go. In this Investigation stage, the Feds will review all the documents and items seized and continue to be more and more invasive in your life with their investigation. In my particular case, the Feds interviewed my past and current clients, business associates, past girlfriends, family, acquaintances, friends – anyone they could dig up in the investigation.

The Feds are extremely thorough. They went back over twenty years into my past, investigating my divorce, my school transcripts, my previous employment – everything! No stone was left unturned. At this point you will realize that the Feds have all the advantage, and you are certainly outgunned, no matter the quality and scope of your Defense Team. However, this realization of reality is a good thing, as you can't start adequately attacking the problems or mount a solid defense until you understand and acknowledge their superior advantage.

There are some beneficial things you can do during this stage of the Federal Legal Process:

- An opportunity for your Attorneys to start a dialogue with the Feds. A skilled, experienced attorney at this early juncture can start sniffing out the Fed's case against you.
- This is an opportunity to dispel certain inaccuracies and clarify certain evidence but you have to be very careful not to further build the Fed's case. Let your Attorney take the lead in any conversations!
- Opportunity to Negotiate: Once your Attorney has an idea of the Fed's case, it could lead to an opportunity for an Early Plea Agreement. You can certainly take a Plea Agreement at a later time, when you know all the case evidence; however, this is a great opportunity to see what the Government will initially offer you. It also gives you preliminary notions of what the Fed's believe are the strengths of their case.

Don't despair! At this stage of your investigation, you will most certainly feel helpless, humiliated, embarrassed and violated. I certainly did! Don't lose your cool or wits. You may feel outgunned, and rightly so, but you can most certainly defend yourself successfully (as explained with the numerous Defense Strategies in this section). In the Federal System, you have to take a few on the chin before you can start turning things around.

### **Indictment**

It is about a 100% chance that the one-sided evidence presented to a Grand Jury will return an Indictment. The trick is to try to stop the Legal Process in the Investigating Stage if at all possible, and the reason to quickly retain a Defense Team to aggressively negotiate with the Fed's (and hopefully kill the case). Unfortunately, this contingency is rare due to the fact the Fed's do an impressive amount of investigation prior to Indictment.

At this point, post-Indictment, your case is fully in the Public eye, and the damage to your business, profession, family and life is extensive (again, you have to take another one on the chin). In my case, the Indictment was immediately released to the Press and appeared on the Department of Justice's website. The Internet and Print news agencies picked it up immediately, printing numerous inaccuracies from the Fed's Indictment. I had a severe public relations problem on my hands, and the impact on my business was deadly.

[Other Contingencies]:

- Criminal Complaint: Sometimes used prior to an Indictment and may be a very good point to negotiate with the Feds to minimize damage.
- Secret Indictment: You have no idea you are being investigated or been indicted until you are arrested and detained.
- Preliminary Hearing: In some instances you can be Arrested, have an Initial Appearance before a Magistrate to be informed of the charges and your rights, as well as, conduct a Bail Assessment. If denied Bail or if it is too prohibitive to secure, the Feds will continue to hold the defendant in Detention pending Trial. A Preliminary Hearing is held subsequent to determine if the Legal Process will continue against the Defendant. All the Fed's need to show at this hearing to continue the legal process is Probable Cause.

- **Information:** If a Defendant waives the right to Indictment, an Information, or a charging document similar to an Indictment, is produced by the Preliminary Hearing.

### **Arrest, Arraignment & Pleading**

When the Indictment is returned, you will be arrested and arraigned, or be summoned for an Arraignment. You will be informed of the charges and your rights, make a Plea, and hopefully be released on Bond (Personal Recognizance Bond bring the best type of bond). A Probation Officer will look into your Background and provide the Pre-Trial Magistrate with any Bond recommendations. You will be required to meet with your assigned Pre-Trial Probation Officer immediately upon making bail to review your Pre-Trial and Bond requirements and restrictions.

In a few days you will appear again in front of the Pre-Trial Judge where the Probation Office will make any more recommendations on your Pre-Trial restrictions and requirements. It is extremely important your Attorney talks with the Pre-Trial Probation Officer to determine what restrictions may be imposed. In dialogue with the assigned AUSA (Assistant U.S. Attorney) to your case, perhaps your Attorney can negotiate an amended, better, Pre-Trial recommendation to the Magistrate / Pre-Trial Judge.

In my case, the Pre-Trial Judge closed down both my companies and prevented my access to the Internet and computers (purportedly since my companies had a dominate online structure, and I was charged with Wire Fraud and Money Laundering). I had to have my companies completely shut down in three days. I was devastated, as were my clients. Make sure your Attorney discussed any recommendations with the PO and AUSA prior to the subsequent Hearing.

### **Trial Hearing**

You will be appointed a Trial Judge (also handles the role of the Sentencing Judge), and a hearing is set for all parties to appear before the Trial Judge. At this Hearing, the Judge confirms your Plea and sets a Trial Date. In the Federal System you will be offered a speedy Trial normally within 30 days. However, most White Collar Cases are quite complex and document intensive, rarely is 30 days enough time for your Defense to prepare for Trial. You can elect not to have a Speedy Trial date and buy your Defense Team a few months to prepare for Trial. This extra time also gives your Attorney valuable time to negotiate the possibility of a Plea Agreement with the Feds, once your team has thoroughly the Fed's Discovery.

The Trial Judge will give the Government 10 days to provide you with Discovery. Hold them to it and put in a motion to the Judge if they exceed the time given. This is the time to set the tone of your Defense. The Judge should also be apprised of any missing or incomplete Discovery. Plant a firm seed in the Judge's mind any inadequacies, mistakes and incompetence exhibited by the Government.

### **Discovery**

Discovery, or the evidence the Feds have gathered to further their case against a Defendant, is quite often document heavy. The first order of business upon its receipt is to organize it so the mass of documents, videos, tape recordings, statements, etc can be logically analyzed. It will be the Feds intention to overwhelm you with Discovery volume so the organization of it is a critical first step in your Pre-Trial Process. I recommend every Defendant to review and make notes on the entire Discovery. Copies should be made, sections grouped by subject / content, and then divided among particular expertise in your Defense Team. Notes of importance, facts, inconsistencies, strengths, weaknesses, etc should be annotated by each expert reviewer. Review should be conducted in the scope of Trial Strategy

and Trial Risk Assessment. It is paramount that each Discovery Reviewer has a consistent Summary Note Format so the analysis can be easily assimilated and identified.

White Collar Case Discovery Review & Analysis can take a lot of time to do properly; therefore, it is important to ask for a Trial Date continuance early enough if needed. This also buys your Defense Team enough time to suitably negotiate with the Feds to determine if a Plea Agreement is feasible in your case.

It is important to keep the Government honest by challenging any missing, incomplete or corrupted evidence. If you do not get adequate satisfaction, the Judge is there to mediate and expedite such matters. Also, it sets the tone for your Trial. The Government had all the power and momentum up to this point. Discovery is the starting point for your Defense Team to turn the tables to your side and ride a wave of momentum to Trial. The success of Trial is mostly achieved outside the Courtroom, so adequate preparation, as well as, positioning is critical.

The next important step during the Discovery Stage is to compare the assimilated Discovery Summary Notes, made by your team, with the Indictment and the information gained via communications with the Feds. The goals of the review at this point are:

- Gauge the substance, strength and content of the Fed's Case.
- Negotiate any cloudy or contentious areas with the Feds to determine their Trial Strategy.
- Show advantage and strength against the Fed's case.
- Paper the Feds back as they have done to you to set the tone for Trial.

The final step in the Discovery Stage is for your Defense Team to provide you with their professional opinion as to the risks of proceeding to Trial. A Trial Risk Analysis is an objective process which can weigh out all the complicated variables affecting Trial of your Case. However, before making any decisions as to go to Trial or not, this is the point to aggressively negotiate a potential Plea Agreement with the AUSA. Then weigh your Trial Risk Analysis against the Plea Offer. The answer will be apparent.

## **Trial**

Federal White Collar Criminal Trials are the big leagues. If found guilty, the Defendant faces stiff penalties and prison time. So it is important to understand the Risks of a Federal Trial:

- Relevant Conduct: This concept is what scared me into a Plea Agreement, and the principal reason for my 33 month sentence. A Scenario for you: Go to Trial with 20 counts against you, you beat 19 of the 20 counts, which on the State level would be resounding success. On the Federal Level, Relevant Conduct will be considered during sentencing, and since you were found guilty on one count, the other related counts, even acquitted on them can be found "relevant" and used toward your Sentencing. From a White Collar perspective, Relevant Conduct means Loss and the more Loss, the higher sentencing range, the longer the sentence – just for being found guilty on one count!
- [Gives you pause, doesn't it?] Well, the flip side of this Relevant Conduct comes into play if you opt for a Plea Agreement, which is why the Statement of Facts and Pre-Sentence Report are so instrumental in determining a Guilty Plea Sentence.
- Counts: The number of counts can be added to your existing Indictment prior to trial so it is important to determine this eventuality with AUSA.

- Costs of Trial: Costs can certainly exceed the fees for your Defense Team. Is it worth it?
- Speed & Efficiency of Federal Courts: No matter the case complexity, once Trial begins, it will be decided quickly. Preparation, organization and execution are absolutely essential.
- Government Resources: The Feds have unlimited Resources, and no matter the size, scope or importance of your case, they will outspend you, no matter the cost!
- The Perfect Trial: There's no such thing, but to mitigate Federal Sentencing Risk, you have to be pretty close to perfect. At the very least, it is essential to pierce the Fed's methods, evidence and witnesses – impeach and challenge. Reasonable Doubt!

[So, why go to Trial?]

- Plea Agreement terms may be prohibitive.
- Enough holes in the Feds case to create substantial Reasonable Doubt.
- Fed Misconduct.

Do not go to Trial to preserve your Ego or reputation. The damage has already been done with the Investigation and Indictment. An Egocentric Public Relations strategy will only give you more time in Prison. Go to Trial on the Facts and based on an objective Risk Analysis.

For more information, please see our Trial Strategy section. For a detailed explanation on Trial Procedure, as well as more Trial Strategies, please consult FCDC's Legal Guide: The Federal White Collar Criminal Defense Guide.

### **Appeals:**

If you go to trial and are not fully acquitted, then you can Appeal any clear errors or raised objections. However, if you sign a Plea Agreement, Direct Appeal is often waived; however, you can challenge using a Relief Petition, such as a 2255. Another area you can Appeal is improper Jurisdiction. Grounds for Appeal are provided in 18 U.S.C. 3742.

[Appeal Statistics]: Of all Federal Appeals completed in 2001 and decided by their merits, 79% were affirmed, 4% Affirmed in Part, 9% Reversed or Remanded, and 7% were dismissed. (Reference: 2001 Federal Justice Statistics)

It is very important to retain a Law Firm that specializes in Federal Appeals. A thorough Appeal Review (analyzing the Court's Transcripts) is necessary to determine if it is worthwhile to proceed with an Appeal. Appeals can be handled "by Right" (preferred) or at the Appellate Court's "Discretion" (and permission).

- Habeas Corpus: After all Appeals and challenges have been exhausted and all Appeal time limits expired, you are entitled to a Confined Person's Conviction Review. This is a last ditch effort, but it can rectify any mistakes made, whether by Counsel or the Court.

### **Plea Agreement**

- [Statistics]: 94% of Federal Criminal Defendants plead guilty. Of the 6% that go to trial, 75% of them are convicted. In the Trial Section, I discussed a host of reasons why Guilty Pleas are so prevalent in the Federal Legal System. Relevant Conduct and the Government's Resources being major contributors.

I know you may not want to hear this as a Defendant, but in the Federal Criminal Legal System, the Plea Agreement can sometimes be the best Defense Strategy. However, it is important to go through the Legal Process, analyze the Discovery, have discussions with the AUSA, and complete a Trial Risk Analysis, to determine with certainty that a Plea Agreement is the best Defense.

Once the decision is made, all the work your Defense Team has done to prepare for Trial will be extremely important in your Plea Agreement negotiations, since you should know at this point what the strengths and weaknesses are for both sides, the Defendant and the Government (AUSA). Moreover, a lot of the material that has been reviewed can play an important role in your Plea Negotiations, and as importantly, your Sentencing Strategy. I discuss some important Plea Agreement Negotiation Strategies in the Sentencing Section, but I will make a few significant points here:

- ✓ The Plea Agreement strategy's success in Sentencing is the [Pre Sentence Report]. Remember that the PSR and the PSR Probation Officer is your end goal in negotiating the Plea Agreement. See the Sentencing Section for more information on this.
- ✓ [AUSA]: Using the information gleaned through the Discovery Process, discussions with the Government, and information from the Defendant, your Defense Attorney is now in the proper negotiating position with the AUSA.
- ✓ [Enhancements]: The U.S. Attorney's Office likes to request Sentence Enhancements after a Plea Agreement has been signed (but before Sentencing). Be sure to have your Plea Agreement terms memorialized in writing by the AUSA. Then any future attempts at Enhancement can be struck down via the Sentencing Judge and/or the PSR Probation Officer.
- ✓ [Right to Appeal]: You typically waive any right to Direct Appeal when Pleading Guilty. However, you do have avenues to challenge the Plea Agreement and/or Sentencing via 2255 Relief or another type of Petition / Challenge.
- ✓ [Statement of Facts]: Before signing the Plea Agreement, ensure the SOF is correct and properly negotiated, as the Sentencing Judge and PSR Probation Office will use it in determining / recommending your Sentence.
- ✓ [Loss, Restitution, Forfeiture & Fines]: Address each area separately in negotiations with the AUSA. The goal will be to minimize the Loss amount at the expense of the three other variables (Restitution, Forfeitures & Fines) since a Lower Loss amount means a lower Sentence Range. However, you can and should negotiate each and every area to the maximum extent.
- ✓ [Recommended Sentence]: If agreeable with the AUSA, your Plea Agreement can recommend a Sentence or Sentence Range to the Sentencing Judge. This strategy has its positives and negatives and is typically used as a stop gap or when cooperation is obtained. Often a solid strategy is to negotiate the frame work of a Plea Agreement, have that in writing from the AUSA, then negotiate aggressively with the PSR Probation

Officer and subsequently the Sentencing Judge on Mitigating Factors, Variances and Departures. In other words, it is a three part process: AUSA first, Probation Office Second and Sentencing Judge Third. Don't close off any avenues unless you absolutely have to in order to dissuade a heavier sentence.

Remember, at the end of the day, you don't have to accept the Plea if the terms are too prohibitive, as compared to your Pre-Trial Risk Analysis, and proceed to Trial. Proceeding like you are going to Trial is also important in your Plea Negotiations. The Government doesn't want to go to Trial if they don't have to, nor if you present enough of your Trial "Ammunition" to dissuade them. It is absolutely essential to have a capable Defense Team in place who understands these nuances and can effectively negotiate without revealing too much Trial Strategy.

### **Sentencing**

You will find a large section on Sentencing in the FCDC website because that is where the overwhelming majority of Defendants are headed in the Federal System. There are a multitude of areas for negotiation and sentence mitigation in Federal Criminal Law, especially now, [Post-Booker].

If you Plead Guilty, you sign a Plea Agreement and accept the accompanying Statement of Facts about your case. The Sentencing Judge will subsequently set a Sentencing date, whereby the Pre-Sentence Report, has to be completed in first draft 35 days prior.

If you go to Trial and lose, you will most probably be taken into custody until Sentencing. Moreover, any Mitigation Strategy will be significantly minimized in a Sentencing, Post-Trial. This is a significant factor as to why so many Defendants opt for a Plea Agreement.

Some important points regarding Sentencing in the Federal Legal System:

- ✓ [Acceptance of Responsibility]: By simply accepting Responsibility for your crime(s), you can be granted up to 3 points off your Sentence Points calculation by the Sentencing Judge.
- ✓ [Pre-Sentence Report (PSR)]: 90% of a successful Sentencing Strategy in the Federal Legal System occurs prior to the Sentencing Hearing. Negotiate aggressively the information in the PSR with the Probation Officer (PO) and AUSA, as the Sentencing Judge uses the information and recommendations contained within the PSR extensively when imposing Sentence. Sentence Mitigation begins during the PSR stage, not the Sentencing Hearing!
- ✓ [Judge has a Sentence in Mind]: Before your Sentencing Hearing, the Judge has already, pretty much determined your Sentence. This is why Sentence Mitigation is so important during the PSR stage proceeding the Sentencing date. Any Sentencing Arguments before the Court on the Sentencing Date often little effect or represent a last ditch effort over a Sentencing issue which couldn't be resolved between the Defense Team and the PO / AUSA. The terms of a Sentence are mostly determined prior to Sentencing. Sentencing Hearing arguments / motions are to be used to augment (i.e. a Sentencing Memorandum based on the PSR negotiations) Sentence Variances or Departures, Judgment Recommendations and Sentence Mitigation, whose basis has been established prior to Sentencing Day. In fact, 10 days prior is best to ensure the Sentencing Judge's consideration. Of course, any major issues your Defense Team can't negotiate agreement toward should be presented at the Sentencing Hearing.

There is so much more to be considered and to do in the Sentence area so be sure to review the FCDC Sentencing Section, as well as, the FCDC Legal Guide: [The Federal White Collar Criminal Defense](#)

[Guide](#). The quality and diversity of your Defense Team is the single most limiting or success factor in your Sentence. Be sure to review the FCDC article on [Criminal Defense Team Formation](#) for critical information in this area.

### **Designation & Incarceration**

Upon completion of your Sentencing, the Sentencing Judge will either grant you the privilege of Self-Surrender to a Prison or other forms of confinement upon a certain date (and the Prison to be determined by the Bureau of Prisons – BOP), or you will be transported by the U.S. Marshalls Service and transferred to BOP custody. Here are some important considerations to keep in mind (and should be part of your Sentencing Strategy Process):

- [Request Self-Surrender Privilege]: Being allowed to self-report to your BOP designated Prison is a privilege granted by the Judge. Show good reason why you should have such a privilege and request a self-report date far enough in the future (backed by a sage argument) so you can have your “life” well situated prior to your departure. The alternative to self-surrender is transfer via the U.S. Marshalls Service and BOP, commonly called Diesel Therapy. If you have a choice in the matter, don’t do it! By all means, self-report. In the [FCDC Legal Guide](#) I explain the horrors of Diesel Therapy, Detention and Prison Transfer.
- [Ask for a Judicial Recommendation]: In your Sentencing Memorandum presented to the Sentencing Judge, put in a specific request for a Prison of your choice (with a possible back-up) and the reasons for the recommendation. If a Judge sees sound reasoning and receives assurances that the calculation of Safety Factors were done correctly (i.e. the Designation is appropriate), then the Judge is more prone to include the recommendation in the Sentencing Judgment. 85% of the time, the BOP respects the Judicial Recommendation.
- [Pre-Sentence Report]: An accurate and detailed PSR is absolutely essential to proper designation. If not before, ensure at the Sentencing Hearing that any mistakes are corrected (and follow up with the Court and Probation to ensure it has been done) in the PSR. Just a one point mistake / omission can affect proper designation.
- [Sentencing Strategy]: Be sure Incarceration and Designation is part and parcel of your Sentencing Strategy. These are not separate events in the Strategic sense!
- [Alternative Sentences]: An example of an Alternative Sentence would be a Split Sentence, such as, 24 months sentenced to A Year & A Day (10months served with Good Time) in Prison and split with the remaining time in Home Confinement, as a condition of Supervised Release. As I said, Incarceration is definitely an important consideration of an effective Sentencing Strategy.

For much more on Designation & Incarceration see the sections on [Sentencing](#). We provide full details, strategies and information in the FCDC [Federal White Collar Criminal Defense Guide](#).

### **Halfway House and Home Confinement**

After serving your Prison Sentence, or as part of an Alternative Sentence, you will be designated to a Halfway House in your residence area. The purpose of a Halfway House (now called an RRC) is to transition you back into Society. After securing employment and showing good transition progress, the Halfway House will transition you to Home Confinement for the remainder of your sentence.

In the [FCDC Legal Guide](#), there is an entire Chapter dedicated to Incarceration, Halfway House and Home Confinement. Please consult the Guide for placement strategies, rules, regulations and all sorts of information on Halfway House & Home Confinement. Please see the section on [Post Incarceration](#) for more information.

### Supervised Release

After completing your sentence, there will typically be 1 to 5 years Supervised Release. You are under the supervision of a Probation Officer and will be required to meet with your Probation Officer about once per month. As I indicated in the Incarceration Section, for Alternative Sentence with Home Confinement, be sure to have the HC as part of your Supervised Release. See the [FCDC Legal Guide](#) for more details on this most important strategy.

### Summary

In this article on The Federal Criminal Legal Process, I reviewed in summary format the following Legal Process Stages:

### **Investigation**

#### **Federal Raid & Serving the Search Warrant**

#### **Additional Investigation**

#### **Indictment**

- ✓ [Criminal Complaint](#)
- ✓ [Secret Indictment](#)
- ✓ [Preliminary Hearing / Initial Appearance](#)
- ✓ [Information](#)

#### **Arrest, Arraignment & Pleading**

#### **Trial Hearing**

#### **Discovery**

#### **Trial**

#### **Appeal**

#### **Plea Agreement**

#### **Sentencing**

#### **Designation & Incarceration**

#### **Halfway House & Home Confinement**

#### **Supervised Release**

For more information on the Federal Criminal Legal Process, please refer to the FCDC [Federal White Collar Criminal Defense Guide](#).

This article was written by the FCDC Chief Legal Consultant, who is a White Collar Felon and writes from the perspective of real – world experience.

We appreciate your [Feedback](#) on this article and our website!

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