DISTRICT OF OREGON
2024 CONFERENCE

THURSDAY, MAY 2, 2024

PROGRAM MATERIALS

First Amendment and New Media in the Age of Rage

Hyperlinks

https://brandeiscenter.com/wp-content/uploads/2023/11/Brandeis-Center-Complaint-11.28.2023.pdf

https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-list-open-title-vi-shared-ancestry-investigations-institutions-higher-education-and-k-12-schools#:~:text=As%20part%20of%20the%20Biden,7%20Israel%2DHamas%20conflict%2C%20today

https://houstonlawreview.org/article/73668-the-free-speech-of-public-employees-at-a-time-of-political-polarization-clarifying-the-_pickering_-balancing-test

Selected Cases and Statutes

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).
Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988).
Koala v. Khosla, 931 F.3d 887 (9th Cir. 2019).
Mahanoy Area School District v. B. L., 141 S. Ct. 2038 (2021).

Or. Rev. Stat. § 336.477 (2007)

Supreme Court and Ninth Circuit Review

Recently decided SCOTUS:

• *Pulsifer v. United States*, 144 S. Ct. 718 (2024) (Narrowing safety valve for mandatory minimums, resolving circuit split)
• *Idaho v. United States*, 144 S. Ct. 541, 217 L. Ed. 2d 287 (2024) (federal preemption of Idaho abortion law)
• *Muldrow v. City of St. Louis, Missouri*, No. 22-193, 2024 WL 1642826 (U.S. Apr. 17, 2024) (held that a lateral transfer of an employee to a position with similar rank and pay can be an adverse employment action under Title VII of the Civil Rights Act of 1964 even if the employee cannot show that the transfer caused a "materially significant disadvantage")
• *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 144 S. Ct. 18, 217 L. Ed. 2d 155 (2023) (A case in which the Court was asked to decide whether a civil rights "tester" has Article III standing to challenge under the Americans with Disabilities Act a hotel's failure to provide disability accessibility information on its website.)
• *Lindke v. Freed*, 601 U.S. 187, 144 S. Ct. 756 (2024) (held that a public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts)
• *Murray v. UBS Sec*., LLC, 601 U.S. 23, 144 S. Ct. 445 (2024) (held that under the Sarbanes-Oxley Act of 2002, a whistleblower need not prove his employer acted with a "retaliatory intent" as part of his case in chief to succeed on a retaliation claim, only that his protected activity was a "contributing factor" of the unfavorable personnel action)
• *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205, 206, 144 S. Ct. 717 (2024) (The Ninth Circuit's judgment — that 42 U.S.C. § 1983's state-action requirement was satisfied because of the "close nexus" between petitioners' social media pages and their positions as public officials — is vacated, and the case is remanded in light of Lindke v. Freed.)

Pending SCOTUS:

• *United States v. Rahimi*, 61 F. 4th 443, 452 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023) (2nd Amendment rights for DV offenders/ re-examination of Bruen)
• *United States v. Erlinger*, 77 F.4th 617, 620 (7th Cir.), *cert. granted*, 144 S. Ct. 419, 217 L. Ed. 2d 233 (2023) (does question of whether predicate offenses were committed "on occasions different from one another" for purposes of the Armed Career Criminal Act require a jury finding beyond a reasonable doubt)
• *Arizona v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269 (Ariz. Ct. App. July 14, 2022), *review denied* (Jan. 6, 2023), *cert. granted*, 144 S. Ct. 478, 216 L. Ed. 2d 1311 (2023) (Sixth Amendment confrontation right when substitute expert relies on work of non-testifying expert)
• *Johnson v. City of Grants Pass*, 72 F. 4th 868, 880 (9th Cir. 2023), *cert. granted sub nom*. *City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 679 (2024) (ordinances prohibiting public camping)
• *Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part sub nom*. *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (the Court will decide whether to overrule its decision in *Chevron v. Natural Resources Defense Council*)
• *Relentless, Inc. v. United States Dep't of Commerce*, 62 F.4th 621 (1st Cir. 2023), *cert. granted in part sub nom. Relentless, Inc. v. Dep't of Commerce*, 144 S. Ct. 325, 217 L. Ed. 2d 154 (2023) (the Court will decide whether to overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency)
• *Moyle v. United States*, No. 23-726; No. 23A469, 144 S.Ct. 541 (2024), appeal from Ninth Circuit's November 13, 2023, decision (The Court will decide whether the federal Emergency Medical Treatment and Labor Act—which requires hospitals receiving Medicare funding to offer "necessary stabilizing treatment" to pregnant women in emergencies—preempts an Idaho law that criminalizes most abortions in the state)
• *Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700 (2d Cir. 2022), *cert. granted in part*, 144 S. Ct. 375, 217 L. Ed. 2d 202 (2023) (the Court will decide whether a New York regulator's discouragement of companies from doing business with the National Rifle Association after the Parkland school shooting constitutes coercion in violation of the First Amendment)
• *McKinney for & on behalf of Nat'l Labor Relations Bd. v. Starbucks Corp*., 77 F.4th 391 (6th Cir. 2023), *cert. granted*, 144 S. Ct. 679, 217 L. Ed. 2d 342 (2024) (the Court will decide what test courts must use to evaluate the National Labor Relations Board's requests for injunctions under Section 10(j) of the National Labor Relations Act)

Recently decided Ninth Circuit:

• *Linthicum v. Wagner*, 94 F. 4th 887 (9th Cir. 2024) (Republican walkout from legislature)
• *U.S. v. Castillo*, 69 F.4th 649 (9th Cir. 2023)
• *U.S. v. Scheu*, 83 F.4th 1124 (9th Cir. 2023)
• *Post-*Bruen* Ninth Circuit Cases included as part of the discussion of *Rahimi*:

- *Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023) (constitutionality of California's high-capacity magazine ban)
- *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023) (constitutionality of California's open-carry ban)
- *United v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023) (constitutionality of U.S.S.G. § 2D1.1(b)(1))
- *United States v. Perez-Garcia*, 96 F.4th 1166 (9th Cir. 2024) (constitutionality of pre-trial firearm restriction for criminal defendants)

• *Medoff v. Minka Lighting, LLC*, 2023 WL 4291973 (C.D. Cal. May 8, 2023), and its discussion of 9th Cir. cases
• *Hashemi v. Bosley, Inc*., 2022 WL 18278431 (C.D. Cal. Nov. 21, 2022), and its discussion of 9th Cir. Cases

Ninth Circuit Pending

• *U.S. v. Sullivan*, No. 23-927 (9th Cir.), appeal from the United States District Court for the Northern District of California, No. 3:20-cr-00337-WHO

Ethical Lawyering & Generative AI: Prickly Questions, Practical Guidance, and Predictions of What's to Come

Generative AI and LLMs.

Generative AI is an umbrella term for a variety of techniques that draw on machine learning processes such as neural networks to learn patterns and structures of training data sets, then generate new data with similar patterns and structures. Generative AI as such has been around almost as long as computers; simple examples such as Markov chains have been used to generate text since they were first formulated in 1906, and computer-robotic images were being generated with paint and pixels in the 1960s and '70s. The recent generative AI boom, less than ten years old, is due to major advancements in 2014, allowing for the generation of images from training data, and the development of the transformer network architecture in 2017 allowed for the development of Large Language Models, or LLMs.

LLMs work by converting text into tokens, or numeric values in an array, or vector. Vectors are used as part of the massive corpus of training data for the LLM, storing countless relationships between tokens. Natural language prompts are converted to vectors, compared with the training data, and the vectors most likely to most satisfactorily continue the pattern are returned. There's no agency, no understanding, and no creativity at work; just spookily precise brute-force computing.

How (not) to use an LLM.

- *Mata v. Avianca, Inc.*, 22-cv-1461, U.S. District Court, S.D. New York. Plaintiff's counsel used ChatGPT to assist in the generation of a brief; ChatGPT generated citations to 10 different cases that do not exist. When asked for more information, counsel used ChatGPT, which generated decisions from some of those cases. *LLMs are not search engines.*
- *U.S. v. Cohen,* 18-cr-602, U.S. District Court, S.D. New York. Michael Cohen relied on Google Bard for legal research, and inadvertently cited a case that does not exist, generated by Google Bard in response to a prompt. *Again, LLMs are not search engines.*
- *Grant v. City of Long Beach,* 315 F.3d 1081 (9th Cir. 2002). Appellants cited two cases that do not appear to exist at all. The opening brief was stricken and the appeal dismissed. *LLMs are **not** search engines.*
- *The Microsoft Loophole.* Co-Pilot's terms and conditions allow Microsoft to retain and review any and all prompts—which could include discovery materials or other confidential documents, if Co-Pilot is used to review or comment on those. Dedicated legal AI tools should protect you: but *always check the terms and conditions.*

How to (prudently) use an LLM.

Used prudently, there are some benefits to generative AI. The field is still very new, with new products appearing on an almost hourly basis, and a great many existing software providers and platforms are

rushing to add AI in the most unexpected places. Be cautious, skeptical, and wary of dazzle, but here are some possible use-cases for existing AI tools:

- Discovery review and summarization
- First drafts and brainstorming boilerplate and simple documents
- Revision and polishing suggestions
- Translation and transcription services

Key ethical considerations.

- Competence (ORPC 1.1)
- Diligence (ORPC 1.3)
- Communication (ORPC 1.4)
- Confidentiality (ORPC 1.6)
- Candor to the Tribunal (ORPC 3.3)

Resources and links.

- RAILS AI Use in Courts Tracker: https://rails.legal/resource-ai-orders/
  Contains court orders, local rules, and guidelines from the U.S. and other countries. Each document is classified by its particular characteristics, and the tracker allows for search and filtering capabilities based on factors such as jurisdiction, date, and other key terms. The Tracker includes links to original source documents for further reference. You can also download our raw data for your own analysis.
- AI Essentials for Lawyers: https://www.americanbar.org/groups/crsj/events_cle/recent/ai-essentials-for-lawyers/
  The ABA's introductory webinar and supporting materials on the basics of AI, a contextualization of related definitions as they pertain to the law, and a discussion of the impact of AI on marginalized communities.
- Cartography of generative AI: https://cartography-of-generative-ai.net/
  An excellent diagram and discussion of the material, real-world systems and labor behind the apparent magic of LLMs and other generative AI tools.
- OpenAI's ChatGPT Tokenizer: https://platform.openai.com/tokenizer
  Play with the very first step of an LLM: the tokenizer behind the most popular LLM at the moment.
- "Here's What Happens When Your Lawyer Uses ChatGPT."
  https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html
  The New York Times coverage of *Mata v. Avianca.*

Criminal Breakout Session: Sentencing Guidelines – Updates and Overview of New Amendments

Program PowerPoint

Commission Update

District of Oregon

May 2, 2024

This document is produced and disseminated at U.S. taxpayer expense.

Ross Thomas

Acting Deputy Director

rthomas@ussc.gov

Jessica Collins

Senior Attorney

jcollins@ussc.gov

Office of Education and Sentencing Practice

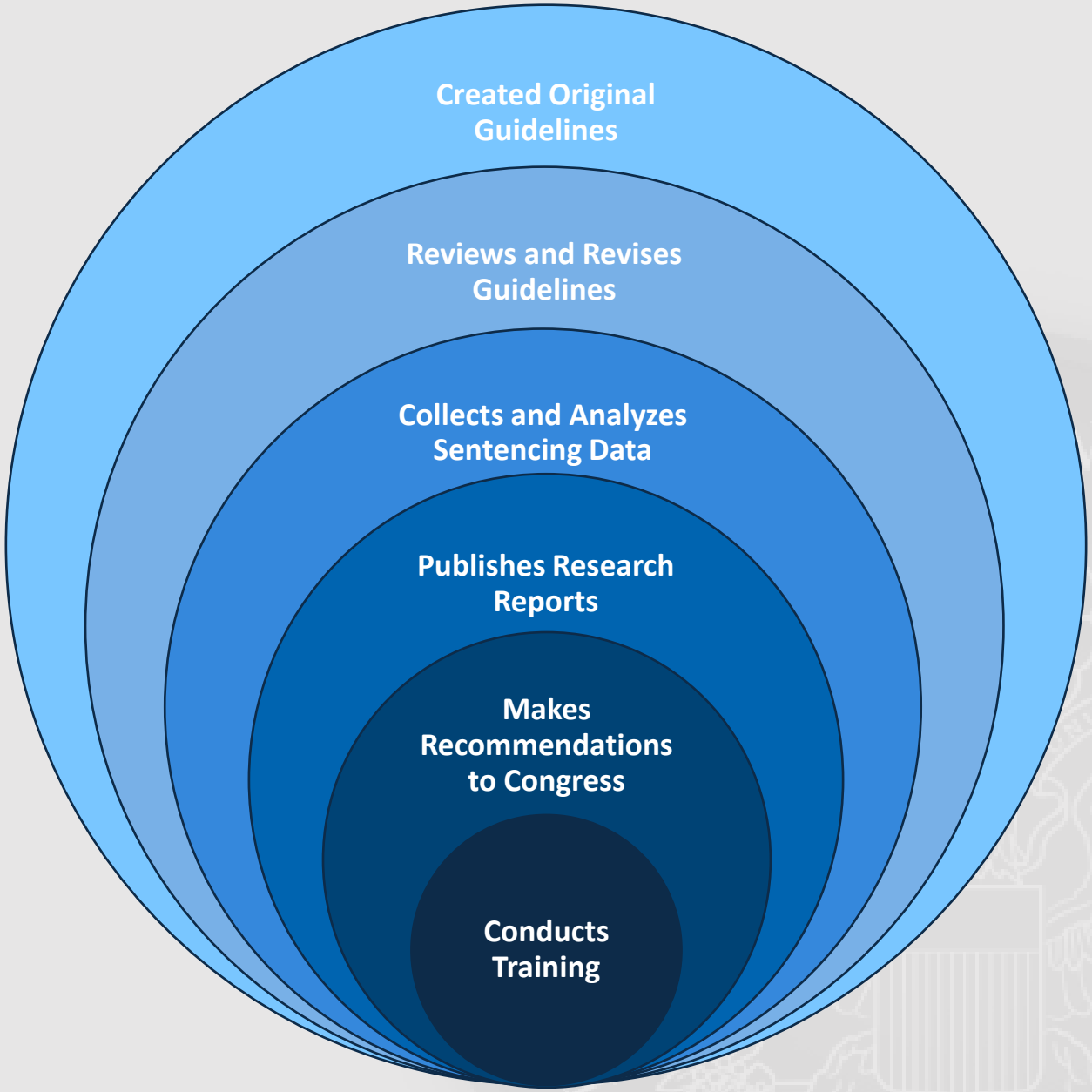
HelpLine: (202) 502-4545

Online HelpLine Form

Agenda

- Sentencing Commission Overview
- 2024 Policy Priorities
- Online Resources
- National and District Sentencing Data

The United States Sentencing Commission



USSC Voting Body

28 U.S.C. § 991(a)

7

Voting Commissioners

28 U.S.C. § 991

USSC Voting Body

28 U.S.C. § 991(a)

Bipartisan

No More Than 4 from the Same Political Party

USSC Voting Body

28 U.S.C. § 991(a)

Bipartisan

No More Than 4 from the Same Political Party

USSC Voting Body

28 U.S.C. § 991(a)

3

Must Be Federal Judges

USSC Voting Body

28 U.S.C. § 991(a)

4+

Required for Quorum

Current Commissioners

Confirmed August 2022

Judge Carlton Reeves
Chair

Claire McCusker Murray
Vice Chair

Laura Mate
Vice Chair

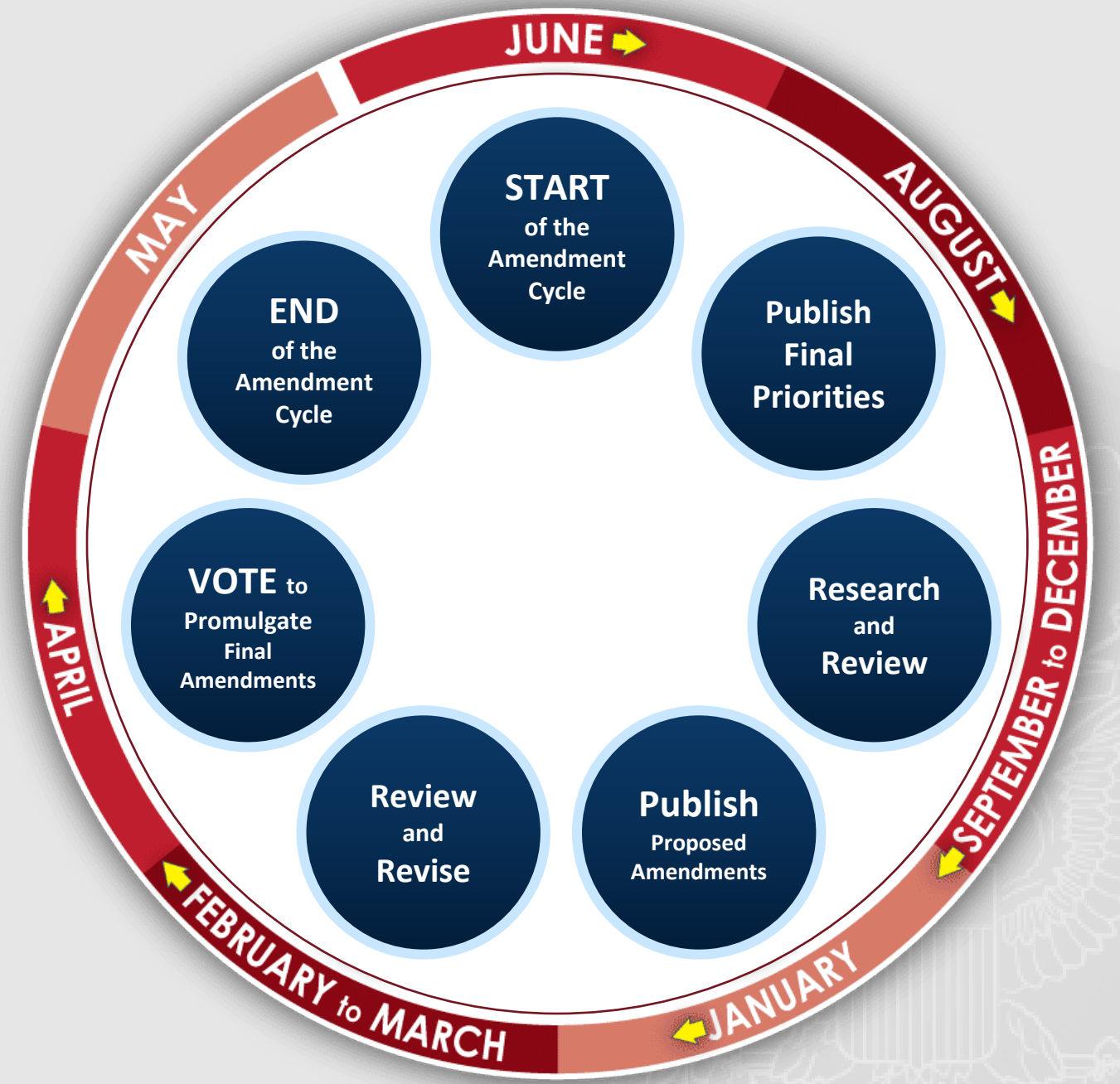
Judge Luis Felipe Restrepo
Vice Chair

Judge Claria Horn Boom

John Gleeson

Candice Wong

Amendment Cycle



2024 Priorities

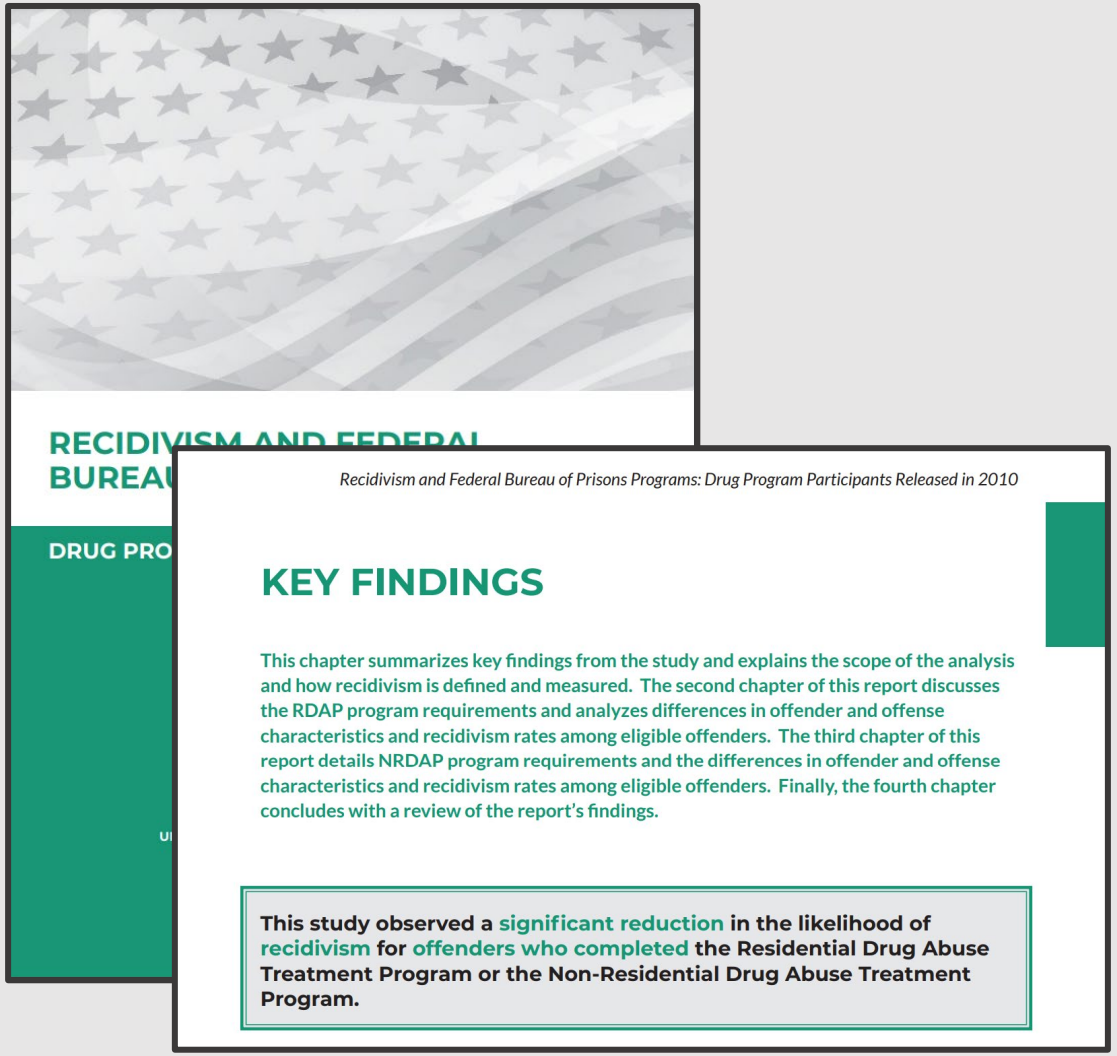
General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

BOP Issues


RECIDIVISM AND FEDERAL
BUREAU
DRUG PRO
Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010
KEY FINDINGS
This chapter summarizes key findings from the study and explains the scope of the analysis and how recidivism is defined and measured. The second chapter of this report discusses the RDAP program requirements and analyzes differences in offender and offense characteristics and recidivism rates among eligible offenders. The third chapter of this report details NRDAP program requirements and the differences in offender and offense characteristics and recidivism rates among eligible offenders. Finally, the fourth chapter concludes with a review of the report's findings.
This study observed a significant reduction in the likelihood of recidivism for offenders who completed the Residential Drug Abuse Treatment Program or the Non-Residential Drug Abuse Treatment Program.

BOP Issues

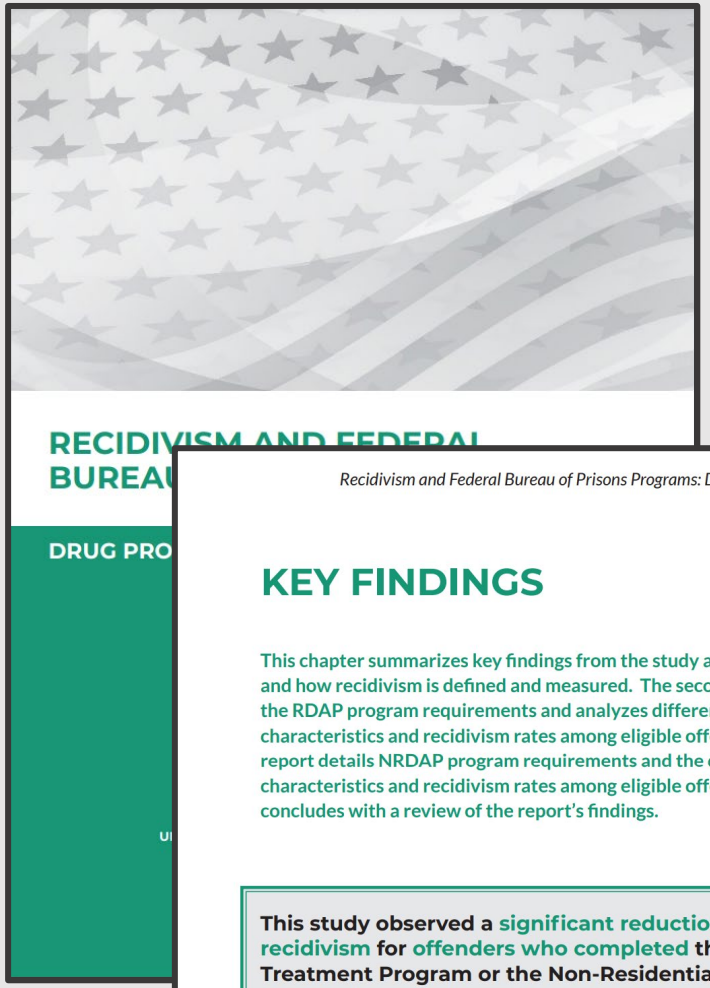
Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010

KEY FINDINGS

This chapter summarizes key findings from the study and explains the scope of the analysis and how recidivism is defined and measured. The second chapter of this report discusses the RDAP program requirements and analyzes differences in offender and offense characteristics and recidivism rates among eligible offenders. The third chapter of this report details NRDAP program requirements and the differences in offender and offense characteristics and recidivism rates among eligible offenders. Finally, the fourth chapter concludes with a review of the report's findings.

This study observed a significant reduction in the likelihood of recidivism for offenders who completed the Residential Drug Abuse Treatment Program or the Non-Residential Drug Abuse Treatment Program.

BOP Issues

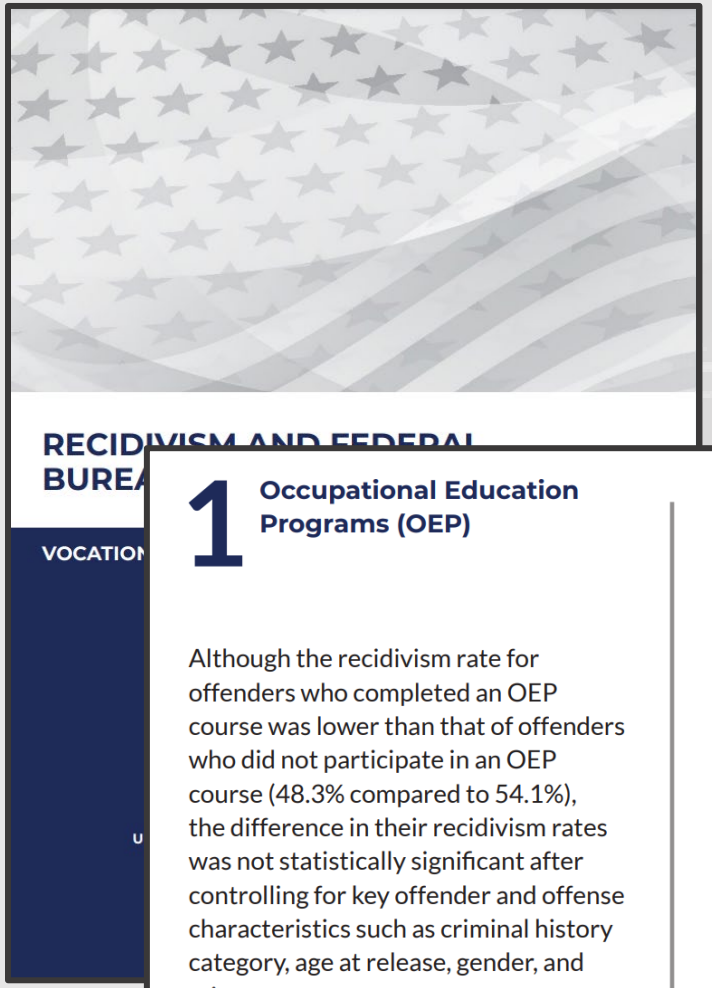


Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010

KEY FINDINGS

This chapter summarizes key findings from the study and explains the scope of the analysis and how recidivism is defined and measured. The second chapter of this report discusses the RDAP program requirements and analyzes differences in offender and offense characteristics and recidivism rates among eligible offenders. The third chapter of this report details NRDAP program requirements and the differences in offender and offense characteristics and recidivism rates among eligible offenders. Finally, the fourth chapter concludes with a review of the report's findings.

This study observed a significant reduction in the likelihood of recidivism for offenders who completed the Residential Drug Abuse Treatment Program or the Non-Residential Drug Abuse Treatment Program.



1 Occupational Education Programs (OEP)

Although the recidivism rate for offenders who completed an OEP course was lower than that of offenders who did not participate in an OEP course (48.3% compared to 54.1%), the difference in their recidivism rates was not statistically significant after controlling for key offender and offense characteristics such as criminal history category, age at release, gender, and crime type.

2 Federal Prison Industries (FPI)

Although the recidivism rate for offenders who participated in FPI was higher than that of offenders who did not participate in FPI (55.0% compared to 52.0%), the difference in recidivism rates was not statistically significant after controlling for key offender and offense characteristics, such as criminal history category, age at release, gender, and crime type.

BOP Issues

1 Occupational Education Programs (OEP)

Although the recidivism rate for offenders who completed an OEP course was lower than that of offenders who did not participate in an OEP course (48.3% compared to 54.1%), the difference in their recidivism rates was not statistically significant after controlling for key offender and offense characteristics such as criminal history category, age at release, gender, and crime type.

2 Federal Prison Industries (FPI)

Although the recidivism rate for offenders who participated in FPI was higher than that of offenders who did not participate in FPI (55.0% compared to 52.0%), the difference in recidivism rates was not statistically significant after controlling for key offender and offense characteristics, such as criminal history category, age at release, gender, and crime type.


THE UNITED STATES SENTENCING COMMISSION
Eligibility
Earning
Award
Table. Excluding Offenses for Earning First Step Act Time Credits
In some instances, a listed offense will exclude an individual only if specific or additional circumstances are present. These specific or additional circumstances are indicated in bold text in the Description column.
Filter table by offense category:
All
Arson
Assault
Burglary and Robbery
Damage to Property Involving Endangerment to Human Life
Drugs
Espionage, National Security, and Terrorism
Explosives, Firearms, and Weapons
Homicide
Human Trafficking
Immigration
Individual Rights
Kidnapping
Miscellaneous
Offenses Involving Correctional Facilities
Offenses Involving Government Officials
Sex Offenses
Or search the table for a specific statute or keyword:
Search in table
Page 1 of 14
Offense Category
Statute
Title
Description
FSA Citation
Arson
18 U.S.C. § 81
Arson within special maritime and territorial jurisdiction
18 U.S.C. § 3632(d)(4)(D)(iv).
Assault
18 U.S.C. § 111(b)
Assaulting, resisting, or impeding certain officers or employees
"[R]elating to assaulting, resisting, or impeding certain officers or employees using a deadly or dangerous weapon or inflicting bodily injury."
18 U.S.C. § 3632(d)(4)(D)(v).
Assault
18 U.S.C. § 113(a)(1)
Assaults within maritime and territorial jurisdiction
"[R]elating to assault with intent to commit murder."
18 U.S.C. § 3632(d)(4)(D)(vi).
Assault
18 U.S.C. § 113(a)(7)
Assaults within maritime and territorial jurisdiction
"[R]elating to assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years."
18 U.S.C. § 3632(d)(4)(D)(vi).

2024 Priorities

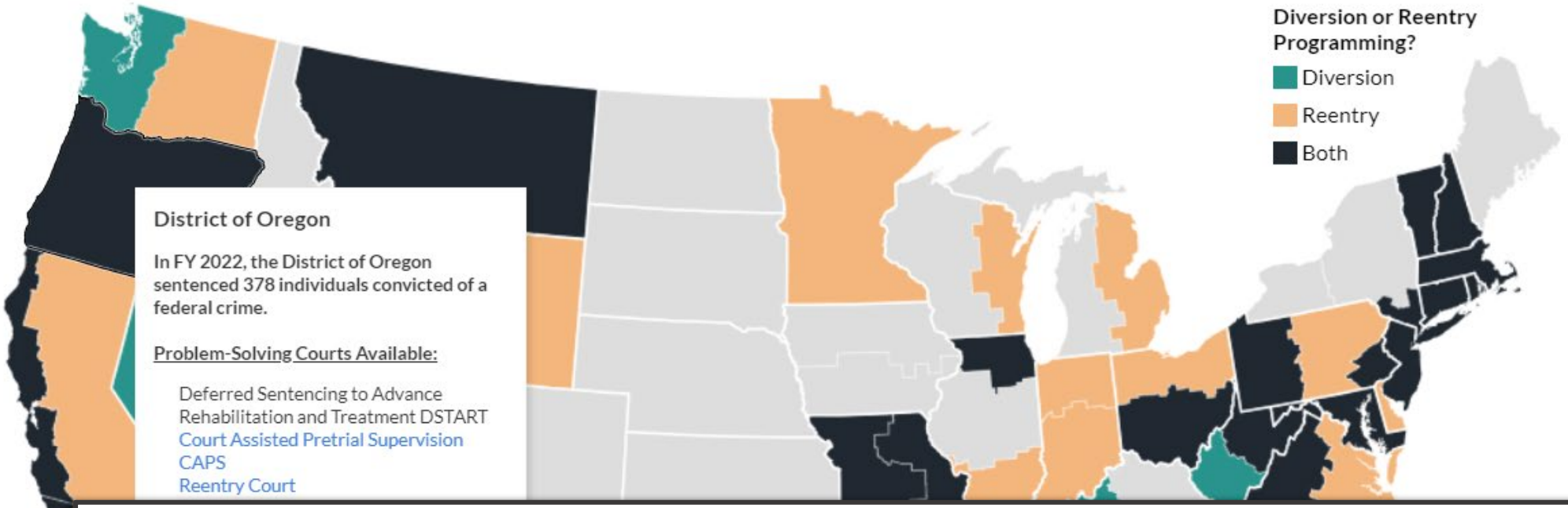
General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

Federal Problem-Solving Courts



COMMISSION *Chats*

Follow along with the work of the 2023-2024 Alternatives-to-Incarceration Policy Team in this Commission Chats miniseries, featuring the federal judges who lead the problem-solving court programs available around the country. Parts One through Six are out now!

(Latest episode published March 2024)

LISTEN HERE

2024 Priorities

General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

Career Offender

UNITED STATES SENTENCING COMMISSION

GUIDELINES | RESEARCH | POLICYMAKING | EDUCATION | ABOUT | BY TOPIC

ROUNDTABLE – FEBRUARY 7, 2024

Roundtable on Career Offender & the Categorical Approach

Wednesday, February 7, 2024
Washington, DC
By Invitation

The Commission has prioritized the continued examination of the career offender guidelines (§§4B1.1, 4B1.2), including the exploration of alternatives to the "categorical approach" to determine whether an offense is a "crime of violence" or a "controlled substance offense."

While the Commission did not propose 2024 amendments addressing this policy priority, the Commission continued its multiyear examination of the career offender guidelines inviting several experts to the February 2024 roundtable to generate alternatives to the categorical approach in the guidelines and solicit fresh perspectives on what, if anything, can be done to address the critiques of the categorical approach.

This wide-ranging and informative discussion included both circuit and district court judges, representatives from the Department of Justice, the Federal Public Defenders, the Commission's Practitioners Advisory Group, private practitioners, and law professors.

The Commission welcomes further comment and input on the career offender guidelines and the categorical approach. Please feel free to email us at PubAffairs@ussc.gov.

Related Materials:

- Primer on the Categorical Approach
- 2016 Report to the Congress
- Quick Facts on Career Offenders
- 2022 Sourcebook of Federal Sentencing Statistics, Table 26

2024 Priorities

General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

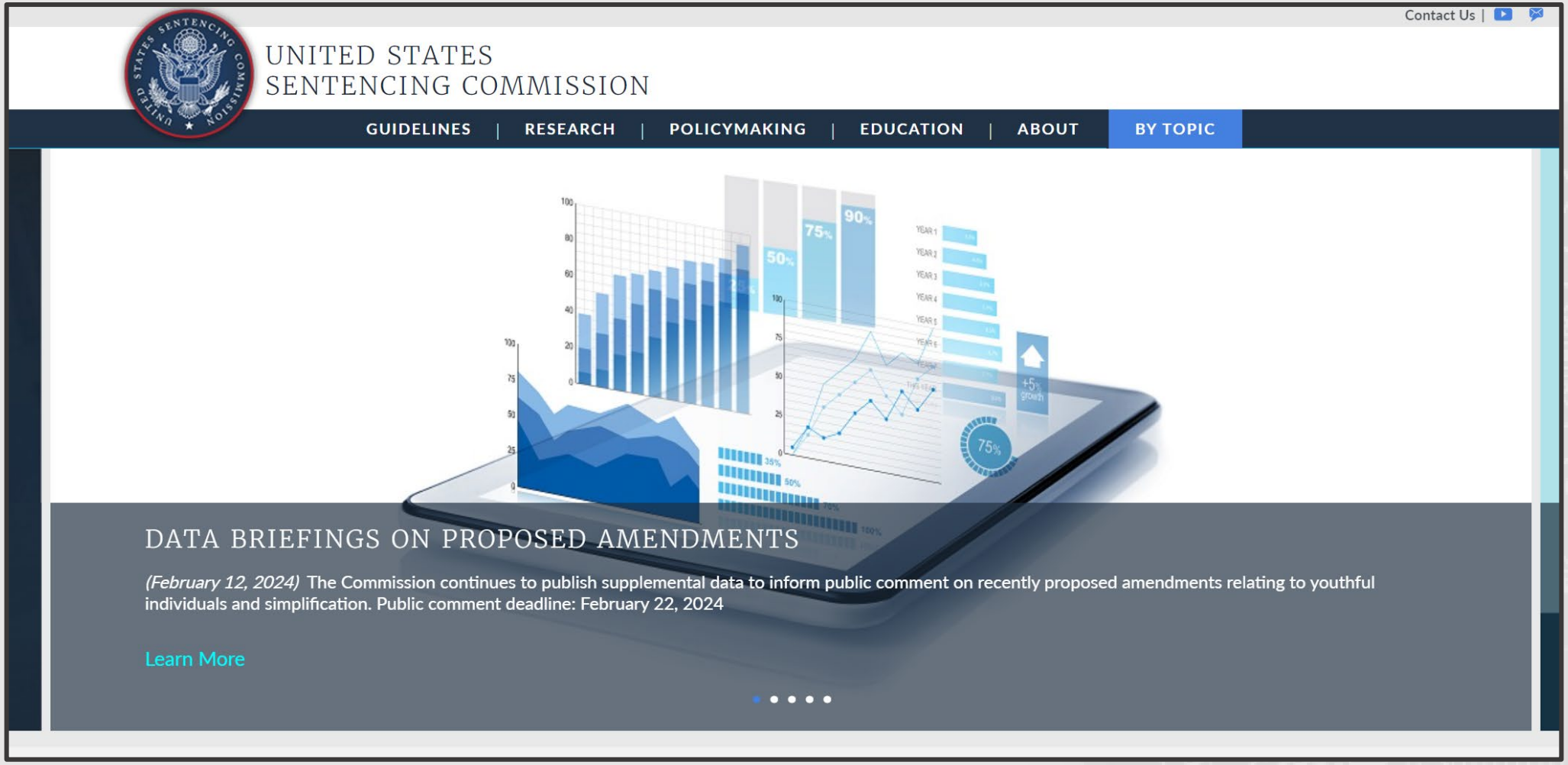
Youthful Sentenced Individuals

Option 1 — Juvenile Adjudications Score 1 Point

Option 2 — Juvenile Adjudications Do Not Score

Option 3 — Convictions under 18 Do Not Score

Youthful Sentenced Individuals



2024 Priorities

General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

Acquitted Conduct

Option 1 — Acquitted Conduct ≠ Relevant Conduct

Option 2 — Downward Departure

Option 3 — Clear and Convincing Evidence

2024 Priorities

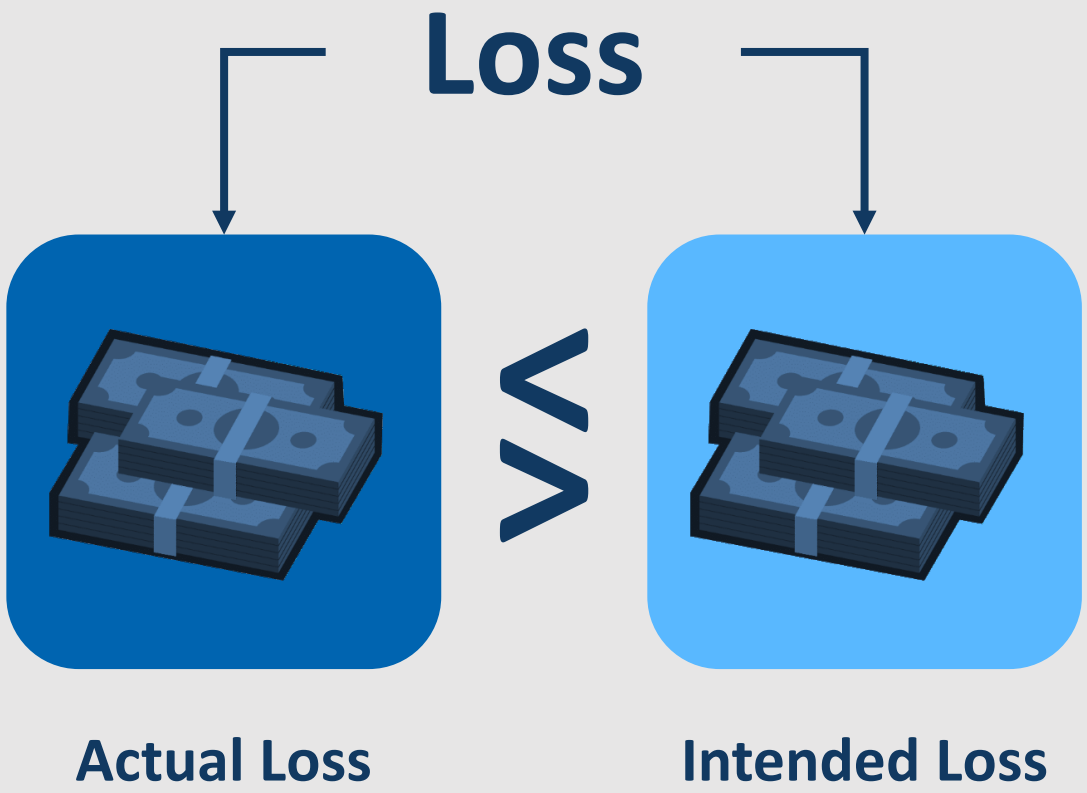
General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

Status of Commentary



Commentary

Actual vs. Intended (Use the Greater)

Guidelines

2024 Priorities

General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

Circuit Conflicts

Part A — Illegible v. Less Legible (Obliterated Firearms)

Part B — Grouping of Offenses with § 924(c)

2024 Priorities

General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification

Miscellaneous

1. Section 2D1.1 (Base Offense Levels)
2. Section 4C1.1 (Add New Excluded Offenses)
3. Section 1B1.1 (Order of Operations)

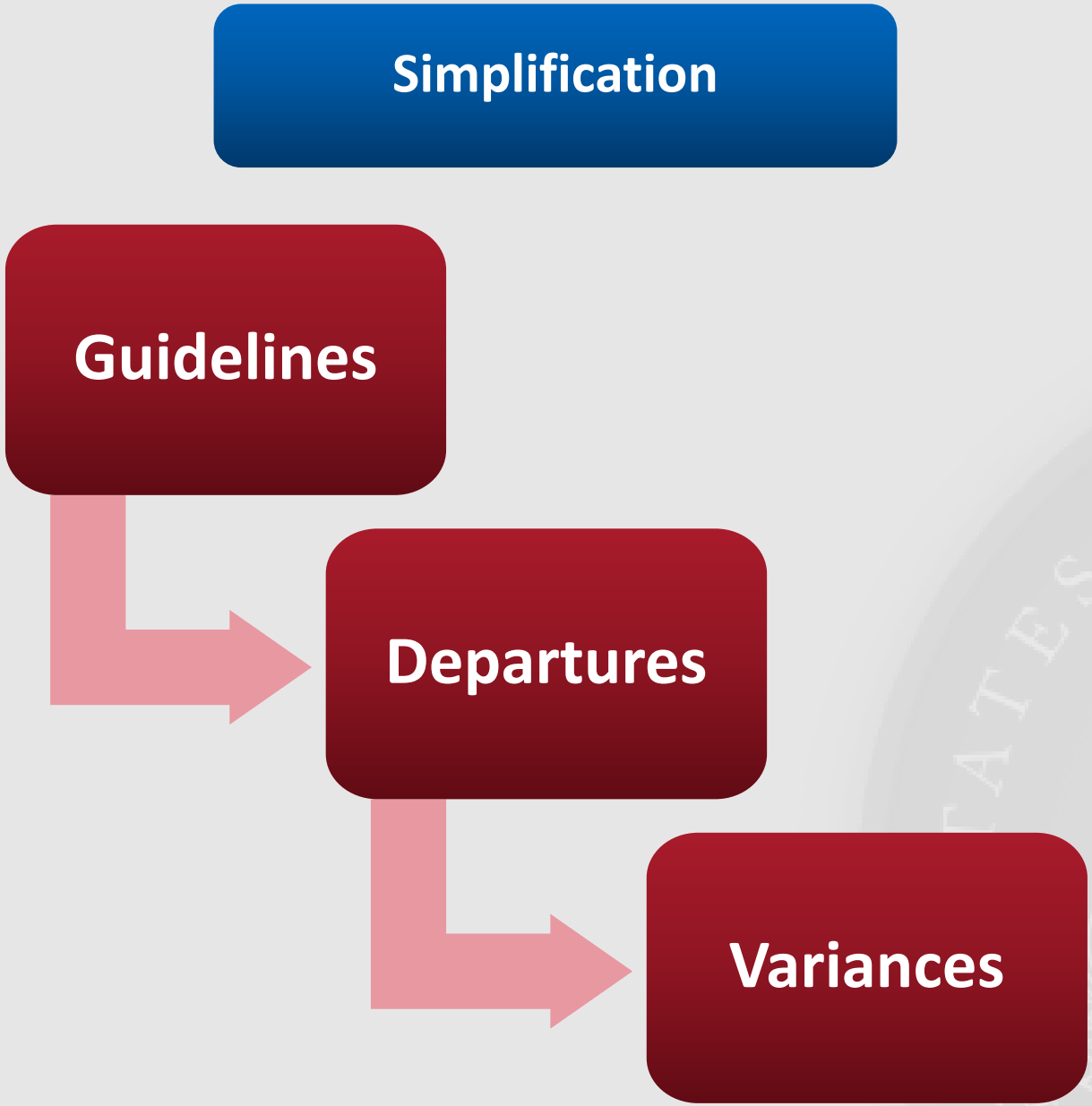
2024 Priorities

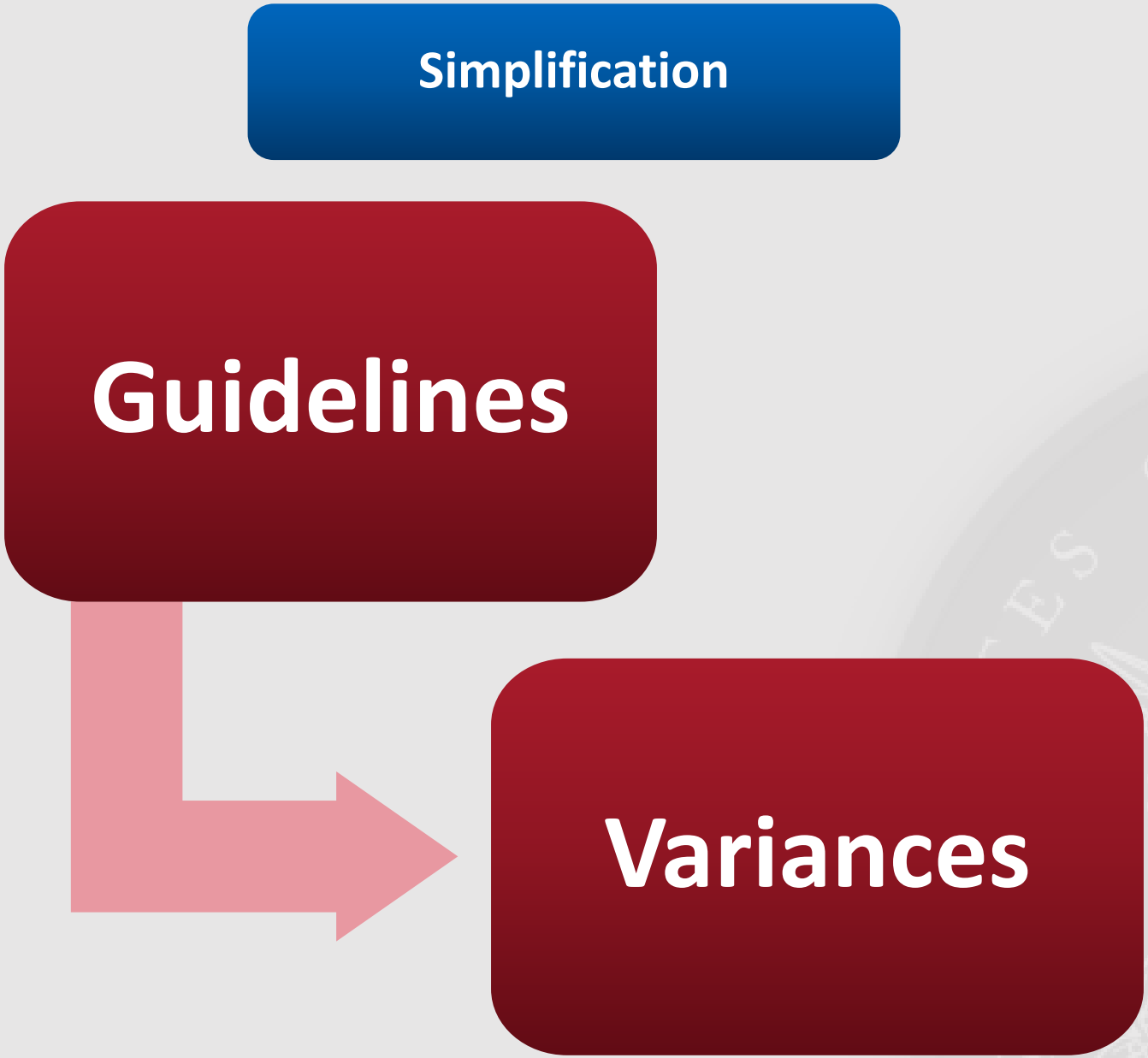
General Updates

- BOP Issues
- Problem-Solving Courts
- Career Offender

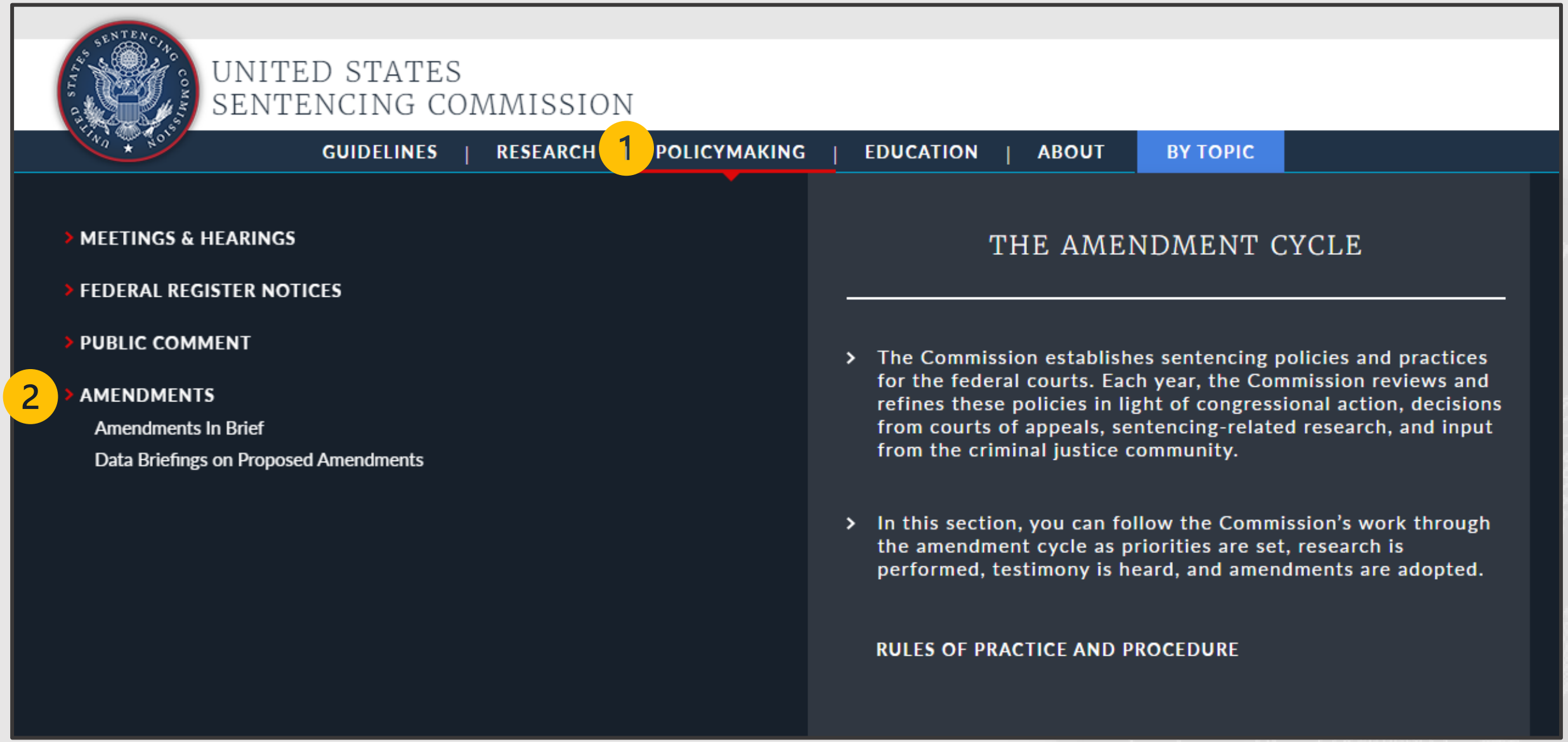
Proposed Amendments

- Youthful Sentenced Individuals
- Circuit Conflicts
- Acquitted Conduct
- Miscellaneous
- Status of Commentary
- Simplification


Simplification
Guidelines
Departures
Variances


Simplification
Guidelines
Variances

Amendment Resources



Commission Resources

Guideline Resources

§2B1.1 - LARCENY, EMBEZZLEMENT, AND OTHER FORMS OF THEFT; OFFENSES INVOLVING STOLEN PROPERTY; PROPERTY DAMAGE OR DESTRUCTION; FRAUD AND DECEIT; FORGERY; OFFENSES INVOLVING ALTERED OR COUNTERFEIT INSTRUMENTS OTHER THAN COUNTERFEIT BEARER OBLIGATION OF THE UNITED STATES

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (apply the greatest)	Increase in Level
(A) $6,500 or less	no increase
(B) More than $6,500	add 2
(C) More than $15,000	add [illegible]

Historical Note:
Effective November 1, 1987. Amended effective June 15, 1988 (Amendment 7); November 01, 1991 (Amendment 393); November 01, 1993 (Amendment 481); November 01, 1993 (Amendment 482); November 01, 1997 (Amendment 551); November 01, 2000 (Amendment 596); November 01, 2001 (Amendment 617); November 01, 2002 (Amendment 638); January 25, 2003 (Amendment 647); November 01, 2003 (Amendment 653); November 01, 2003 (Amendment 654); February 06, 2008 (Amendment 714); November 01, 2008 (Amendment 719); November 01, 2008 (Amendment 725); November 01, 2009 (Amendment 726); November 01, 2009 (Amendment 737); November 01, 2010 (Amendment 747); November 01, 2011 (Amendment 749); November 01, 2012 (Amendment 761); November 01, 2013 (Amendment 772); November 01, 2015 (Amendment 792)

3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).

(A) **General Rule.**—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) **Actual Loss.**—"***Actual loss***" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) **Intended Loss.**—"***Intended loss***" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) **Pecuniary Harm.**—"***Pecuniary harm***" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) **Reasonably Foreseeable Pecuniary Harm.**—For purposes of this guideline, "***reasonably foreseeable pecuniary harm***" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) **Rules of Construction in Certain Cases.**—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

792

victims, particularly in high-loss cases.

Intended Loss

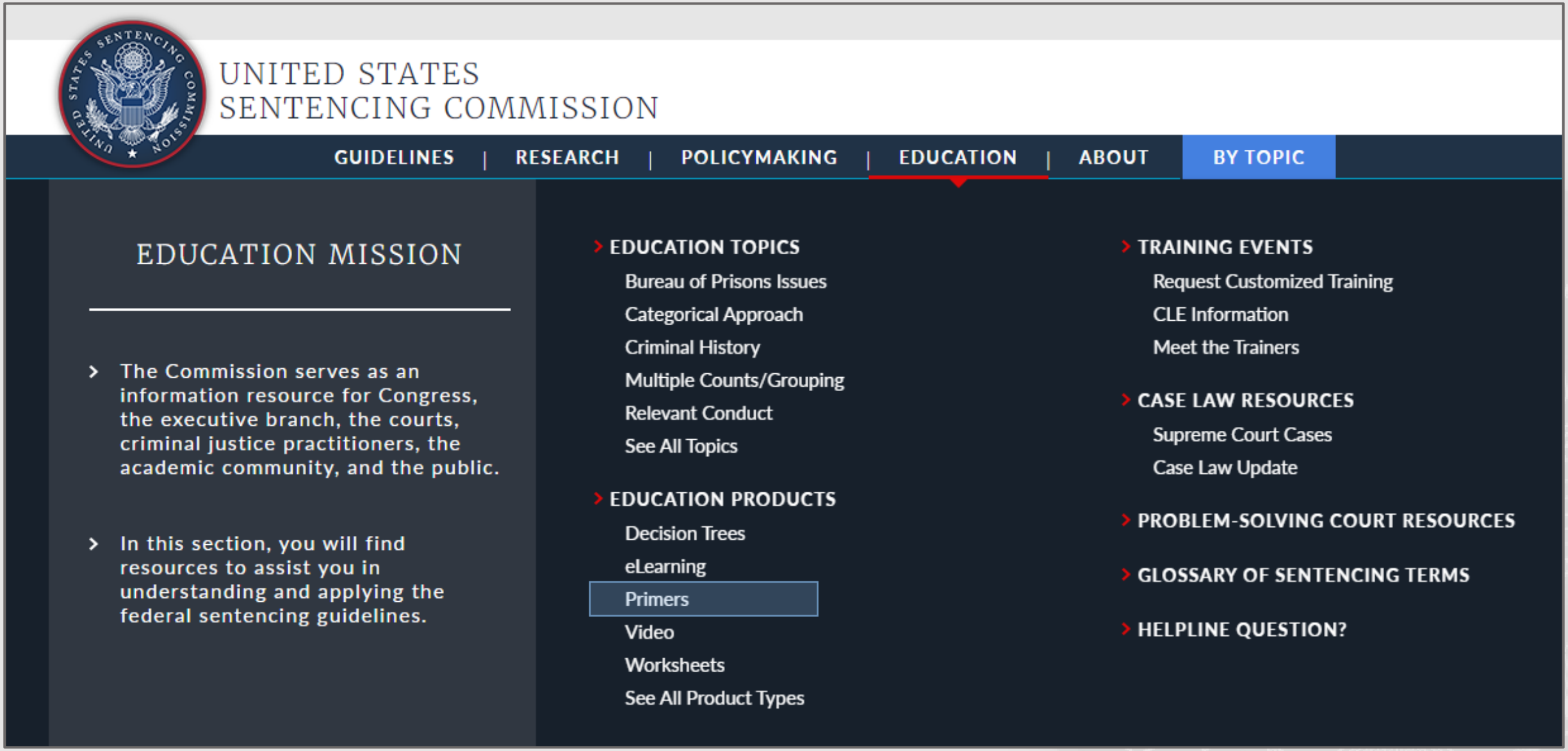
Second, the amendment revises the commentary at §2B1.1, Application Note 3(A)(ii), which has defined intended loss as "pecuniary harm that was intended to result from the offense." In interpreting this provision, courts have expressed some disagreement as to whether a subjective or an objective inquiry is required. Compare United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011) (holding that a subjective inquiry is required), United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) ("To make this determination, we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims."), United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had "proven a subjective intent to cause a loss of less than the aggregate amount" of fraudulent loans), and United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) ("our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level"), with United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) ("we focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes") and United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) ("The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct").

The amendment adopts the approach taken by the Tenth Circuit by revising the commentary in Application Note 3(A)(ii) to provide that intended loss means the pecuniary harm that "the defendant purposely sought to inflict." The amendment reflects the Commission's continued belief that intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant's culpability.

Sophisticated Means

Third, the amendment [illegible] the

Educational Resources



UNITED STATES SENTENCING COMMISSION

Contact Us |

GUIDELINES | RESEARCH | POLICYMAKING | EDUC

Primers

FILTERS

TOPIC

- About Us
- Alien Smuggling
- Antitrust
- Backgrounder
- Categorical Approach
- Computer Fraud
- Copyright/Trademark
- Corporate Crime
- Criminal History
- Departures/Variances
- Drugs
- Economic Crime
- Family Ties and Responsibilities

BACKGROUNDER

Retroactive Guideline Amendments

PRIMER

NOVEMBER 2023

This primer provides a general overview of the statute, policy statement, and case law applicable to motions for a...

Download the PDF

BACKGROUNDER

Categorical A

PRIMER

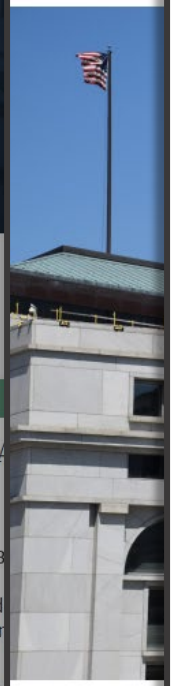
AUGUST 2023

This primer provid statutes, sentenci application...

Download the PDF

Pri

Cate



a. "Force" or "elements" clauses

A "force clause," sometimes referred to as an "elements clause," requires that the offense have an element of physical force against a person. For example, the ACCA defines a "violent felony" in part as a prior conviction that "*has as an element* the use, attempted use, or threatened use of *physical force* against the person of another."[21] Section 4B1.2(a)(1) likewise defines a "crime of violence" as a felony offense that "*has as an element* the use, attempted use, or threatened use of *physical force* against the person of another."[22]

In the context of the ACCA, the Supreme Court has held "physical force against another" means that the crime necessarily must involve violent force—that is, "force capable of causing physical pain or injury to another person."[23] In so holding, the Court rejected the common law definition of "force," which could be satisfied by even the slightest offensive touching, because it did not fit the context of the ACCA.[24] The Supreme Court has since further clarified that in the context of the ACCA, " 'force capable of causing pain or injury,' includes the amount of force necessary to overcome a victim's resistance."[25] However, the Court previously held that a "misdemeanor crime of domestic violence," as defined by a force clause in 18 U.S.C. § 921(a)(33)(A) to include an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," could be supported by "the degree of force that supports a common-law battery conviction."[26]

In the context of 18 U.S.C. § 16(a), a statute providing that a "crime of violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, the Supreme Court has held in *Leocal v. Ashcroft* that accidental or negligent conduct does not constitute the "use" of force in section 16(a).[27] The Court explained that the word "use" joined in context with the

offense" similarly); United States v. Woods, 576 F.3d 400, 403–04 (7th Cir. 2009) (because the language is identical in the ACCA's "violent felony" and §4B1.2's "crime of violence" definitions, "we therefore refer to the ACCA and the career offender provisions of the Guidelines interchangeably").

21 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added).

22 USSG §4B1.2(a)(1) (emphasis added).

23 Johnson v. United States, 559 U.S. 133, 140 (2010).

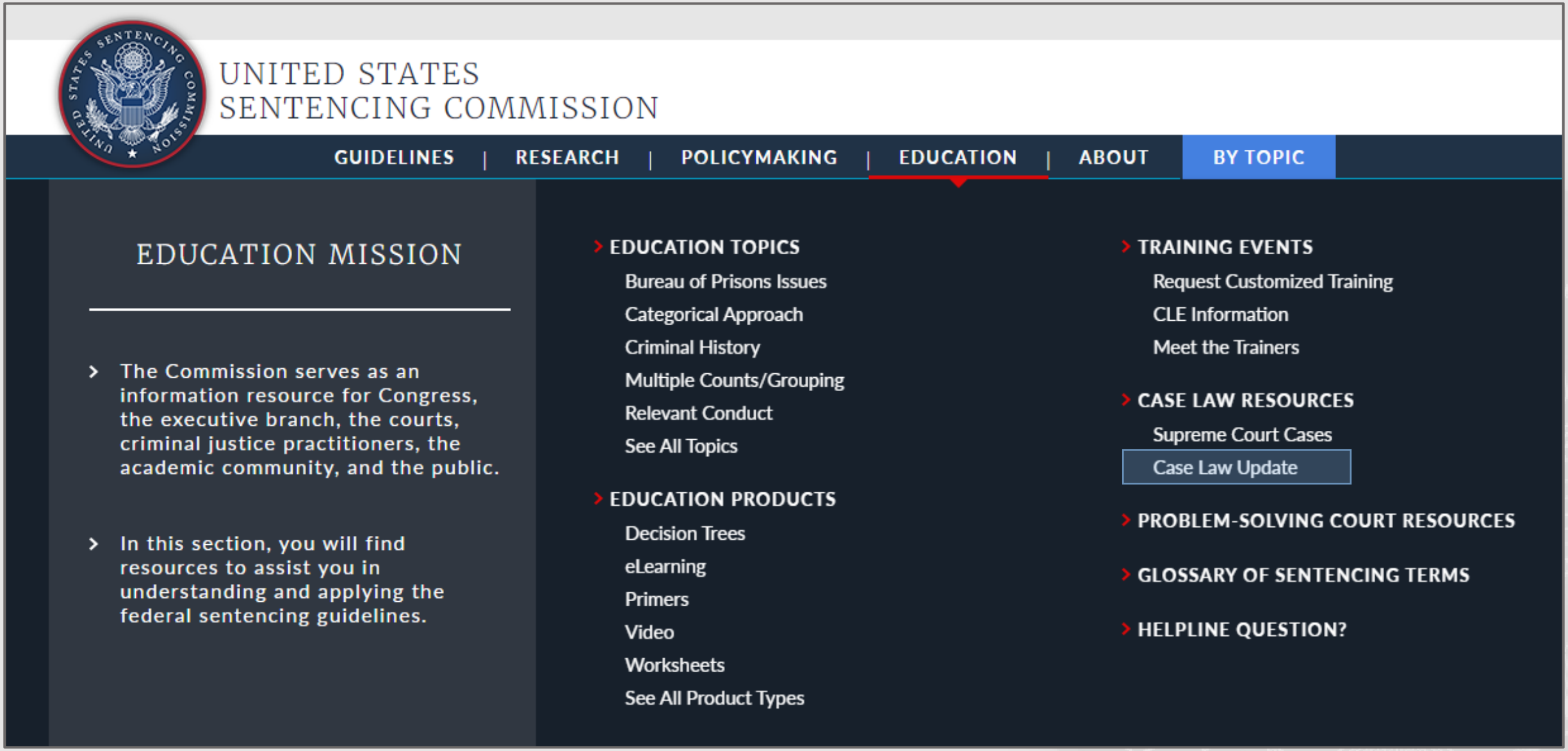
24 *Id.* at 139; *see also id.* at 141 ("It is significant, moreover, that the meaning of 'physical force' the Government would seek to import into this definition of 'violent felony' is a meaning derived from a common-law *misdemeanor*.").

25 Stokeling v. United States, 139 S. Ct. 544, 552, 554–55 (2019) ("force capable of causing physical pain or injury" in the force clause of the ACCA "does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality" (citation omitted)); *see also* United States v. Alvarez, 60 F.4th 554, 564 (9th Cir. 2023) (discussing the definition of "capable" in *Johnson* and *Stokeling*); Johnson v. United States, 24 F.4th 1110, 1119 (7th Cir. 2022) (discussing the definition of "physical force" in *Johnson* and *Stokeling*).

26 United States v. Castleman, 572 U.S. 157, 168 (2014); 18 U.S.C. § 921(a)(33)(A).

27 543 U.S. 1, 9 (2004).

Educational Resources



INTERACTIVE

JANUARY – DECEMBER 2023

EXPLORE BY TOPIC:

(Click to view by topic)

U.S. Supreme Court
Career Offender
Categorical Approach

Click the icon to view U.S. Supreme Court decisions:

Select Supreme Court

uit (or view

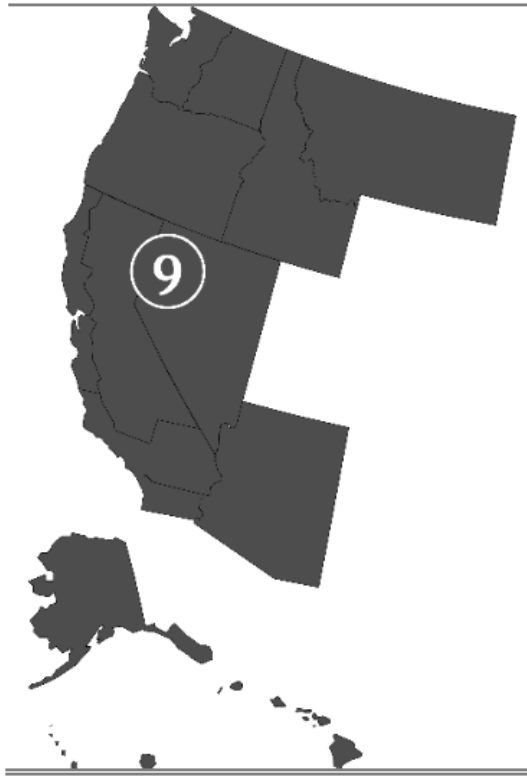
Drug Offenses

D.C. Circuit

No cases selected by Commission staff.

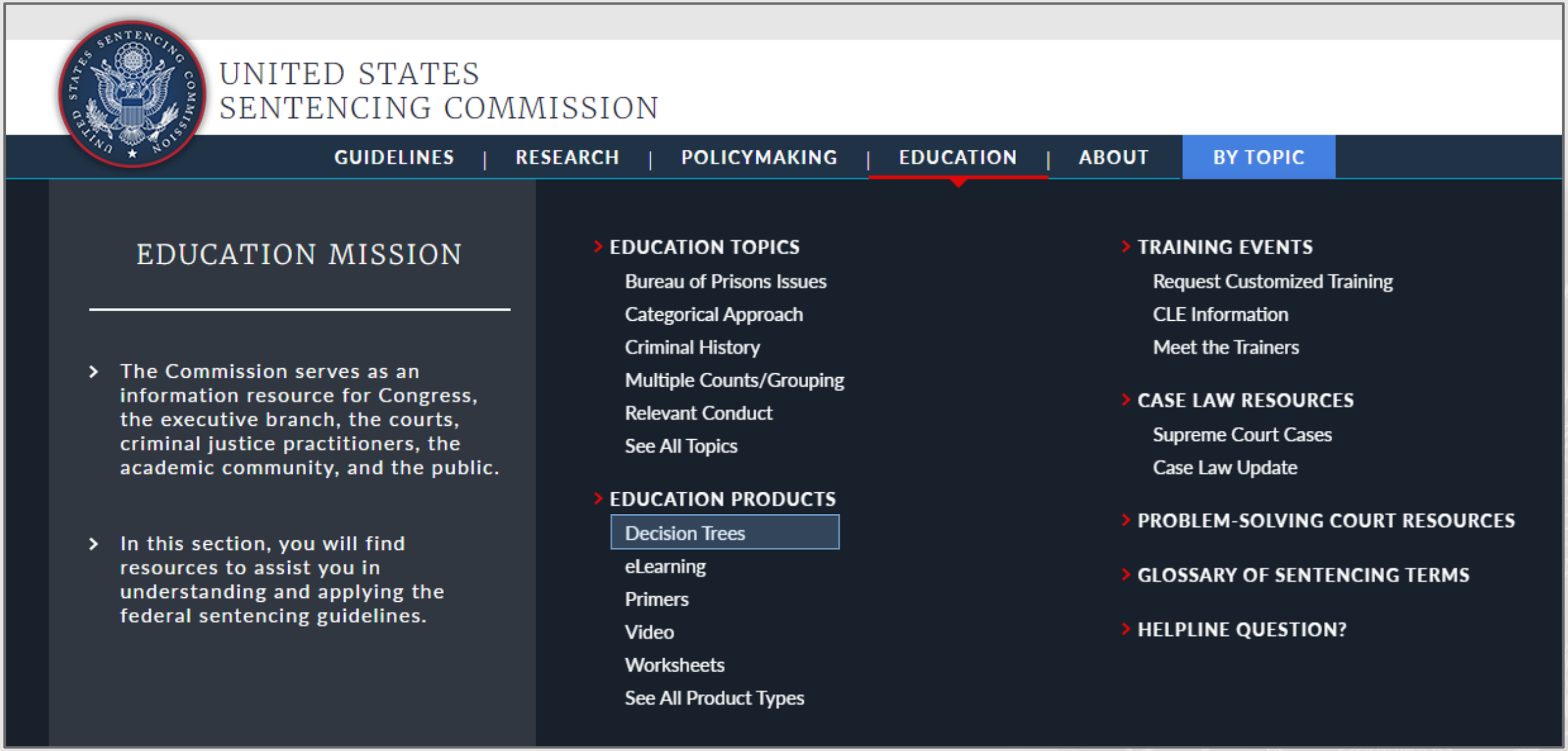
First Circuit

Under §5C1.2(a)(2), "a firearm can be possessed 'in connection with the offense' . . . so as to



United States v. Castro, 71 F.4th 735 (9th Cir. 2023) (Career Offender)
United States v. Castillo, 69 F.4th 648 (9th Cir. 2023) (Career Offender)
United States v. Eckford, 77 F.4th 1228 (9th Cir. 2023) (Categorical Approach)
United States v. Klensch, 87 F.4th 1159 (9th Cir. 2023) (Chapter Three Adjustments)
United States v. Vinge, 85 F.4th 1285 (9th Cir. 2023) (Chapter Three Adjustments)
United States v. Roper, 72 F.4th 1097 (9th Cir. 2023) (Compassionate Release)
United States v. Sadler, 77 F.4th 1237 (9th Cir. 2023) (Criminal History)
United States v. Alaniz, 69 F.4th 1124 (9th Cir. 2023) (Drug Offenses)
United States v. Salazar, 61 F.4th 723 (9th Cir. 2023) (Drug Offenses)
United States v. Munoz, 57 F.4th 683 (9th Cir. 2023) (Firearms)
United States v. Lopez, 58 F.4th 1108 (9th Cir. 2023) (First Step Act of 2018)
United States v. Dadyan, 76 F.4th 955 (9th Cir. 2023) (Restitution)
United States v. Scott, 83 F.4th 796 (9th Cir. 2023) (Sex Offenses)
United States v. Scheu, 83 F.4th 1124 (9th Cir. 2023) (Sex Offenses)

Educational Resources



Contact Us |

UNITED STATES SENTENCING COMMISSION

SEARCH

GUIDELINES | RESEARCH | POLICYMAKING | EDUCATION | ABOUT | BY TOPIC

Decis

FILTERS

PRODUCT TYPE

TRAINING TOPIC

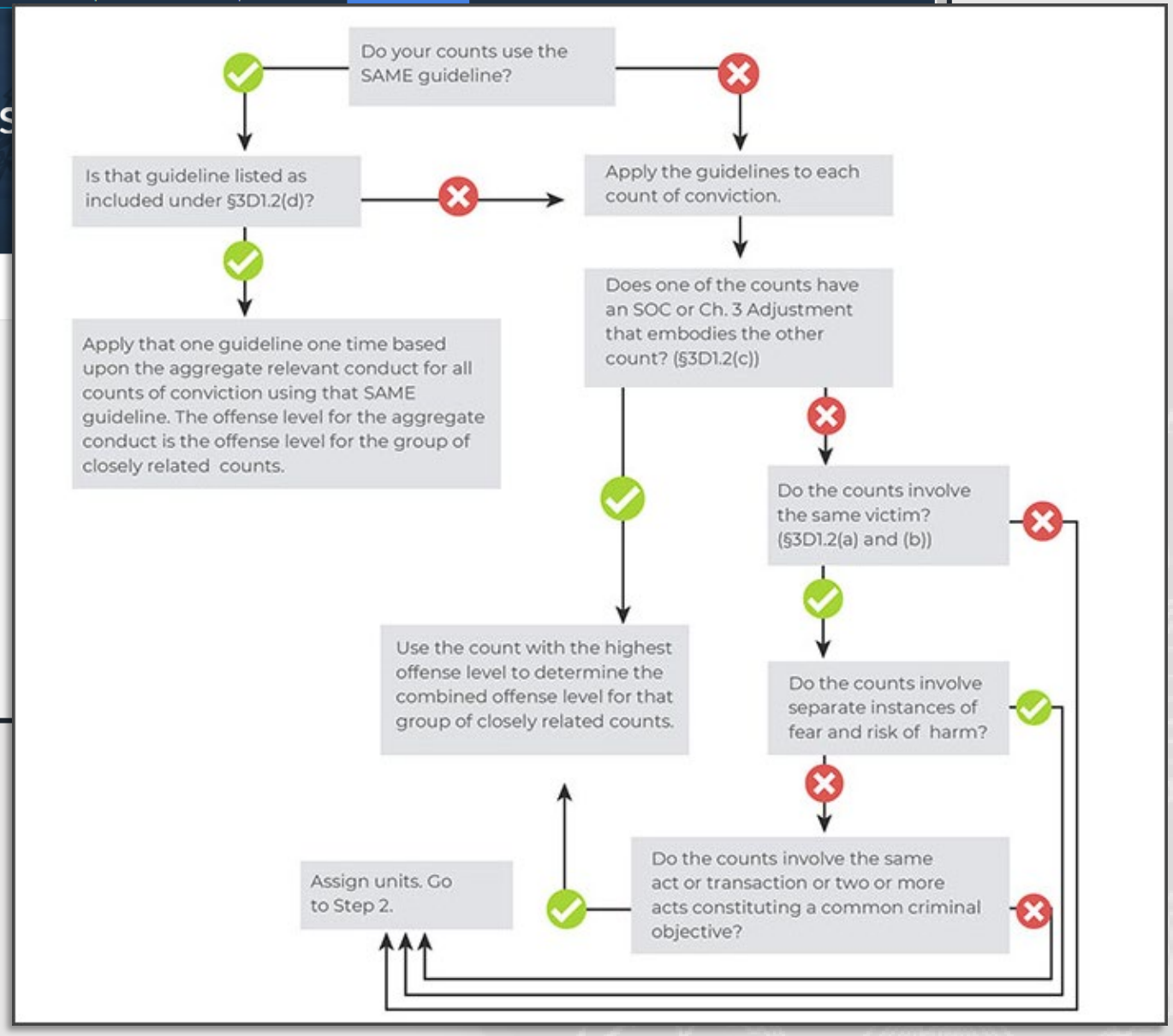
- [ ] Case Law
- [ ] Categorical Approach
- [ ] Concurrent/Consecutive Sentences (§5G1.3)
- [ ] Criminal History
- [x] Multiple Counts/Grouping
- [ ] Organizational Guidelines

Multiple Counts – Quick Reference Materials

DECISION TREE

AUGUST 2020

Grouping of Multiple Counts If you've ever encountered a federal case with more than one count of conviction, you need...



Research

UNITED STATES SENTENCING COMMISSION

GUIDELINES | RESEARCH |

- 2022 SOURCEBOOK
  - Archive
- DATA REPORTS
  - By Geography
  - By Guideline
  - By Quarter
  - Prison Impact Reports
  - Retroactivity Reports
  - Compassionate Release
- DATAFILES
  - Research Notes
- INTERACTIVE DATA
  - Tutorial Videos
- RESEARCH REPORTS
  - Reports At A Glance
  - Reports To Congress
- QUICK FACTS
- LIST OF ALL PUBLICA

Q

Quick Facts publications give readers basic facts
Commission releases new Quick Facts periodicall

Offender Groups

- Offenders in the Federal Bureau of Prisons
- Career Offenders (July 2023)
- Non-U.S. Citizens (July 2023)
- Women in the Federal Offender Populatio
- Native Americans in the Federal Offender

Drugs

- Drug Trafficking (May 2023)
- Methamphetamine Trafficking (June 2023)
- Powder Cocaine Trafficking (July 2023)
- Crack Cocaine Trafficking (June 2023)
- Fentanyl Trafficking (May 2023)
- Fentanyl Analogue Trafficking (May 2023)
- Heroin Trafficking (July 2023)
- Marijuana Trafficking (July 2023)
- Oxycodone Trafficking (July 2023)

Quick Facts

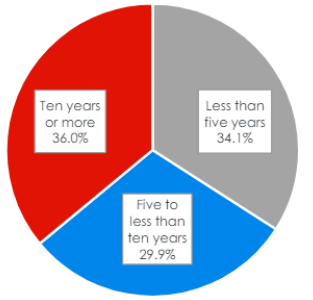
— Methamphetamine Trafficking Offenses —

Fiscal Year 2022

- In FY 2022, 64,142 cases were reported to the U. S. Sentencing Commission.
- 20,037 cases involved drugs.[1]
- 19,851 involved drug trafficking.[2]
- 48.8% of drug trafficking cases involved methamphetamine.
- Methamphetamine trafficking offenses have increased by 28.8% since FY 2018.

Number of Methamphetamine Trafficking Offenders

Sentence Length FY 2022



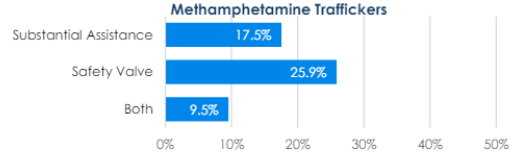
Offender and Offense Characteristics[3]

- 78.1% of methamphetamine trafficking offenders were men.
- 39.8% were Hispanic, 38.2% were White, 17.9% were Black, and 4.1% were Other races.
- Their average age was 38 years.
- 87.6% were United States citizens.
- 34.8% had little or no prior criminal history (Criminal History Category I); 5.8% were career offenders (§4B1.1).
- The median base offense level in these cases was 32, corresponding to between 1.5 and five kilograms of methamphetamine mixture or 150 and 500 grams of methamphetamine actual/"ICE."
- Sentences were increased for:
  - possessing a weapon (28.6%);
  - a leadership or supervisory role in the offense (5.0%).
- Sentences were decreased for:
  - minor or minimal participation in the offense (22.2%);
  - meeting the safety valve criteria in the sentencing guidelines (34.2%).
- The top five districts for methamphetamine trafficking offenders were:
  - Southern District of California (1,264);
  - Northern District of Texas (489);
  - Western District of Texas (487);
  - Southern District of Texas (388);
  - Eastern District of Tennessee (267).

Punishment

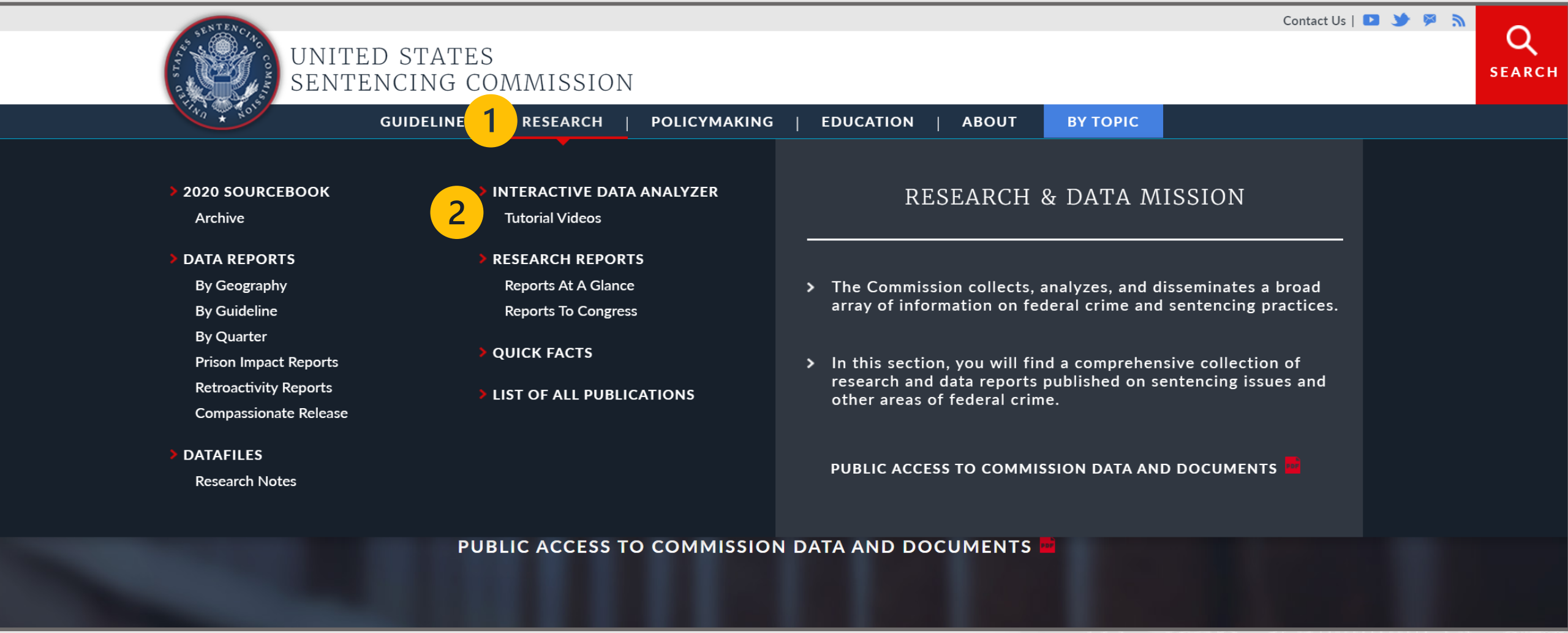
- The average sentence for methamphetamine trafficking offenders was 95 months.
- 98.2% were sentenced to prison.
- 73.3% were convicted of an offense carrying a mandatory minimum penalty; of those offenders, 52.9% were relieved of that penalty.

Means of Relief from Mandatory Minimum Penalty for Methamphetamine Traffickers



This document was produced and published at U.S. taxpayer expense.
For more Quick Facts, visit https://www.ussc.gov/research/quick-facts.

Interactive Data Analyzer (IDA)



UNITED STATES SENTENCING COMMISSION

INTERACTIVE DATA ANALYZER

HOME | MAJOR CRIME TYPES | CRIMINAL HISTORY | SENTENCING OUTCOMES | GUIDELINE APPLICATION | METHODOLOGY

1 Sentences Relative to Guideline Range | Sentencing Table

DATA FILTERS

Geography

Circuit --Select--
State --Select--
2 District Oregon
Clear Filter

Demographics

Race --Select--
Gender --Select--
Age --Select--
Citizenship --Select--
Education --Select--
Clear Filter

Crime Type

Crime Type --Select--
Clear Filter

Primary Guideline

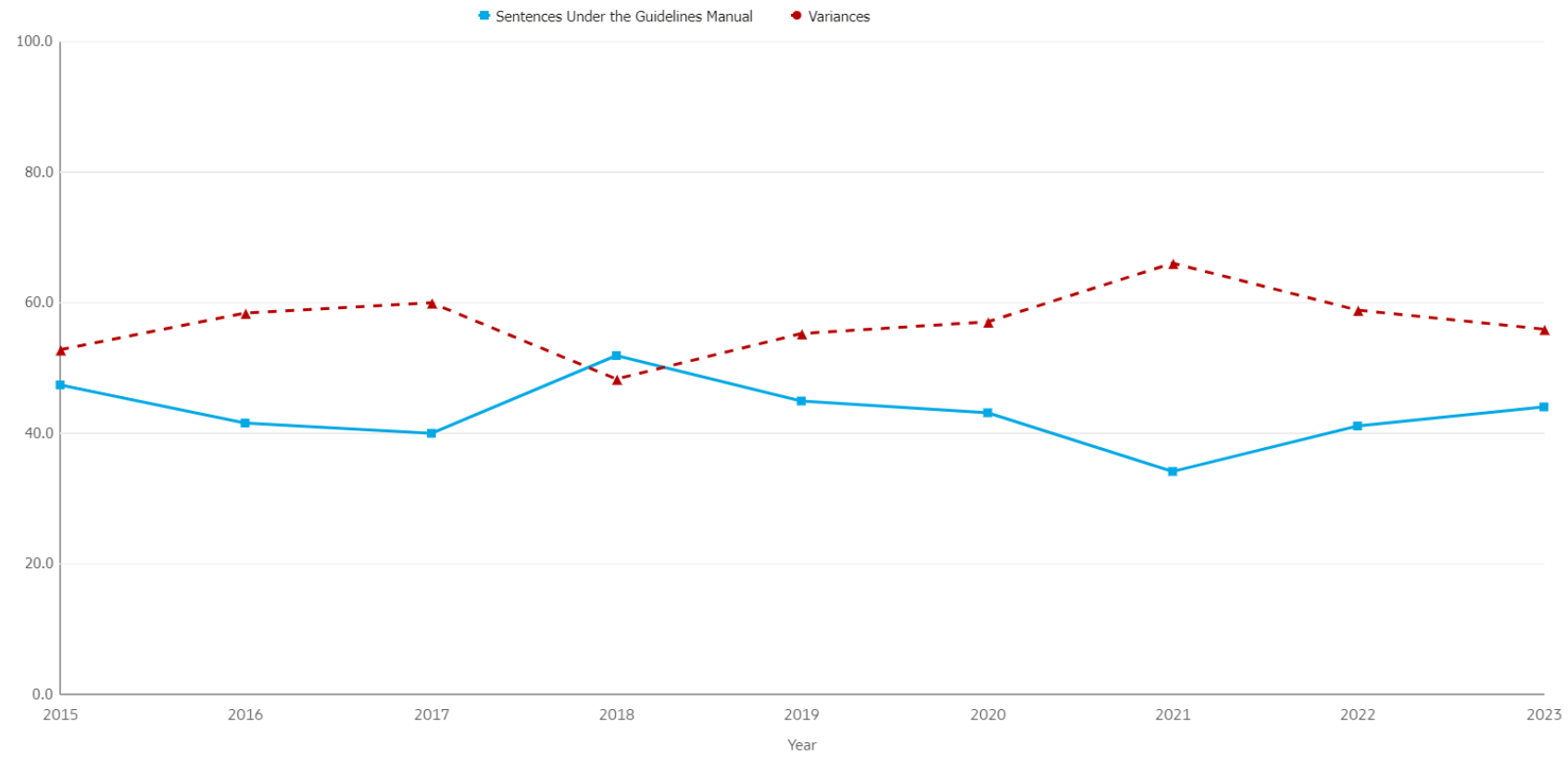
Guideline §2D1.1
3 Clear Filter

Drug Type

Drug --Select--

Sentences Under the Guidelines Manual and Variances Over Time

Fiscal Year 2015,2016,2017,2018,2019,2020,2021,2022,2023



The figure includes the 1,268 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure.

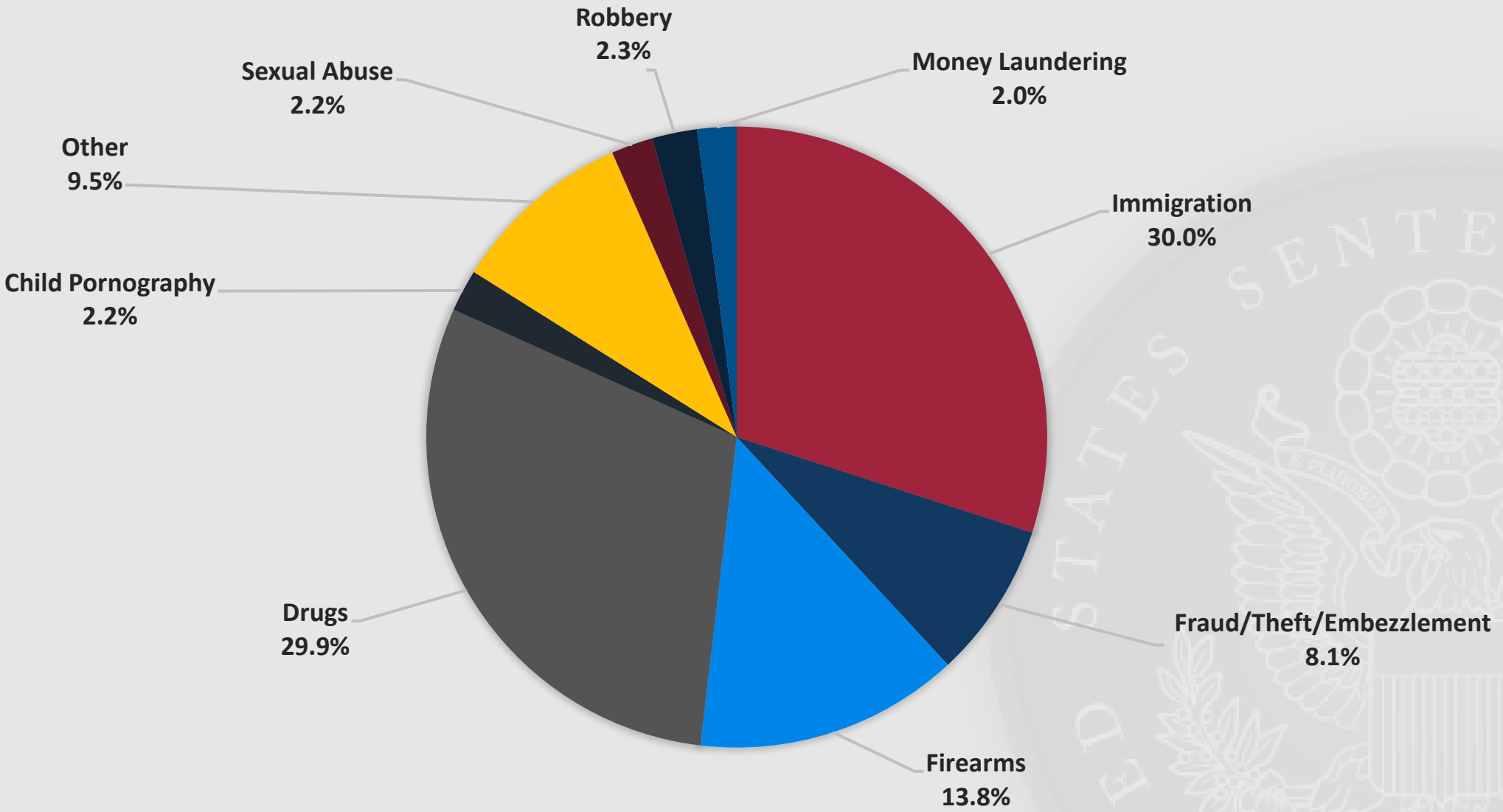
FILTER:

Fiscal Year: 2015,2016,2017,2018,2019,2020,2021,2022,2023; Circuit: All; State: All; District: Oregon; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: All; Guideline: §2D1.1; Drug Type: All; Criminal History: All; Career Offender Status: All

National and District Data

Primary Offense Types

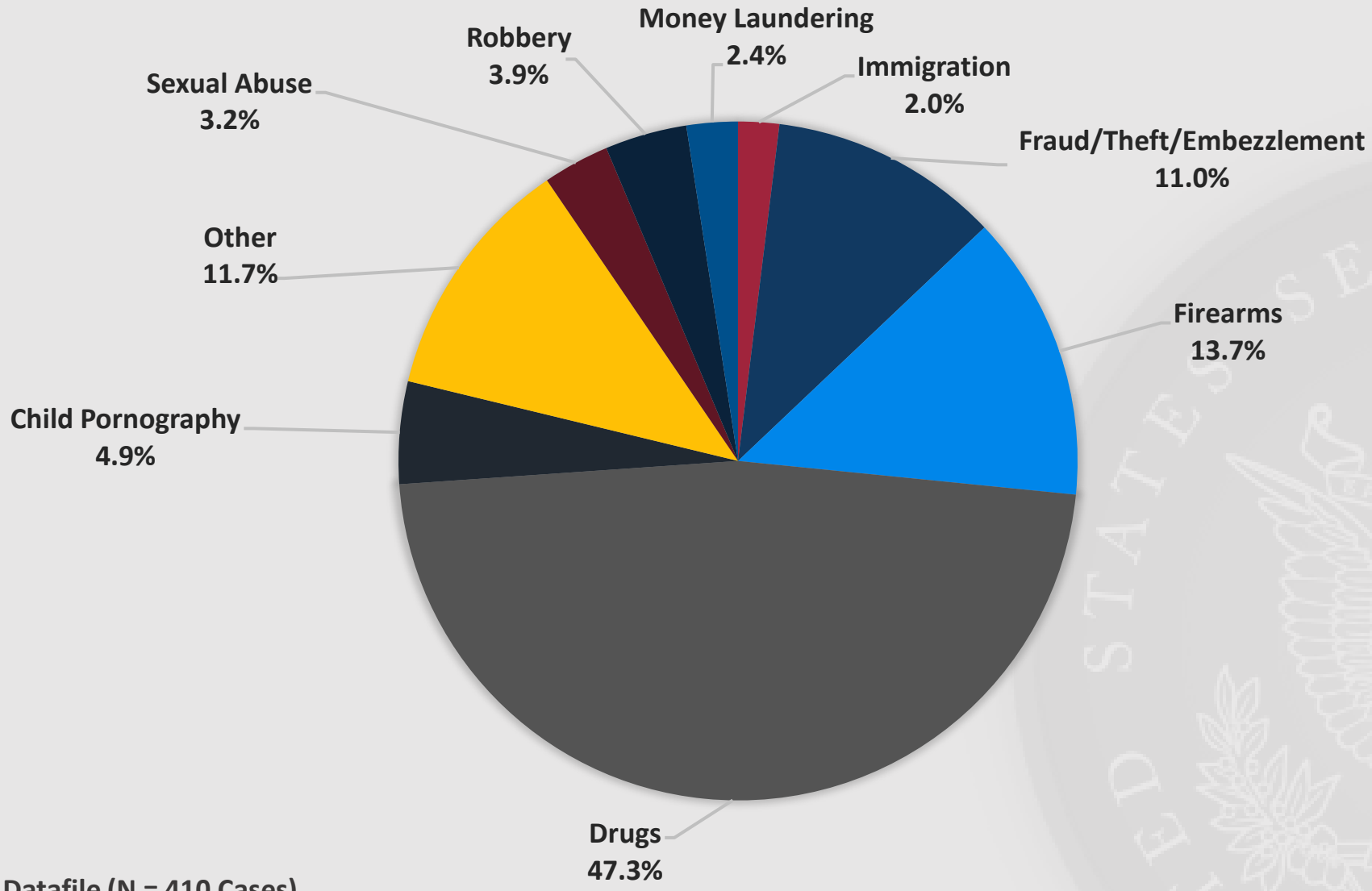
National – FY2023



SOURCE: 2023 USSC Datafile (N = 64,126 Cases)

Primary Offense Types

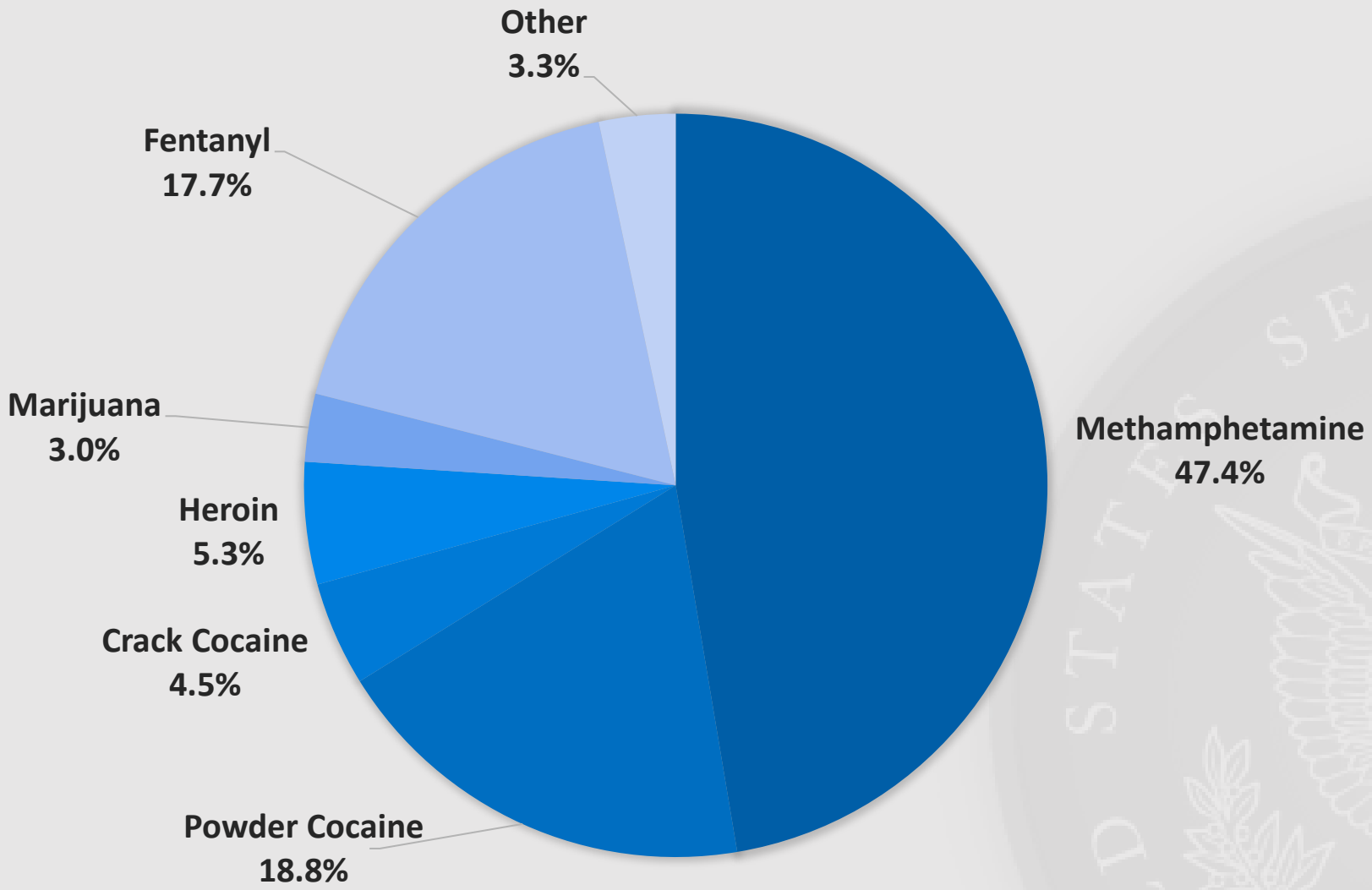
District of Oregon – FY2023



SOURCE: 2023 USSC Datafile (N = 410 Cases)

Primary Drug Types

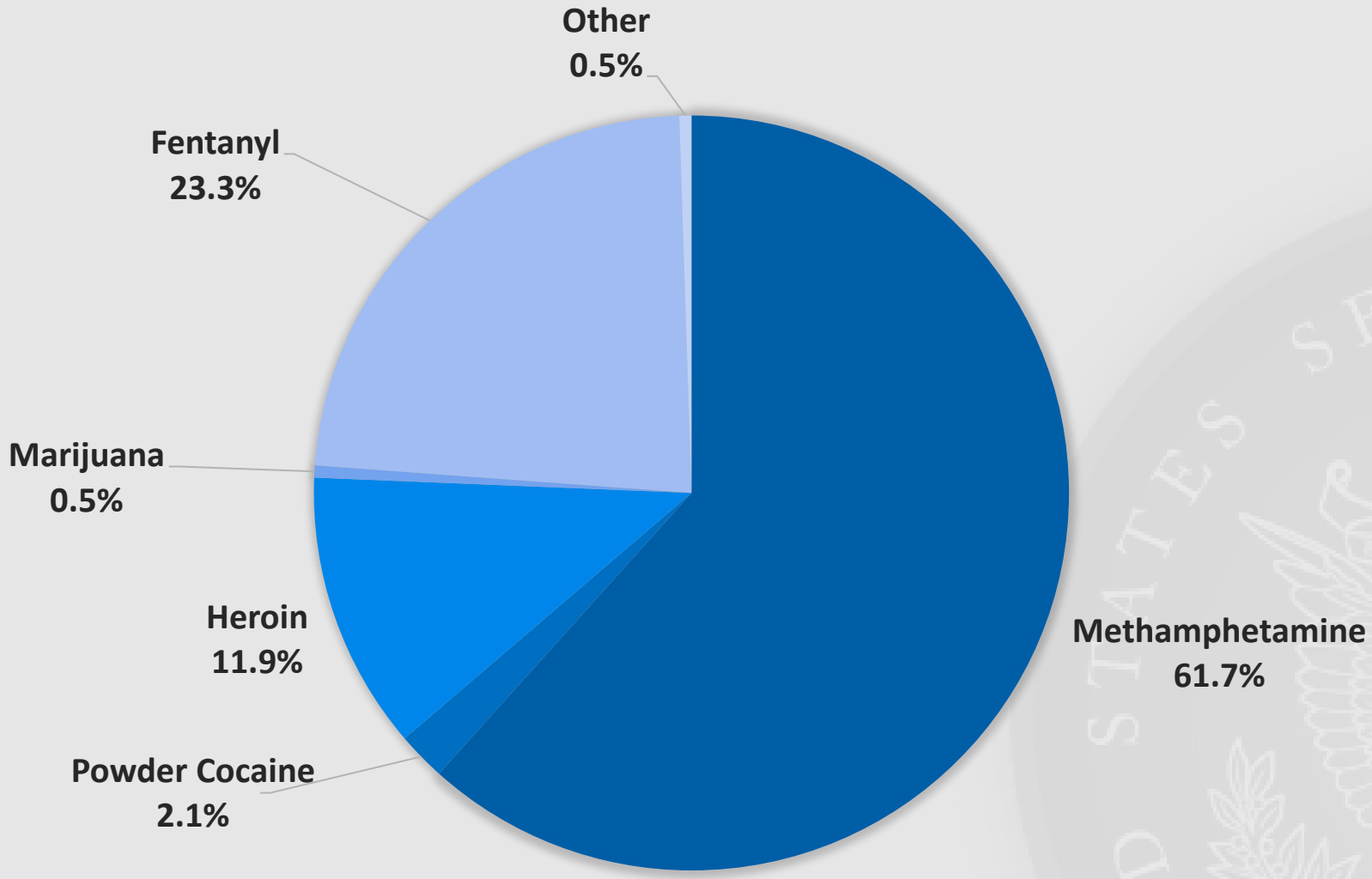
National – FY2023



SOURCE: 2023 USSC Datafile (N = 19,066 Cases)

Primary Drug Types

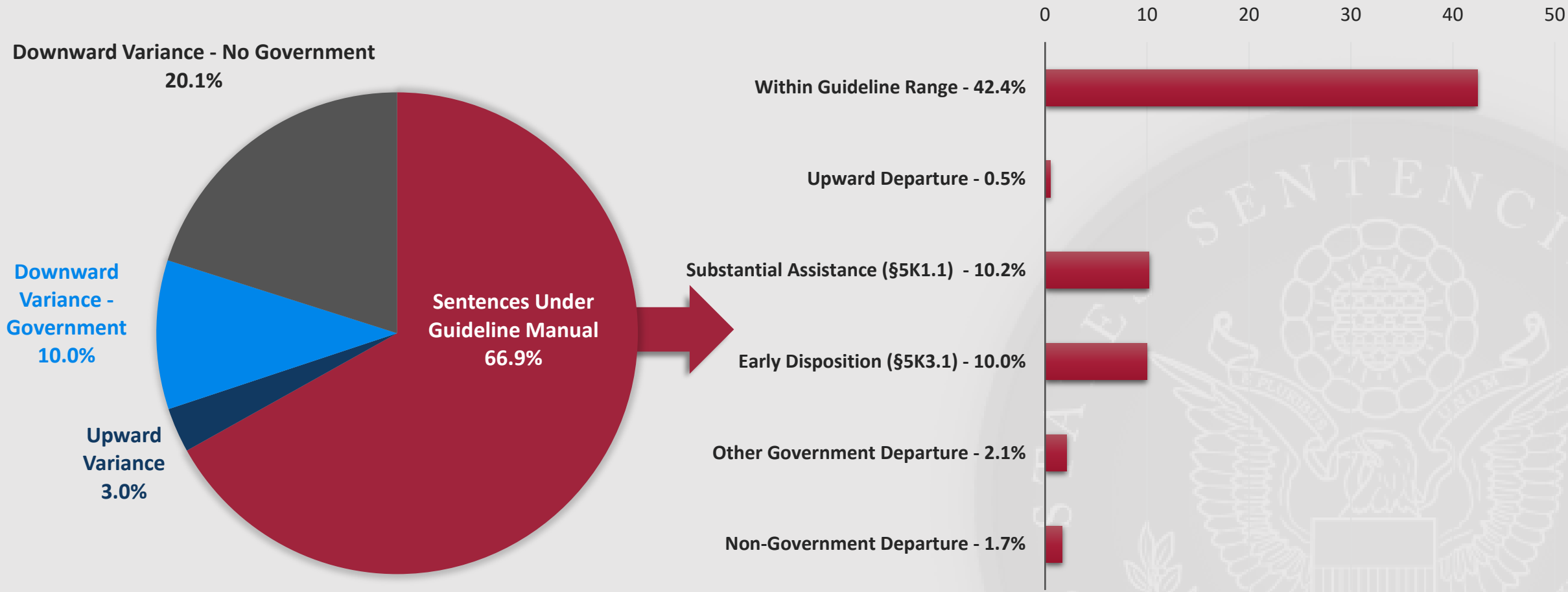
District of Oregon – FY2023



SOURCE: 2023 USSC Datafile (N = 193 Cases)

Position of Sentences in Relation to Guideline Range

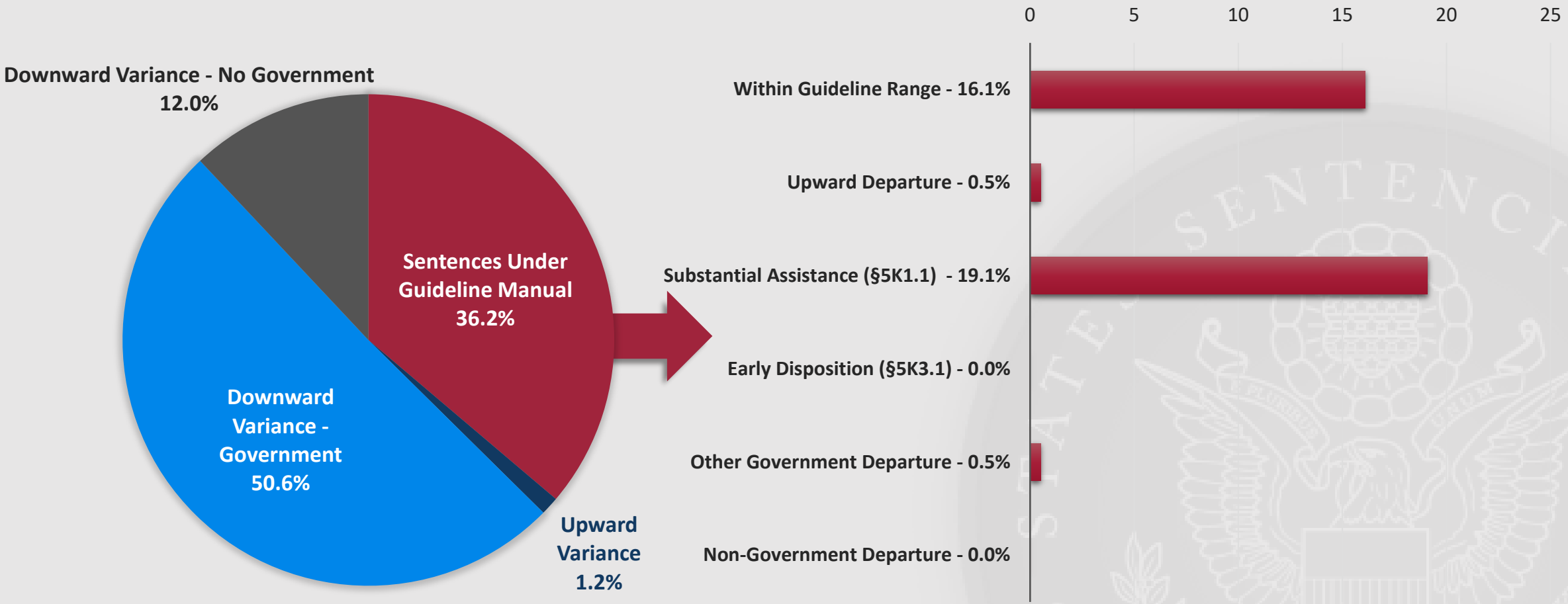
National – FY2023



SOURCE: 2023 USSC Datafile (N = 63,814 Cases)

Position of Sentences in Relation to Guideline Range

District of Oregon – FY2023



SOURCE: 2023 USSC Datafile (N = 409 Cases)

Please Review Our Session

Questions?

www.ussc.gov

@theusscgov

HelpLine (202) 502-4545

training@ussc.gov

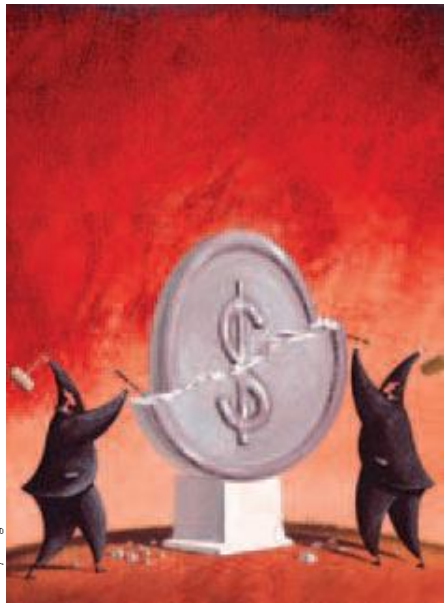
Civil Breakout Session: Deal or No Deal: Barriers to Effective ADR in Federal Court and How to Overcome Them

PDF Program Materials

Advising Clients on the Value of a Case

Let's *Not* Make a Deal

By Susan M. Hammer



Gettyimages

The settlement discussions concluded with plaintiff demanding $1.8 million, the defendant offering $1 million, and neither side willing to budge. The case went to trial, ending with a $1.4 million verdict and each side improving their position. According to a recent study published in the Journal of Empirical Legal Studies,[1] this was a relatively rare event.

In just 15 percent of all cases, both sides better their position at trial – that is, the plaintiff is awarded more than the defendant offered and the defendant paid less than the plaintiff demanded. In 85 percent of all cases that went to trial, one or both parties were worse off by rejecting the last settlement proposal.

This fascinating study included 2,054 California civil cases decided between 2002 and 2005. The purpose was to determine whether, and under what circumstances, the parties did better at trial than they could have with settlement. In 61 percent of all cases, plaintiffs did worse. On average, their decision error cost $43,000. The frequency of defendants' decision error rate was lower (24 percent), but the magnitude of error was greater. On average, getting it wrong cost defendants $1.1 million. These figures include awarded costs and attorneys fees.

Certain types of cases had higher settlement error rates. The researchers found that plaintiffs had higher decision error rates where contingency fee arrangements are common, such as medical malpractice cases (81 percent) and personal injury cases (53 percent). In contrast, plaintiffs' decision error rate in contract cases was 41 percent. On the defense side, decision error rates were highest in cases where insurance coverage is generally not available; for example, 44 percent in contract cases and 40 percent in fraud cases. Lower decision error rates were associated with cases where insurers were more likely to represent the defendant, such as premises liability (17.5 percent) and personal injury (26.3 percent).

Here's the kicker. The authors of this study have surveyed trial outcomes for the past 40 years. Even with availability of jury verdict information, the frequency of settlement (95 percent plus) and the attention given to risk analysis, decision error rates were *more* frequent in 2004 than in1964. Of course, this does not mean that our profession is getting it wrong in the 95 percent-plus cases that do settle. We simply have no basis for comparison in those cases.

Advising clients on the value of a case — when to hold 'em and when to fold 'em — is something lawyers do well every day. The study provides us with the opportunity to reflect on the reasons why cases do not settle and the costs and benefits associated with those decisions. Here are a few observations about how we might do better.

The Price to Pay

In the real world, settlement decisions are based on many factors other than economic efficiency. There are extrinsic factors that cause parties to sacrifice the optimal economic outcome in favor of a compelling, non-economic need. A party may put a premium on having his or her day in court, setting a precedent, sending a market signal, punishing or needing to "bet the company."

There is nothing inherently wrong with considering extrinsic factors so long as it is clear that pursuing them may come with a substantial price tag. Attorneys may have varying degrees of influence over client decisions, but at the very least, they can advise and hope their client will listen. I'd also suggest asking your mediator to help you work with a client who is having a hard time balancing the tradeoffs.

Manage Your Clients' Expectations

Lawyers need to work from day one on managing their clients' expectations. When plaintiff's counsel writes a demand letter that includes unrealistic theories and exaggerated numbers, and defense counsel responds, offended at the suggestion of liability and describing the claims as frivolous, there's a risk the client might take the lawyer's position literally. The client may not understand that aggressive advocacy is one thing and case evaluation another. When each side then writes a letter to the mediator giving an unrealistic settlement range, the client might come to mediation unwilling to consider a number outside it.

The plaintiff may first realize at mediation that their chance of getting a

Decision Errors and Cost of Error

	Percentage of Error	Mean Cost of Error
Overall		
PL Error	61.2%	$43,100
DEF Error	24.3%	$1,140,000
Eminent Domain		
PL Error	41.7%	$72,100
DEF Error	33.3%	$523,600
Contract		
PL Error	44.3%	$144,900
DEF Error	44.3%	$1,528,700
Fraud		
PL Error	47.4%	$134,400
DEF Error	40.4%	$4,086,200
Personal Injury		
PL Error	53.2%	$32,200
DEF Error	26.3%	$622,000
Employment		
PL Error	51.1%	$64,800
DEF Error	32.4%	$1,417,700
Negligence (non-PI)		
PL Error	66%	$82,100
DEF Error	19.1%	$1,597,000
Premises liability		
PL Error	68.7%	$46,100
DEF Error	17.5%	$2,378,000
Intentional tort		
PL Error	69.3%	$43,400
DEF Error	21.2%	$859,400
Products Liability		
PL Error	71.7%	$72,600
DEF Error	17.0%	$1,327,300
Medical Malpractice		
PL Error	80.8%	$15,200
DEF Error	15.1%	$986,200

Journal of Empirical Studies, Volume 5, Issue 3, 551-591,September 2008 titled "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane. It can be found at http://www3.interscience.wiley.com/cgi-bin/fulltext/121400491/PDFSTART

$1million verdict is about 5 percent, and a defendant may hear, for the first time, that their chance of getting out on summary judgment is about 5 percent. The client may feel betrayed by the attorney ("whose side are you on?") and the lawyer may feel their client is being irrational. Attorneys can save their client relationships and have an easier time managing expectations if they use caution from the beginning, by talking about evidence that may surface during discovery or mediation that could change the risk assessment and by explaining the difference between an initial advocacy letter and a settlement analysis.

Vet Your Case to Someone Who has a Different Point of View

The most successful lawyers vet their case with seasoned practitioners in order to get a balanced view. When counsel seek out only like-thinking colleagues, they tend to get an overly optimistic view. It may be comforting in the short run but ultimately not helpful.

Give the Same Attention to Dispute Resolution Advocacy as to Trial Advocacy

Litigators go to CLE programs on deposition techniques, cross-examination techniques, offering evidence, voir dire and closing arguments. Although almost all cases will settle, attorneys generally have less training in dispute resolution advocacy. Some come to mediation and repeatedly present some version of their closing arguments. The best dispute resolution advocates come to mediation ready to learn something new and to thoughtfully analyze cost, risk, opportunity and non-economic factors. They are a counselor. Their clients are prepared to see their lawyers play a different role than they would at trial, and they are ready to appreciate it.

In 2014, this study will likely be done again. Will it show that, as a profession, we are helping our clients get better at knowing when and how we should "make a deal?" Time will tell. In the meantime, how can we counsel our clients to make the best decision possible?

Susan Hammer is a Portland-based mediator, focusing on business, employment, professional liability and injury cases. She has mediated for over 20 years. She is a distinguished fellow in the International Academy of Mediators and is listed in Oregon Super Lawyers and The Best Lawyers in America for Alternative Dispute Resolution.

Endnote

1. Journal of Empirical Studies, Volume 5, Issue 3, 551-591, September 2008, titled "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane. It can be found at *www3.interscience.wiley.com/cgi-bin/fulltext/121400491/pdfstart.*

Judge Acosta Discusses Mediation

As the bar mediates more cases than we try, it is important for us to understand mediation more deeply. What are the qualities of mediators and attorneys that result in good outcomes? The Honorable John V. Acosta of the U. S. District Court for Oregon is a favorite choice among the bar to serve as settlement judge. He was kind enough to sit down with me to talk about mediation.

Judge as Mediator

Judge Acosta knows that parties often view a judge as the "presumptive fount of knowledge; 'Well if the judge says . . . .'" To encourage self-determination, Judge Acosta "takes every precaution to ensure that [my judicial office] doesn't take over the process for the parties." He takes time at the beginning, especially in plaintiff's room, "to ensure the plaintiff knows that this is not my decision. It's theirs. It's not my case; it's theirs. I am not here to tell them to do anything or to take or make any offers, or to tell them to settle the case. It's all up to them."

Give people time and space

"I think the process is extremely important to creating ownership of the result," says Judge Acosta. If one of the parties thinks "they have been given an ultimatum or the number has been dictated to them," then they are "not going to own the process. They are not going to feel good about it, and they are less likely to say 'yes.'" Mediation that elevates self-determination over authoritative direction takes time. That's one reason why Judge Acosta does not set a time limit for the settlement conference; he sets aside a whole day.

Some mediators believe in same-room mediation, but not Judge Acosta, "I am a firm believer in not convening the parties in the same room -- at any point in the process. I have never found that it helps facilitate an open discussion and ultimately a settlement in the cases that I have conducted. Usually, it hinders the process."

So what is it about same-room mediation that can be a problem? Judge Acosta harkened back to his experience as a lawyer. "When you get them in the same room, then the lawyers have to be advocates, and they have to put their best face on their client's case. That usually means saying stuff in the presence of the opposing party that makes the opposing party angry. Then, that lawyer feels compelled to respond."

What makes a good mediator?

Judge Acosta says the primary skill of a good mediator is listening. "Most people listen to respond. When you mediate you have to listen to understand. The best mediators that I encountered as a lawyer listened and understood my client's viewpoint, perspective and position. Mediators really have to do that. If you come in with a preconceived notion of where the case should end up and you start driving the process, that's wrong. You are not really paying attention to what their interests are, you are just trying to maneuver around positions. I don't think that is the way it should be conducted. So I think that listening is first."

A mediator cannot listen unless and until the parties speak openly. Judge Acosta is terrific at asking the right questions and projecting the empathy, which encourages the parties to talk. In the plaintiff's room, I've heard him open with, "When you think of this case or your employment [in an employment law case], what do you think of?" It is a

brilliant question on so many levels. It permits the plaintiff to unload anything she wants. Maybe she did not sleep at all last night. Maybe she's blindingly angry at how she was treated. Maybe she's worried about how she can take time from her new job to sit for a week at trial? The open-ended question identifies interests and concerns that can go well beyond the usual ones that attorneys assume are in play.

Another important skill, says Judge Acosta, is the ability to "honestly challenge each side's firmly-held beliefs about their cases." Here's where settlement judges differ widely in approach. For Judge Acosta, "You have to do it in a non-judgmental way that does not put them on the defensive." Judge Acosta likes to start with the strengths of a case to build trust. Later, he tries "to make each side think about their case in ways they hadn't previously thought about it. They can't own the process if I am telling them what their case is and isn't. So I try to guide them to their own conclusions, which, in turn drives their decision-making."

Judge Acosta's approach is to emphasize his position as a neutral <u>person</u> coming to the case with fresh eyes, rather than as <u>judge</u> declaring what will be the likely outcome. "I put it in the context of what a jury is likely to pick up on and wonder about and ask questions about and respond or react to. I tell the parties, if I am having these questions, there is a pretty good chance that one or more of the jurors is going to be picking up on the same things."

What can attorneys do to achieve good results in mediation?

Over the four years he has conducted settlement conferences, Judge Acosta has identified traits that distinguish attorneys.

<u>Understand that the law is less important in mediation.</u>

"Your role should be to represent your client's best interest. To try to get the outcome your client wants, and that doesn't always mean you have to be the zealous advocate that you would be in a trial or a deposition," says Judge Acosta.

According to Judge Acosta, "In mediation, attorneys tend to place too much emphasis on the law. Law is not so important in a mediation or settlement conference as lawyers often think it is. Is it important in the case? Sure: motions for summary judgment, motions to dismiss, evidentiary motions, jury instructions, sure. But we are not doing any of that in a settlement conference. Attorneys often try to impress me with how great this legal issue is for a party, and my response is always, 'Well, if you've got a great legal position, you ought to just go file your summary judgment motion or try the case. Why are you here?' Well, they are here because they know there is always a risk to either side in any case moving forward to a jury. I want to get to the more pragmatic issue of "how can we resolve this?"

<u>Good attorneys let their clients talk.</u>

Judge Acosta continued, "The best lawyers let their clients talk for themselves. I like to talk directly to the parties. Doesn't matter what room I am in, it absolutely doesn't. If I am in the defendants' room, I take the same approach. I talk with the representative. I can talk to the lawyer anytime, but I can't talk to the representative except this time. It is their case, not the lawyer's case. It is not the lawyer's decision."

"The best lawyers let their clients talk and don't interrupt. When they do interject, it is usually very helpful context or affirmation of what I am saying or linking it to something that the two of them have talked about as a factor in that party's decision making. That is very useful."

Counsel your client on the realities of the case.

Judge Acosta advises attorneys to "be realistic about the case before you ever show up for the settlement conference. Candidly identify the weakness of the client's case. Manage the clients expectations by honestly conveying to them jury verdicts or settlements in similar cases."

"Quite often plaintiffs start very high in a range that they know the defendant is not going to pay. They are trying to create some room so that when they get to the real bargaining, they will end up where they would like to end up. And Defendants always start too low. They come in with a number that they know that the other side is not going to take, but they do it for the same reason."

"Very effective lawyers," said Judge Acosta, "have already had a heart-to-heart talk with their client about starting at a realistic range. It doesn't matter if it is the defendant who comes in realistically or the plaintiff who comes in realistically. That really helps me because I can say. 'Look, these folks are already starting at a range that is within the range of reason. You are not even on the map here. You need to get close because if you don't, I am not going to be able to do much with the other side until you do.'"

Effective attorneys dovetail their counseling with the work of the settlement judge. According to Judge Acosta, "Some lawyers do this ahead of time. Other lawyers to do it in the settlement conference itself, [perhaps] because they are waiting for the judge talk to their client before they can say 'see now, remember what we talked about before we came here today. You heard what the judge said. That's a lot of what we

talked about. Let's look at our number now.' The good lawyers I have seen in settlement conferences do that very effectively."

TIPS FROM THE BENCH

By The Honorable John V. Acosta
United States Magistrate Judge

Effective Judicial Settlement Conferences in Federal Court

"The definition of a good settlement is that both sides got what they didn't want."

When considering whether to ask for a judicial settlement conference, start by asking yourself what objectives you and your client believe will be achieved by using a judge instead of a private mediator. Identifying these goals before asking for a settlement conference is the best way to determine whether a judicial settlement conference is appropriate for your specific case. If you conclude that it is appropriate, then the next step is to properly prepare for the judicial settlement conference. This article suggests steps to effectively prepare for the settlement conference. These tips are the product of my experience, acquired first as a lawyer and now as a settlement conference judge. They are intended to give lawyers and their clients insight both into the judicial settlement conference process and how to navigate it to best increase the chances of an acceptable settlement. Be mindful that each judge has his or her own style and preferences; that said, the observations that follow probably enjoy general applicability and, thus, should be useful to guide your strategy, preparation, pre-conference submissions, and negotiating approach.

I. What A Settlement Conference Is and Isn't.

It's called a "settlement conference," not a "capitulation conference." Too often, lawyers or their clients seem to expect that the settlement conference judge will convince the other side that it is wrong or that its case is weak and that once this occurs, the other side surely will see reason ("reason" defined as how you or your client have evaluated the case). But settlement judges aren't going to do that, nor will we tell the other side that it should accept a certain amount or offer a certain amount. More likely, we will share our perceptions of the facts, as well as our views about the parties' respective cases and case evaluations. We also will help the parties identify the risks of further litigation and the uncertainties of trial by jury, and will point out problem areas as well as the strengths of the case. In particular, we will offer you and your clients a perspective about the case that you or they might not yet have considered or considered fully.

II. Utilizing the Judicial Settlement Conference Format.

Parties often choose a judicial settlement conference over a private mediation for specific reasons. What, then, can a judicial settlement conference bring to the negotiation dynamic that private mediation cannot? In my experience, the reasons often relate to the lawyers' belief that a judge or, more precisely, the aura of the judicial office, if you will, needs to be involved in the negotiation process. If that is a reason, and especially if it is the main reason, you've asked for a judicial settlement conference, then spend some time before the conference thinking about how best to leverage that element. Does the other party or its representative need to hear certain things from a judge because the party's expectations are unrealistic? Does the opposing lawyer need to hear from a judge certain points you believe he or she is not being fully considering? Does your own client need to hear from a judge certain observations you've been making all along but which your client is reluctant to accept? Whatever the reason for requesting a judicial settlement conference, include information in the position statement relevant to that reason and be prepared to follow-up at the settlement conference.

Remember that in the District of Oregon lawyers are permitted to ask for a specific judge to preside over their settlement conference. This request may be made to the assigned judge or directly to the desired settlement conference judge. Choosing a settlement conference judge is as important as choosing a privately retained neutral to preside over a mediation because many of the same factors should be considered: style, experience, background, and knowledge of the case's subject area, among other factors. Time also is a consideration, as judges often must contend with scheduled hearings and other matters on the same day that the settlement conference is scheduled. Find out in advance what amount of time the judge can or is willing to set aside for your settlement conference so that you will know whether the judicial settlement conference will be effective for your case.

III. The Position Statement.

The purpose of the position statement is to inform the settlement judge of the relevant information and issues he or she must know to effectively conduct the settlement conference of the particular case. First, then, the position statement should not be a summary judgment brief. I mention this because I have received many such position statements. Don't use the confidential position statement to convince the settlement judge that you're certain to obtain or thwart summary judgment, or certain to prevail at trial. If that's true, why, then, did you agree to a settlement conference? To convince the other side to capitulate? If so, see above. Settlement won't be achieved by asking the settlement judge to tell the other side how confident you and your client are about your case, so don't structure your position statement that way.

On this point, remember that the jury will not be deciding your case based on competing legal arguments but on the facts of the case. The settlement judge comes to the case as a disinterested party coming, and knowing nothing about it except what the lawyers can impart in their position statements or oral presentations at the settlement conference. In this context, the settlement judge sees the facts of the case a lot like a jury would; all the elements of fairness, common

sense, and simple logic come into play. You'll be better served addressing those elements of your case then you will by arguing some relatively subtle legal point in the position statement.

Second, your submission should be candid. You give the settlement judge little help by submitting a position statement that trumpets the strengths of your case and admits to no weaknesses of any sort, while cataloging the myriad shortcomings of your opponent's case. Don't expect the settlement conference judge to help the parties build a settlement if your position statement lacks the information necessary to construct it.

Candor is a particularly important point because it translates to credibility with the settlement judge, the establishing of which should always be a goal of your pre-conference submission. A good position statement sets out a balanced summary of the case that allows the settlement judge to gain full perspective of the case. Position statements that "spin" or characterize the facts, or that focus heavily on the law as the talisman that will vanquish the other side's case, detract from your credibility with the settlement judge. Remember that your position statement is not given to the other parties; only the settlement judge will read it. By being candid you will help the settlement judge identify the parties' common interests which will form the basis for a settlement agreement and often times produce results that could not have been obtained through trial.

Third, keep the analysis brief and focused, always being mindful that you are writing for the settlement conference judge and not the trial judge or jury. Supplement the statement by attaching key exhibits, such as documents constituting the contract, letters or e-mails that contain alleged admissions, and similarly critical documents necessary to understanding the case or the parties' respective positions. Often, only part of a document is relevant to the settlement analysis, so include only the relevant portions and highlight the passages that are most important.

Fourth, address the topics that the settlement judge usually wants to know about:

1. The most important legal and factual issues, including the best and worst fact for your case.
2. The factors making settlement difficult.
3. Any overlapping interests between the parties that might create common ground for reaching settlement.
4. What will happen – good and bad – if your client doesn't negotiate a settlement.
5. The outcomes that your client believes settlement could produce that would not be attainable through a trial or other formal disposition of the case.
6. The status of settlement negotiations, including the last settlement proposal made by each party and which party should make the next offer.
7. The fees and costs incurred to date, and an estimate of the anticipated fees and costs that will be incurred to prepare, try, and participate in an appeal of the case.
8. The range you and your client consider reasonable for settling the case (but not your client's "bottom line").

Usually, all of these topics come into play during the mediation, so addressing them in advance will allow the judge to be better prepared to conduct the settlement conference.

IV. Attendees.

The client should always be personally present. This is an important point. Any mediation, including a settlement conference, is premised on the mediator's or judge's ability to interact, in real time and in-person, with the individual who makes the decision whether or not to offer or accept a specific amount of money. I have conducted settlement conferences that did not result in settlement or that were much more difficult and time-consuming to settle precisely because the decision-maker was not personally present. If your client has agreed to participate in a settlement conference, and particularly if your client is the party that requested the conference, then your client should give the process the importance it deserves and be there in person. And, in-person attendance is respectful of the other parties who are personally present; think about how you or your client would react if the other party decided to have its decision-maker "phone it in."

Arrive with full settlement authority. If the client is an entity, then a representative should be present who has full authority to settle the case. "Full authority to settle" does not mean that the representative has full authority to settle within the range the entity deems reasonable. It also does not mean that the attending representative can "make a call" and try to get additional authority from the person who really holds the authority to settle the case. I expect the party who is in the position of being the paying party (usually the defendant or defendants) to come to the settlement conference with enough authority to settle the case. Opinions will vary on what amount of money constitutes "enough." I appreciate that the parties disagree on the settlement value of the case and that they asked for a settlement conference at least in part for that reason. However, for example, "enough" does not mean that the paying party's attending representative has been told by someone not attending the settlement conference that settlement must not exceed "X". Such a position does not allow for the inevitable changes in perspective that the settlement judge's insights and observations often create during the settlement conference.

V. The Settlement Conference Mindset.

Settlement conference discussions will be more productive if you and your client don't approach it as simply an extension of the pending litigation. This only makes sense, since the goal of litigation is to win the case for your client (a process that does not require the parties to agree on anything), while the goal of settlement is to work toward and reach a mutually acceptable resolution of the case (an outcome that typically requires the parties to agree on everything). Thus, keep in mind the following guiding principles.

Prepare for the settlement conference. Your client should understand the format and, in particular, that the settlement judge is not there to order either party to do something or to decide the case in any way. Also, spend some time explaining to your client what view of the case you will be sharing with the settlement judge: strengths and weaknesses, worst facts of the case, estimated chances of prevailing on liability, likely verdict ranges, the similar information. Your client shouldn't be hearing for the first time at a settlement conference your candid evaluation of the case.

Be reasonable. Of course, it depends on one's perspective – one person's ceiling is another person's floor, and all that. More tangibly, don't come to a settlement conference having staked-out some ridiculously high or low number from which you hope to bargain to a number that is merely unrealistic. If everyone starts from a reasonable position, the case either will settle much faster or we will learn more quickly that the case cannot be settled.

Come prepared to give-up stuff. Settlement is a compromise, not a capitulation (again, see above), so don't show up expecting the other side to give you everything you want or that the settlement judge will be able to convince them to do so. Most all of the time, settlement is reached because the party seeking payment agreed to take less than it hoped to get through settlement and the paying party agreed to pay more than it hoped to pay through settlement.

Be prepared to move outside your comfort zone. At some point during the settlement conference it is very likely that you will be talking about a number, terms, or conditions that are outside the range you had in mind for setting the case. This is because judicial settlement conferences often produce information to each side that it hadn't considered before; sometimes, in fact, the judge's perspective is particularly enlightening to one or both parties. Thus, it is counter-productive and unrealistic to come into a settlement conference having decided that you will not take less than a certain amount or not pay more than a certain amount. Yes – that means it is counter-productive to enter into a settlement conference having determined your "walk-away number" before you've heard one word of what the settlement judge has to say about the case. I realize that this is a notion counter to conventional settlement strategy wisdom. But my experience has shown that almost always, parties who begin with that walk-away mindset end up changing their minds during the settlement conference, and settlement usually results. The more effective approach is to have discussed ranges and contingencies in advance but preserved an open mind about the case's settlement value.

Make meaningful and good-faith offers and counter-offers. Yes, it's scary to be the first one to make a "big" move. But, somebody has to do it first so it might as well be you. How does this help your settlement posture? Once you do, you give the settlement judge the leverage to convince the other side to make a similarly meaningful move, and you make it more difficult for the other side to justify only an incremental increase or decrease in their number. Plus, it moves the process toward final resolution more quickly and effectively.

VI. Conclusion.

In conclusion, judicial settlement conferences can produce acceptable and even favorable settlements between litigants. To achieve that result, you and your client must be prepared to engage in a process that is likely to be much different from the litigation process that the parties have engaged in for many months prior to the conference. Advance preparation, a firm idea of what you want to achieve, and flexible thinking will serve you and your client well, and will help the settlement conference judge achieve a result that will satisfy your client.

ORDER
and
Instructions and Information
for
Settlement Conferences

This document explains the settlement conference process as I conduct it and my expectations of the lawyers and parties in preparing for the settlement conference. Please read these instructions carefully because the contents constitute **ORDERS** by the court. The parties and their lawyers are expected to follow these instructions in every particular. Variances from these instructions not approved in advance by Judge Acosta could result in sanctions.[1]

Expectations

Each of the following expectations is the product of hard experience as a settlement conference judge. Meeting these expectations will ensure that the time spent preparing for and conducting the settlement conference is time well-spent.

I. Attendees.

A. Each party must have physically present at the settlement conference the representative who is the decision-maker with respect to the amount of money to be offered or agreed to in settlement. "Decision-maker" means the person who possesses full and final authority to settle the case without need to contact or confer with a person not present at the settlement conference. If a party has multiple decision-makers, they must either be present as well or have given the decision-maker in attendance unrestricted authority to settle the case. **This order includes claims and risk managers or representatives handling the case for a party's insurance company.** Lawyers ask about this requirement and whether it includes their client's insurance carrier representative. It does. So don't call to ask if I'm "serious" about this requirement. [2]

[1] The authority of the court to enter orders pertaining to the convening and conducting of a settlement conference is well established. *See* 28 U.S.C. § 473(b)(5) (court may require "representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference"); FED. R. CIV. P. 16(c)(1) ("If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."); FED. R. CIV. P. 16(f)(1) (court may impose sanctions if a party or attorney fails to appear, is substantially unprepared to or does not participate in good faith, or fails to obey a pretrial order); USDC Oregon Local Rule 16-4(e)(2) (court may on its own motion schedule a settlement conference).

[2] In-person presence is strongly preferred, but exceptions will be made upon request for good cause (such as medical condition, for example) or to facilitate scheduling.

B. Geographic distance from Portland does not excuse the decision-maker's in-person attendance. If attempting to settle the case is important to your client, then attending the settlement conference in-person should be equally important, especially if your client is the party who requested the settlement conference. In-person attendance also is respectful of the other parties who have arranged to be personally present.

C. The trial attorney and, if applicable, the settlement attorney for each party must attend the settlement conference in person. If a party's trial attorney is from outside Oregon, then that attorney and that party's Oregon counsel must be physically present at the settlement conference.

D. Identify by name and title the attendees to the settlement conference.

E. Appropriate attendees are the named parties (individuals and designated representatives of companies, organizations, and public bodies), and the lawyers of record for the parties. Settlement counsel also is an appropriate attendee.

II. Position Statement.

Any settlement conference statement that does not comply with the following requirements will be returned to the party who submitted it for revision and re-submission:

A. Limit the statement to ten (10) pages. Ten pages means ten pages.

B. Do NOT submit a position statement that reads as if it is a summary judgment brief. Do not try to convince me that you certainly will obtain or thwart summary judgment, or that you are certain to prevail at trial. If you or your client are that confident about your case, then a settlement conference is a waste of everyone's time. Go to trial instead.

C. Be candid. Candor is key to your credibility with me and to my ability to effectively mediate your case. No purpose is served by praising your strengths and admitting no weaknesses, or by discussing only the myriad shortcomings of the opponent's case. Any unfavorable aspect of your case that you choose to not share with me usually appears in the other side's position statement, so omitting weaknesses will damage your credibility with me before the settlement conference even begins. Again, if you really believe your case is that good, then go to trial.

D. Be timely. Please send me your position statement no later than five (5) business days in advance of the date the settlement conference will occur. Late statements reduce my ability to be fully prepared for the conference. **To facilitate timely submission of your statement, you may e-mail it directly to me at John_Acosta@ord.uscourts.gov.** If you e-mail your statement DO NOT also send me a copy by mail, and vice versa.

E. Your position statement must address these points:

1. The three (3) best and three worst facts for your case.
2. Any legal issues which, when ruled upon, could substantially change your client's position in the case, either favorably or unfavorably.
3. The damages claimed and the method by which you have calculated damages. Plaintiffs and defendants each are to provide this calculation.
4. An explanation of any factors making settlement difficult for the parties.
5. Any common goals that might facilitate settlement.
6. The status of settlement negotiations, including the last settlement proposal made by each party. Please tell me if the parties have settled some part of the case already, and identify the issue or issues that have been settled.
7. The fees and costs you have incurred to date, and an estimate of the anticipated fees and costs you will incur to prepare, try, and participate in an appeal of the case.
8. The range – reasonable and realistic – you currently consider appropriate for settling the case. **Note:** this is not an invitation to tell me your "bottom line" number, which I do not want to know, at least not at the outset of the settlement discussions.
9. The range – reasonable and realistic – of a jury verdict should the plaintiff prevail at trial.

You may attach key exhibits, reasonable in number and length, such as documents constituting the alleged contract, letters or e-mails that contain an alleged admission or memorialize key facts, and similar documents, if the exhibits are critical to understanding the case or the parties' respective positions.

III. Settlement Authority.

The party who is in the position of being the paying party (usually the defendant or defendants) must come to the settlement conference with enough authority to settle the case. Opinions will vary on what amount of money constitutes "enough authority." I appreciate that the parties disagree on the settlement value of the case and that they asked for a settlement conference at least in part for that reason. However, the paying party's representative should not attend the settlement conference if s/he has been told by someone else not attending the settlement conference that s/he must get a settlement for "X" because the paying party won't agree to settle the case for more than that, no matter what. Such a position does not allow for changes in the negotiating position when new information or new perspectives are revealed or discussed during the settlement conference.

IV. Preparation.

Participants should be prepared in advance of the settlement conference in each of the below-listed areas. **NOTE: IF ANY PARTY TO A PROPOSED SETTLEMENT CONFERENCE IS UNABLE TO MEET ANY OF THESE EXPECTATIONS, I WILL DECLINE TO CONDUCT YOUR SETTLEMENT CONFERENCE.**

A. Know whose turn it is to make the next number. Lawyers often arrive at the settlement conference and disagree which party is to make the next settlement number. **The parties should arrive at settlement conference having talked about and agreed which of them is to make the next settlement number.**

B. Don't show up at the settlement conference with a new settlement position, or asserting new claims or defenses not previously disclosed to the other side sufficiently in advance of the settlement conference. No one likes unpleasant surprises. At the settlement conference, then, the plaintiff should not give me a higher number and the defendant should not give me a lower number than the parties had discussed prior to the settlement conference. Such changes negatively affect the entire process and impair my ability to move the parties toward a settlement. If you or your client must change a prior position, convey it to the other side as soon as possible before the settlement conference or contact me to discuss it so that I can advise you how best to proceed. Note: "as soon as possible" does **not** mean late in the afternoon of the day before the settlement conference. Don't play games.

The same is true for new claims and new defenses. Parties prepare their settlement positions based on an analysis of existing claims and defenses. The plaintiff should not assert for the first time at the settlement conference one or more new claims not previously contained in the complaint or disclosed to the defendant; similarly, the defendant should not assert for the first time new substantive defenses. **If you arrive at the settlement conference using as a negotiation tactic the threat of asserting new claims or defenses, I will cancel the settlement conference and assess you and your client with the other side's attorney fees and costs incurred to prepare for and attend the settlement conference.**

C. Determine the range and components of economic damages at issue before you arrive. Parties frequently arrive at settlement conference with greatly contrasting assumptions and calculations about the economic damages, past and future, at issue in the case. There often is disagreement over even the most basic and easily determined facts such as hourly wage or annual salary, the type and value of benefits, the value of lost sales or the business itself, and the amount of mitigation achieved. These disagreements delay progress and subtract from the time available to work through more difficult issues relevant to settlement. Knowing the parties' respective damages evaluations in advance of the settlement conference will help me facilitate discussions at the settlement conference.

D. Exchange material terms of settlement before you arrive. Don't insist on or propose new substantive conditions for settlement after the parties have reached agreement on the amount or the other non-economic terms. If a term or condition is essential to your client's willingness to settle, propose it early. Preferably, counsel should exchange written settlement terms, even if only in bullet-point form, in advance of the settlement conference so that each side knows what other understands by "settlement."

E. Come prepared to give-up stuff. Settlement is a compromise, not a capitulation. Don't show up expecting the other side to give you everything you want or that I will be able to convince it to do so. If the case is to settle, one side will have to pay more than it hoped to pay and the other side will have to accept less than it hoped to get.

F. Expect that at some point during the process you will be outside your predetermined comfort zone. It is counter-productive and ultimately unrealistic to come into a settlement conference having already decided that you will not take less than a certain amount or not pay more than a certain amount. Almost always, parties who begin with that mind-set change their minds during the process. Keep an open mind and allow for the likelihood that you will hear information, arguments, and perspectives you hadn't considered previously.

G. Make meaningful and good-faith offers and counter-offers. Yes, it's scary to be the first one to make a "big" move. But, somebody has to do it first so it might as well be you. How does this help your settlement posture? Once you do, you give me the leverage to convince the other side to make a similarly meaningful move and you make it more difficult for the other side to justify incremental increases or decreases in its numbers. Plus, it moves the process toward final resolution more quickly and effectively.

H. Be reasonable – or you will pay. Taking reasonable positions is the best approach to maximizing the chance to settle the case. It also is the best way to avoid being penalized if the case does not settle. In *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011), the Ninth Circuit, following the Third, Seventh, and Eighth Circuits, held that a district court may properly "consider settlement negotiations for the purpose of deciding a reasonable attorney fee award[.]" *See also In re Kekauoha-Alisa*, 674 F.3d 1083, 1093-94 (9th Cir. 2012)(same). Be aware that some areas of law, such as copyrights, have specific rules requiring the court to consider the parties' litigation conduct when determining a party's subsequent request for attorney fees. *See, e.g., Countryman Nevada, LLC v. DOE-73-164-181-226*, Case No. 15-cv-433-SI, 2016 WL 3437598 (D. Or. June 17, 2016). **So, be warned:** if your case is one in which attorney fees can be awarded, you will pay more (or get less) if you are unreasonable in settlement negotiations and found to have "unduly extended the duration of the litigation" by not "aggressively pursu[ing] settlement at the early stages of the case[.]" *Ingram*, 467 F.3d at 927-28.

Voluntariness

This is a voluntary process. Unless the assigned judge has ordered the parties to participate in a settlement conference, the parties' participation is by agreement and any party may elect at any time to discontinue its participation in a settlement conference. In other words, you can quit when you want and I won't make you stay. Also, I will not exercise any authority as a judge to order or require any party to make an offer, accept an offer, or settle the case. If the case settles, it will be because the parties willingly decide to settle it.

Good Faith

I expect that parties who voluntarily agree to participate in a settlement conference do so with the intent of participating in good faith and with a genuine interest in reaching a settlement agreement, and not for some other reason. Remember *Ingram*.

Confidentiality

This is a confidential process, both during and after it concludes. First, I will not disclose discussions with one party to another party without the consent of the disclosing party. Note, however, that I will advise each party generally how I perceive the other parties to be responding to the process and whether I believe progress is being made. Confidentiality survives the settlement conference whether or not the case is settled, and it continues to apply to any settlement discussions, written or oral, in which the I am involved after the conference.

Second, communications exchanged between the parties and me or between the parties during the conference are privileged and confidential and are not admissible as evidence in the pending case, should settlement not occur. *See* Local Rule 16-4(g), "Alternate Dispute Resolution – Proceeding Privileged." Likely, such communications, as well as communications between a party and its attorney regarding mediation and settlement, are not admissible in any other judicial proceeding as well. On these points, at least one judge in this district has so ruled. *See Fehr v. Kennedy, et al.*, No. 08-1102-KI, 2009 WL 2244193 (D. Or. July 24, 2009). Note, however, that there might be exceptions to the general rule of settlement communications confidentiality, depending on the case's subject matter or the status of one or more parties. *See, e.g.*, ORS 36.224, "State agencies; confidentiality of mediation communications; rules. (1) Except as provided in this section, mediation communications in mediations in which a state agency is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, are not confidential and may be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7)."

Nonetheless, remember that *Ingram* allows evidence of settlement negotiations as relevant to the trial judge's attorney fee determination. Also, documents and facts disclosed by the parties during discovery or in other case proceedings that are subsequently used or referred to during the settlement conference are not confidential simply because they are used or referred to during the settlement conference. In other words, discoverable information cannot be protected by using it or referring to it during a settlement conference.

Third, whether or not the case settles, after the settlement conference the parties and their attorneys, and their other representatives, are prohibited from disclosing, discussing, or characterizing in any way the negotiations, the positions of the parties or any of them, and the outcome of the settlement conference by any means, including but not limited to through or on a website, any form of social media, the press, orally, in writing, and in any other manner of communication, dissemination, or disclosure to any person, entity, and the public generally. The only exceptions to this prohibition are the consent of all parties who attended the settlement conference and the express permission of the court.

Fourth, if the case does not settle, I will not disclose to the assigned judge anything other than the case did not settle, or any opinions and observations I might have about the parties' positions, arguments, offers and counteroffers, as well as the discussions I have with the parties (but: remember *Ingram*).

Violation of any aspect of this confidentiality provision will result in sanctions, the form and severity of which to be decided in my sole discretion.

Caucuses

During the settlement conference I will meet with each party and the party's attorney, and more than once. These individual caucuses allow the parties and their attorneys to speak privately and candidly with me about the case and about options for reaching settlement. These individual caucuses will vary in length, depending on the complexity of the case and the settlement negotiations. There will be times when I am in the other party's room for extended periods of time. During such periods your patience is appreciated.

Conclusion of the Settlement Conference

The settlement conference likely will result in one of three possible outcomes: settlement, no settlement, or continuation of settlement discussions beyond the day of the settlement conference. If an agreement to settle the case is reached, I might ask the parties and their attorneys to sign a document that contains the essential terms of the parties' agreement before they leave the courthouse. Alternatively, one side may bring a draft agreement for that purpose. In some cases, a written agreement will be signed later because of agreed-upon contingencies that must be satisfied. In those cases, I might ask the parties to go on the record in court or sign a memorandum of understanding to state that they have agreed in principle to settle the case, states the terms of the understanding, and makes clear there is no agreement until the contingencies have occurred or been satisfied and the parties have signed the final agreement.

Post-Conference Procedure

If the parties reach a settlement, I will report the case as "settled" to the assigned judge. You then should expect the assigned judge to issue some form of dismissal order. A judge may vacate a dismissal order if the settlement is not consummated (*e.g.*, the paying party fails to pay), but another possibility is that the judge will leave the order in place and the aggrieved party will be required to pursue a breach of contract claim.

If the parties wish, I will retain jurisdiction over the settlement for purposes of resolving any disagreements about the settlement terms. This must be a specific provision of the settlement agreement and should be included in a final order of dismissal.

Types of Mediation: Choose the Type Best Suited to Your Conflict

Various types of mediation are available to disputants who are seeking an efficient and relatively low-cost resolution to their conflict. Which one should you choose?

BY KATIE SHONK — ON FEBRUARY 27TH, 2024 / MEDIATION

When parties involved in a serious conflict want to avoid a court battle, there are types of mediation can be an effective alternative. In mediation, a trained mediator tries to help the parties find common ground using principles of collaborative, mutual-gains negotiation. We tend to think mediation processes are all alike, but in fact, mediators follow different approaches depending on the type of conflict they are dealing with. Before choosing a mediator, consider the various styles and types of mediation that are available to help resolve conflict.

7 Types of Mediation

Facilitative Mediation

In facilitative mediation or traditional mediation, a professional mediator attempts to facilitate negotiation between the parties in conflict. Rather than making recommendations or imposing a decision, the mediator encourages disputants to reach their own voluntary solution by exploring each other's deeper interests. In facilitative mediation, mediators tend to keep their own views regarding the conflict hidden.

Court-Mandated Mediation

Although mediation is typically defined as a completely voluntary process, it can be mandated by a court that is interested in promoting a speedy and cost-efficient settlement. When parties and their attorneys are reluctant to engage in mediation, their odds of settling through court-mandated mediation are low, as they may just be going through the motions. But when parties on both sides see the benefits of engaging in the process, settlement rates are much higher.

Evaluative Mediation

Standing in direct contrast to facilitative mediation is evaluative mediation, a type of mediation in which mediators are more likely to make recommendations and suggestions and to express opinions. Instead of focusing primarily on the underlying interests of the parties involved, evaluative mediators may be more likely to help parties assess the legal merits of their arguments and make fairness determinations. Evaluative mediation is most often used in court-mandated mediation, and evaluative mediators are often attorneys who have legal expertise in the area of the dispute.

Transformative Mediation

In transformative mediation, mediators focus on empowering disputants to resolve their conflict and encouraging them to recognize each other's needs and interests. First described by Robert A. Baruch Bush and Joseph P. Folger in their 1994 book *The Promise of Mediation*, transformative mediation is rooted in the tradition of facilitative mediation. At its most ambitious, the process aims to transform the parties and their relationship through the process of acquiring the skills they need to make constructive change.

Med-Arb

In med-arb, a mediation-arbitration hybrid, parties first reach agreement on the terms of the process itself. Unlike in most mediations, they typically agree in writing that the outcome of the process will be binding. Next, they attempt to negotiate a resolution to their dispute with the help of a mediator.

If the mediation ends in an impasse, or if issues remain unresolved, the process isn't over. At this point, parties can move on to arbitration. The mediator can assume the role of arbitrator (if he or she is qualified to do so) and render a binding decision quickly based on her judgments, either on the case as a whole or on the unresolved issues. Alternatively, an arbitrator can take over the case after consulting with the mediator.

Arb-Med

In arb-med, another among the types of mediation, a trained, neutral third party hears disputants' evidence and testimony in an arbitration; writes an award but keeps it from the parties; attempts to mediate the parties' dispute; and unseals and issues her previously determined binding award if the parties fail to reach agreement, writes Richard Fullerton in an article in the *Dispute Resolution Journal*.

The process removes the concern in med-arb about the misuse of confidential information, but keeps the pressure on parties to reach an agreement, notes Fullerton. Notably, however, the arbitrator/mediator cannot change her previous award based on new insights gained during the mediation.

E-mediation

In e-mediation, a mediator provides mediation services to parties who are located at a distance from one another, or whose conflict is so strong they can't stand to be in the same room, write Jennifer Parlamis, Noam Ebner, and Lorianne Mitchell in a chapter in the book *Advancing Workplace Mediation Through Integration of Theory and Practice*.

E-mediation can be a completely automated online dispute resolution system with no interaction from a third party at all. But e-mediation is more likely to resemble traditional facilitative mediation, delivered at a distance, write the chapter's authors. Thanks to video conferencing services such as Skype and Google Hangouts, parties can now easily and cheaply communicate with one another in real time, while also benefiting from visual and vocal cues. Early research results suggest that technology-enhanced mediation can be just as effective as traditional meditation techniques. Moreover, parties often find it to be a low-stress process that fosters trust and positive emotions.

Have you used any of these types of mediation and did you find them effective? Let us know in the comments below.

Related Posts

- Alternative Dispute Resolution (ADR) Training: Mediation Curriculum
- What Makes a Good Mediator?
- Why is Negotiation Important: Mediation in Transactional Negotiations

- The Mediation Process and Dispute Resolution
- Negotiations and Logrolling: Discover Opportunities to Generate Mutual Gains

Comments

6 Responses to “Types of Mediation: Choose the Type Best Suited to Your Conflict”

DOUG T. DECEMBER 30, 2022

The article notes: “When parties and their attorneys are reluctant to engage in mediation, their odds of settling through court-mandated mediation are low, as they may just be going through the motions. But when parties on both sides see the benefits of engaging in the process, settlement rates are much higher.” Although that makes intuitive sense, I wonder if there is data to support the idea. I ask because in my experience with many court mediations, with referrals ranging from truly voluntary to semi-voluntary (parties could decline but the court was putting some pressure on them) to conscription, I have not seen much difference in settlement rates. In fact, as a mediator, I sort of like pessimistic, reluctant parties over those with a “I know you will help us” disposition!

REPLY

SURESH L. JULY 17, 2019

Wonderful analysis, how I wish we as Mediators in Court ref matters are trained more in these techniques in BMC at Bengaluru India.

REPLY

JODY M. MARCH 12, 2018

I ran a mediation center that transitioned from facilitative mediation to transformative mediation. Having trained mediators in both models, they are completely different, beginning with the orientation of each framework, to the way that conflict is understood, to the mediator’s purpose. Further, the center provided transformative mediation in all of the types of mediation provided that included civil court and family court cases in which many had specific requirements from the court with respect to the way that agreements were to be structured for enforceable court orders. Insurance cases, divorce cases, child custody, landlord/tenant, contested wills and estates, business disputes, all with transformative mediation. Attorneys liked the model as well because it was often more efficient and helped them gain a better understanding of the situation through the conversation that unfolded. Transformative mediation can be utilized in any type of dispute as evidenced by experience in a mediation center that worked in partnership with courts as well as those cases that were not referred from courts.

REPLY

SHERI T. MARCH 8, 2018

Thank you for elucidating some of the differences among types of mediation. As a transformative mediator, I would like to clarify the goal of this type of mediation. Transformative mediators do not encourage participants to do anything. We support them in making their own choices about how they wish to respond to their conflict. Participants choose what is important to discuss (or not) and how they would like to have their conversation. The mediator does not educate on skills but rather follows the participants' conversation to help them clarify their thoughts, feelings, and choices. Transformative mediators do not aim to transform the relationship; this can happen when the participants feel empowered and then can recognize the needs and feelings of the other person. Our goal is to support empowerment and recognition in the parties. When we do this, the parties often can resolve their conflict themselves.

REPLY

DAN S. MARCH 6, 2018

I appreciate the article. It's tough to capture the essence of transformative mediation in a paragraph, so I thought I'd add a little. Transformative mediation focuses on helping parties have the highest quality conversation possible, which doesn't necessarily mean focusing on needs or interests. It also doesn't necessarily mean either improving the relationship or acquiring skills. It's based on the fact that conflict, at it's core, is a crisis in the interaction between the parties, characterized by a diminished sense of control and a diminished ability to understand the other. The transformative mediation process, tends, very quickly, to allow parties to regain a sense of control "empowerment" and a sense of understanding of or connection to the other "recognition". Those shifts bring with them more constructive interaction, which is helpful, regardless of the nature of the dispute. It allows for a conversation that allows all parties to live up to their intentions to take good care of themselves and to interact with the other constructively. It allows for effective, efficient resolution of monetary disputes, for healing of relationships, for clarifying the terms of the ending of a relationship, for deciding on appropriate settlements of legal claims, or for achieving whatever it is that the parties want to pursue. The fundamental difference between the transformative approach and others is that it acknowledges the relational nature of all conflict. So, rather than choosing it because it fits a certain type of dispute, it makes sense to choose it if one understands that the conflict, whether between business partners, consumers and corporations, injured plaintiffs and insurance companies, or neighbors, is at its most important level a crisis in the way humans are interacting with each other. In response to Luis' question, the differences between mediation approaches are often called types or styles interchangeably. But the transformative approach is significantly enough different from any of the other approaches that I prefer to use the words "model" or "framework". More information about transformative mediation is available at http://transformativemediation.org

REPLY

LUIS N. FEBRUARY 22, 2018

First of all, congratulation for your essay (post)! Secondly, please, I would like to know if there are some sort of difference between Types and Styles of mediation. That is, are they synonyms? And if they are not, could you explain the difference?

REPLY

JUDGE'S INSTRUCTIONS FOR SETTLEMENT CONFERENCE

All communications made to me in connection with a settlement conference are confidential and will not be disclosed to anyone, including the trial judge. Documents submitted will be destroyed at the conclusion of the settlement conference.

Attorneys for each party should submit to me the following:

1. A brief analysis of the key issues involved in the litigation, not exceeding one page.

2. A description of the strongest and the weakest points in your case, both legal and factual, not to exceed one page.

3. A description of the strongest and the weakest points in your opponents' case, both legal and factual, not to exceed one page.

4. Status of settlement negotiations, including the last settlement proposal made by you and to you.

5. Settlement proposal that you believe would be fair.

6. Settlement proposal that you would be willing to make in order to conclude the matter and stop the expense.

Practice Tips From The Bench

PDF Program Materials

Trial Court Guidelines

TRIAL COUNSEL: PLEASE READ CAREFULLY

Preface

Your compliance with the following requests will be greatly appreciated. These guidelines are not intended to be exhaustive or mandatory in every case. Note any trial judge's deviations at the pretrial conference.

Civility is the key to behavior in this district -- that includes everyone: the judge, staff, lawyers and witnesses. If you have any complaints about anyone's civility, including the judge, please bring the matter to the immediate attention of the court by asking for a conference in chambers.

Promptness

1. The judge makes every effort to commence proceedings at the time set. Promptness is expected from counsel and witnesses.

2. During jury deliberations, counsel must be present or available on 15 minutes' notice to counsel's office. Otherwise the right to be present is waived and consent is given for proceedings to take place in the courtroom during counsel's absence.

Decorum

1. Keep the trial low-key. It is not a circus, a contest of dramatic ability or an oratorical contest. It should at all times be a quiet, dignified search for the truth.

2. Rise when the jury and the judge enter and leave the courtroom.

3. Address all remarks to the judge, not to opposing counsel. Colloquy or argument between attorneys is prohibited.

4. Rise when addressing the judge and when making objections. (This calls the judge's attention to you.)

5. When offering a stipulation in a jury case, first confer with opposing counsel.

6. Do not exhibit familiarity with witnesses, jurors, opposing counsel, or court personnel. Do not use first names for witnesses, parties, opposing counsel or court personnel. During jury argument, do not address any juror individually or by name.

7. Do not bring food or beverages into the courtroom, nor allow witnesses to chew gum, etc. Men should not wear hats in court. Caution your witnesses and guests accordingly.

8. Stand a respectful distance from the jury at all times.

9. Address the court as "Your Honor," not "Ma'am" or "Sir," etc.

Statement of the Case

Each party shall submit a "statement of the case" for use by the court at the beginning of voir dire to advise the jurors of the nature of the case and the issues to be decided by the jury. The statement should be brief (normally two or three paragraphs in length) and neutral in tone and content.

Opening Statements

Confine your opening statements to what you expect the evidence to show. It is not proper to use the opening statement to argue the case, instruct as to the law, or explain the purpose of an opening statement. Unless the case is unusually complex, the average time should not exceed 30 minutes.

Voir Dire

The court will conduct voir dire of the jury. Some judges may permit counsel to ask brief follow-up questions of the jurors. If allowed, use generic questions of the entire panel or address individual jurors who raise a need for an individual response. Do not attempt to question each juror or condition jurors.

Witnesses

1. It is unnecessary to greet or introduce yourself to adverse witnesses. Commence your cross-examination without preliminaries. The right to cross-examine is not a right to examine crossly nor to ask the witness to pass on the credibility of another witness.

2. Examine witnesses while seated at counsel table, standing behind counsel table, or at the lectern.

3. Do not approach a witness or the bench without leave of court.

4. Do not hover over a witness, even when permission has been granted for you to approach the witness. Maintain a respectable distance from the witness.

5. If you need to point to an exhibit or to use the easel when you ask a question, return to your seat as soon as possible. Do not linger in the well of the court.

6. A whiteboard, white paper, chalk, pens, pointer, screen, TV and VCR are available. However, if you want an x-ray viewing box, tape recorder or similar equipment, you must furnish it or make arrangements with the courtroom deputy at least one day in advance.

7. Treat witnesses with fairness and consideration. Do not shout at, ridicule or otherwise abuse witnesses.

8. Do not ever, by facial expression or other conduct, exhibit any opinion concerning any witness' testimony. Counsel will admonish their clients and witnesses about this common occurrence.

9. When court is in session, do not address the reporter. Do not ask the reporter to mark testimony. Address all requests for re-reading of questions and answers to the judge.

10. If a witness is on the stand at a recess or adjournment, have the witness on the stand ready to proceed when court is resumed.

11. Do not delay proceedings by writing out witnesses' answers during questioning. Charts and diagrams, where possible, should be prepared in advance, but counsel may use the writing board for opening and close.

12. Where a party has more than one lawyer, only one may conduct the direct or cross-examination of a given witness.

Objections

1. When objecting, state only that you object and briefly specify the ground(s). Do not use objections to make a speech, recapitulate testimony, or to guide the witness.

2. Do not argue an objection until the judge grants permission or requests argument.

3. Give the judge advance notice if you have reason to anticipate that any question of law or evidence is difficult or will provoke an argument.

4. Sidebar or chambers conferences during trial are not to be utilized for discussion of evidentiary issues. Most evidentiary hearings will be conducted at court recesses or, if important enough to justify interruption of the trial, the jury will be excused and the matter heard in open court (of course you may ask to approach the bench to request necessary recesses, etc.).

Exhibits

1. All exhibits will normally be marked and received in advance - per the court's order.

2. If you desire to display exhibits to the jury, sufficient additional copies must be available to provide each juror with a copy. Alternatively, use enlarged photographic, projected copies or juror notebooks.

3. Each counsel is responsible for any exhibits secured from the Clerk. At each noon-time or end-of-the-day adjournment, return all exhibits to the Clerk.

4. Let the Clerk know in advance the exhibits your next witness will be using.

5. All exhibits will be placed before the witness by the Clerk. Do not approach the witness with an exhibit without permission from the judge.

6. Show documents and other exhibits, where practical, to opposing counsel before their use in court.

7. In a rare case, when it is necessary to mark an exhibit in open court, ask that the Clerk so mark it and briefly describe the nature of the exhibit.

8. Exhibits not previously offered at the pretrial conference should be offered in evidence when they become admissible rather than at the end of counsel's case.

9. When referring to an exhibit, mention the exhibit number so that the record will be clear.

10. Counsel must review and certify on the record that what goes to the jury is correct before closing arguments.

11. At the end of trial, ordinarily exhibits will be returned to counsel.

Depositions

1. All depositions used at the trial must be in accordance with the Local Rules.

2. Portions of depositions used for impeachment may be read to the jury during cross-examination, with pages and lines indicated for the record before reading. The witness should be asked whether he or she was asked the questions and gave the answers on the date of the deposition(s).

Closing Arguments

Never assert your personal opinion of: 1) the credibility of a witness; e.g., "I know Witness X is telling you the truth," 2) the culpability of a civil litigant, or 3) the guilt or innocence of an accused. Never assert your personal knowledge of a fact in issue or a fact not in evidence, nor argue the "Golden Rule" -- e.g., "Do unto others as you would have them do unto you," -- "Treat plaintiff/defendant as you would like to be treated in such a situation."

Jury Instructions

Proposed instructions will be discussed at the final pretrial conference and filed as ordered by the court. See Local Rule 51.1. Supplemental instructions must be filed and served as soon as the need for them becomes apparent. Attempt to agree on neutral instructions. Remember less is better than more and "advocacy" instructions will be rejected. Some judges require "joint submissions" of instructions.

Professionalism

Remember -- professionalism is paramount in this district.

References

Guidelines for Litigation Conduct, Section of Litigation, American Bar Association, August 1998.

Standards for Civility in Professional Conduct, 1998, Sponsored by the Professional Ethics Committee of the Federal Bar Association.

Note: copies of these materials may be ordered by calling Stacy King at (202) 638-0252 or by sending an email to pubs@fedbar.gov.

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

FOR THE DISTRICT OF OREGON

Volume XVII, No. 2 *Summer 2013*

IN THIS ISSUE

THE INTEGRAL ROLE OF LOCAL COUNSEL IN THE DISTRICT OF OREGON

By: The Honorable John V. Acosta and Richard Vangelisti [1]

Local counsel's presence and participation have not been rendered obsolete by liberal rules for granting *pro hac vice* admissions, the increase in cross-border practice, or the availability of electronic filing. Strong participation of effective local counsel better serves the client and ensures that cases are handled in conformity with local rules and custom and with the level of professionalism expected of lawyers practicing in the District of Oregon. A relatively small bench and bar comprises the District of Oregon, and this characteristic has promoted and preserved collegiality and professionalism. This "Oregon Way" permeates local practice and procedure. This article covers topics that out-of-district counsel and local counsel should consider during their association on a matter and provides a judicial perspective on local counsel's importance.

"Meaningfully Participate." Out-of-district counsel may be admitted to the District of Oregon *pro hac vice* if they associate local counsel "who will meaningfully participate in the preparation and trial of the case." Local Rule 83-3(a)(1). This local rule provides flexibility to the court and counsel as to the appropriate level of participation by local counsel. If there is some doubt, however, on whether local counsel should participate in some aspect of the case or court proceeding, counsel should err on the side of participation. Out-of-district counsel should inform the client that the District of Oregon requires local counsel to "meaningfully participate."

No "Mailbox" Counsel in Oregon. At the beginning of the matter, the prospective local counsel will inform out-of-district counsel that local counsel will have to "meaningfully participate" in the case. A reminder from the court that such participation is required usually occurs at the early stages of the case. The Rule 16 scheduling conference is an opportunity for local counsel to introduce out-of-district counsel to the court. At this time, the court will set the expectation that local counsel will participate to ensure that the case proceeds according to the local rules, norms, and professionalism.

If out-of-district counsel does not take steps to have its local counsel meaningfully participate, the court will "encourage" the out-of-district counsel to do so. Counsel should expect that the court will from time-to-time look to local counsel for input at hearings and at trial.

Local Means Local. Out-of-district counsel generally should not retain "local counsel" whose office or practice is outside of Oregon, even if the lawyer is licensed in Oregon and admitted to the District of Oregon. Similarly, out-of-district counsel generally should not retain as "local counsel" a lawyer or law firm whose office is in a division of the district different from the division in which the case has been filed.

Continued on page 2

THE INTEGRAL ROLE OF LOCAL COUNSEL IN THE DISTRICT OF OREGON

Continued from page 1

These practices defeat both the purpose and spirit of the local rule. Conventions and customs differ between the district's four divisions or within the bar that practices in those divisions, and lawyers practicing in one division are not likely to be sufficiently familiar with another division's conventions and customs.

Professionalism. Local Rule 83-7(a) requires every lawyer admitted in the District of Oregon to be "familiar and comply with the standards of professional conduct required of members of the Oregon State Bar and this Court's Statement of Professionalism." The Statement of Professionalism is on the District's website.

Cooperation. Local Rule 83-8, "Cooperation Among Counsel," proscribes certain behaviors between opposing lawyers and establishes the consequences for engaging in unprofessional behavior. Note that the rule authorizes the judge to impose sanctions against an attorney who unreasonably refuses to "accommodate the legitimate requests of opposing counsel." Here, a reasonableness standard is applied to conduct occurring outside the judge's presence.

Credibility. Although out-of-district counsel may have a preexisting relationship with the client, out-of-district counsel should remember that local counsel will likely have greater credibility with the court, judicial staff, and opposing counsel. This greater credibility primarily stems from the reality that local lawyers likely will have previously appeared before the judge on other cases. Moreover, local lawyers and judges likely will have participated together in local bar and community activities, or have been involved in cases with one another when the judge was a practicing lawyer.

United States Magistrate Judges. In the District of Oregon, when a civil case is filed, it is randomly assigned "off the wheel" to an Article III or magistrate judge. Thus, Oregon's magistrate judges have a civil caseload, both in the number of cases as well as the subject matter of cases, identical to Oregon's district judges. Through Local Rule 72-1, the District designates every magistrate judge to conduct all pretrial proceedings contemplated by the *United States Code* and the *Federal Rules of Civil Procedure* without further designation or assignment from the court. Under Local Rule 73-1, parties may consent to magistrate judges for entry of final judgment and the conduct of any court or jury trial. However, in the District of Oregon, a magistrate judge continues to preside over a case, through the dispositive motion stage, even if there is not full consent by the parties. As described in Local Rule 73-2, because magistrate judges are not assigned criminal cases, they usually are able to set earlier and firmer trial dates. Parties in the District of Oregon routinely consent to the magistrate judge if assigned.

Know Your Judge. The District's website has extensive information about each judge, including the judge's resume, chambers information, case management information, and courtroom rules.

Conferral on Motions. Local Rule 7-1(a)(1) requires that the first paragraph of every motion must certify that the parties made "a good faith effort through personal or telephone conferences to resolve the dispute" before filing any motion (except TRO motions). An exception to this rule is a certification that the "opposing party willfully refused to confer." Counsel must actually talk to one another to satisfy the local rule's conferral requirement; email conferral and phone calls made minutes before filing the motion are not conferral under the local rule. Judges in the District expect that counsel for the parties will cooperate with one another in scheduling a conferral within a reasonable time of a request to confer. Local Rule 7-1(a) is often strictly enforced, and the Court may deny any motion that fails to meet the certification requirement. Local Rule 7-1(a)(2).

Written Submissions. Out-of-district lawyers should know that the written submissions in Oregon focus on the merits and not on the personalities of the lawyers or the character of the parties. They also demonstrate a respectful tone toward counsel and the judicial officer who reads the submissions. The late Magistrate Judge Donald C. Ashmanskas used humor in his timeless article, *Creating the Persuasive Argument*, to suggest that lawyers should "attack your opponent, call him names and impugn his motives." He of course meant to convey the opposite.

Local counsel in Oregon should review significant submissions before they are filed. Local counsel should excise words that are inconsistent with the principles summarized above. Words and statements that are "snarky" or disrespectful are unhelpful to the court.

Depositions. Counsel confer on scheduling depositions before serving a notice; depositions are not unilaterally noticed. "Speaking" or "coaching" objections are not allowed under FRCP 30(d)(1). Counsel should look to the Multnomah County Deposition Guidelines, available at https://mbabar.org/assets/depoguide2012.pdf, for guidance. If an issue arises during a deposition, a judge usually is available by telephone to immediately address the problem.

Discovery Sanctions. The District of Oregon is active in addressing dilatory or abusive discovery practices—even if the conduct is not willful. For example, FRCP 37 is entitled

"Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," and subsection (a)(5)(A) of the Rule makes clear that sanctions may be awarded without a finding that a party violated a court order or engaged in willful misconduct.

Imposition of sanctions under the rule turns on a reasonableness standard, a lower measure from the intentional misconduct standard that lawyers typically assume controls their discovery-related behavior. This standard has been applied in the District of Oregon. *See, e.g., Trustees of Oregon-Washington Carpenters-Employers Trust Funds v. Van Zant Construction, Inc*., 2008 WL 2381641, *3 (D. Or. June 3, 2008). Thus, although not willful misconduct, prolonged procrastination in responding to discovery requests that forces the propounding party to file a motion to compel simply to get a response is sanctionable under Rule 37. S*ee Bilyeu v. City of Portland*, 2008 WL 4912048, *3-7 (D. Or. Nov. 10, 2008).

Protective Orders. Local Rule 26-4 governs protective orders in the District. (See the court's "Forms of Protective Order" on the District's website.) Parties may amend or supplement the form order as necessary to meet the specific needs of their case – *e.g*., to address issues regarding the Privacy Act, 5 U.S.C. § 552a.

ADR – Mediation. Local Rule 16-4 sets forth the court's ADR procedures. Local Rules 16-4(c) and (d) require counsel for the parties to (1) confer regarding the potential benefits of any private or court-sponsored ADR option within 120 days from the initiation of the suit (LR 16-4(c)); and (2) file a Joint Alternative Dispute Resolution Report within 150 days of the initiation of the suit (LR 16-4(d)). Local counsel is expected to attend and participate in settlement conferences and mediation. Some of the judges maintain "Instructions for Settlement Conferences" on their individual pages on the court's website.

Trial Court Guidelines. Trial counsel should read these detailed guidelines on the District's website, which cover numerous topics including civility, voir dire, witnesses, objections, exhibits, depositions, and jury instructions. *See* "Trial Court Guidelines," *available at* http://ord.uscourts.gov/index.php/attorneys/tutorials-and-practice-tips/trial-court-guidelines.

Additional Resources. For an annotated set of the local rules, consider ordering *2012 District of Oregon Local Rules of Civil Procedure Annotated with Forms CD* by Kathryn Mary Pratt. Counsel also should consult the *Federal Court Practice Handbook, U.S. District Court for the District of Oregon* (revised ed. 2005 with 2009 Supplement & 2010 Limited Revisions). The Handbook consists of an Index to Questions, which lists each question by number, responses from each Article III and magistrate judge currently working in the District, a quick reference compilation of some of the answers to the questions that have been asked most frequently in the course of compiling the Handbook, and a technology supplement that lays out the current state of evidence presentation technology available in the various courtrooms. To order a copy, visit http://oregonfba.org/content/federal-court-practice-handbook.

[1] The Honorable John V. Acosta is a magistrate judge of the U.S. District Court for the District of Oregon. Richard Vangelisti practices plaintiff's personal injury law in Oregon. The authors serve as members of the Oregon Bench and Bar Joint Commission on Professionalism, and each is a past chair of the Commission. The authors also have served on the Board of the Oregon Chapter of the Federal Bar Association. The authors wish to acknowledge the contributions of the judges of the District of Oregon, Dennis Rawlinson, and Paul Xochihua. Their ideas were most helpful in developing this topic.

OREGON FBA INAUGURATES EUGENE LUNCHTIME PROGRAMS

Our FBA Chapter hopes to establish a stronger presence in Eugene by boosting membership and holding regular programs for members and guests. Our April 16 program entitled "Excessive Force and the Law: Plaintiff, Defense, and Court Perspectives," set us on a great path toward achieving those goals. The event inaugurated a lunchtime series at the Wayne Morse U.S. Courthouse, which will gather attorneys, law students, law professors, and court staff for discussions about current topics in the law.

Magistrate Judge Thomas Coffin, Elden Rosenthal (Rosenthal Greene & Devlin, PC), and Jim Rice (Portland City Attorney's Office) led a colorful and wide-ranging discussion about excessive force law. In addition to discussing what level of police force qualifies as "excessive," the panelists exchanged views on qualified immunity, punitive damages, and the differences in litigating such claims in federal and state court. About 50 members of the legal community attended the panel discussion, including members of the Lane County Bar Association and University of Oregon School of Law faculty and students.

We hope to continue to offer programs in this format and welcome suggestions for future topics. Please contact Paul Bruch (Paul_Bruch@ord.uscourts.gov) or Melissa Aubin (Melissa_Aubin@ord.uscourts.gov) with your suggestions. FBA thanks the Attorney Admissions Fund Committee for supporting this event.