

FUNDAMENTALS OF FEDERAL CRIMINAL PRACTICE SEMINAR



Fundamentals of Federal Criminal Defense

"Oh Acquittal Where Art Thou": Using Fed.R.Crim.P. 29, 30, 32, 33, 34, and 35 to Win Trials and Influence Sentencing

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Rule 29

Motion for Judgment of Acquittal

I. Purpose

Rule 29 authorizes the court, on the Defendant's motion or on the court's own motion, to enter a judgment of acquittal for "any offense for which the evidence is insufficient to sustain a conviction." Rule 29 clearly states that the court "must enter a judgment of acquittal" if the evidence is insufficient. As Judge Friendly wrote in *United States v. Taylor*, 464 F.2d 240 (2nd Cir. 1972),

"The functions of the jury includes the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice, or sympathy. The critical point in this boundary is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But, if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make."

464 F.2d at 243. Others have described Rule 29 as a check on the government's unbridled prosecutorial power, thus preventing erroneous convictions.

II. Definition of Insufficient Evidence

In order for evidence to be insufficient for Rule 29 purposes, the court must determine whether the evidence, viewed in the light most favorable to the government, establishes the essential elements of the offense. *United States v. Villarreal*, 324 F.3d 319 (5th Cir. 2003). The court should grant a Rule 29 motion if the record is devoid of any evidence from which a reasonable jury could find guilty beyond a reasonable doubt (*United States v. Curtis*, 324 F.3d 501 (7th Cir. 2003)) or if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt (*United States v. Chavez*, 230 F.3d 1089 (8th Cir. 2000)).

III. Procedure for Making a Rule 29 Motion

In order to make a motion for acquittal, all counsel needs to do is allege that the evidence is insufficient to sustain a conviction. No other reasons or grounds need be stated. The motion may be oral or written. *United States v. Navarro Viayra*, 365 F.3d 790 (9th Cir. 2004). In fact, alleging specific grounds for the motion for acquittal, other than general insufficiency of the evidence, constitutes waiver of any grounds not specifically asserted. *United States v. Herrera*, 313 F.3d 884 (5th Cir. 2002)(. . . whereas here, a defendant asserts specific grounds for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count).

IV. Timing of a Motion for Judgment of Acquittal

Rule 29(a) and (c) provide for making a motion for judgment of acquittal at three stages of the trial: (1) at the close of the government's evidence; (2) at the close of all the evidence; or (3) within seven days after a guilty verdict or after the court discharges the jury. Every stage listed above is independent and the defendant need not make a motion after the close of the government's evidence in order to make a motion at a later stage of the trial.

Robert's Rules of Advocacy:

Don't forget that if the defendant moves for judgment of acquittal at the close of the government's case, and presents defense evidence after the court has denied the motion, the defendant **MUST** make a later motion for acquittal in order to preserve the sufficiency of evidence issue for appeal. Failure to move for judgment of acquittal or renew the motion limits the appellate court's review of the sufficiency of the evidence issue to a clear error standard.

V. Factors that Affect Timing of the Motion

The timing of making the motion for judgment of acquittal may be critical for its success. If counsel makes a motion after the government rests, the defense is subject to the court granting the government's motion to reopen. Courts have been granted broad discretion "to permit the government to reopen where mere inadvertence or some other compelling circumstance justifies a reopening and there is no substantial prejudice." *United States v. Hinderman*, 625 F. 2d 994, 996 (10th Cir 1980).

VI. Procedures for Ruling on a Motion for Judgment of Acquittal

A. The Court's Grant of Judgment of Acquittal **Prior** to the Jury Verdict

- (1) The court may grant or deny a motion for acquittal made prior to the verdict or the court may reserve ruling on the motion until the close of all the evidence or until after the jury's verdict. If the court reserves ruling, it must evaluate the sufficiency of the evidence based on the evidence involved at the time the court reserved ruling. FED.R.CRIM.P. 29(b).
- (2) If the court grants the motion and enters judgment of acquittal prior to the jury's verdict, the case is terminated. Even if the court of appeals rules that the court's granting of the motion was improper, double jeopardy precludes a retrial. *Sanabria v. U.S.*, 437 United States 54, 69 (1978).

B. The Court's Grant of Judgment of Acquittal **Post** Jury Verdict

Rule 29(d) allows the district court to enter a judgment of acquittal after a guilty verdict; however, should it do so, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed on appeal. FED.R.CRIM.P. 29(d)(1). The finality of the grant of acquittal is not affected by the district court's grant of a conditional motion for a new trial. FED.R.CRIM.P. 29(d)(2). If the district court grants a conditional new trial motion, and the government is successful in reversing the judgment of acquittal on appeal, then a new trial will automatically be held on remand. Otherwise, the court of appeals has the option to either reinstate the jury's guilty verdict or remand the case back to the district court for a new trial.

Robert's Rules of Advocacy:

Defense counsel should join a Rule 29 motion with a motion for a new trial pursuant to Rule 33, as the court has more leeway to grant a motion for a new trial and the client will get another bite at the apple should the government secure a reversal from the appellate court.

C. Grounds for Granting a Judgment of Acquittal

The district court may only grant a motion for judgment of acquittal if it determines that there is insufficient evidence to find a defendant guilty beyond a reasonable doubt. A court may not consider or base its grant on inconsistency of verdicts, prosecutorial misconduct, in the interest of justice, or due to conduct during the trial. The trial court may not weigh the evidence or make its determination on its assessment of the credibility of the witnesses. Additionally, it may not function as the thirteenth juror. *United States v. Genova*, 333 F.3d 750 (7th Cir. 2003); *United States v. Ward*, 197 F.3d 1076 (11th Cir. 1990). Neither may the court *sua sponte* convert the motion for judgment of acquittal into a motion for a new trial. *United States v. Navarro Viayra*, 365 F.3d 790 (9th Cir. 2004).

Rule 30

Jury Instructions

I. Purpose

The purpose of Rule 30 is to provide a mechanism for counsel to assist the court in its duty to instruct the jury as to the law. “The primary function of a trial court’s instruction is to create a roadmap for jurors limning the legal rules that they must follow in finding the facts and determining the issues in a given case.” *United States v. Paniagua-Ramos*, 251 F.3d 242, 245 (1st Cir. 2001).

Counsel also bears a responsibility to advise the judge what they think the jury should or should not be told. *Id* at 246.

II. Counsel’s responsibility

- A. Submit proposed jury instructions to the court either at the close of evidence or earlier as directed by the court. Instructions should be in writing although courts at their discretion may consider oral requests.
- B. Serve opposing counsel with copies of proposed instructions.
- C. Object to court’s proposed instructions or for court’s failure to give a requested instruction. Objections must be made prior to the commencement of deliberations.

III. Court’s duty

- A. Inform counsel prior to final argument how it will rule on requested instructions. FED.R.CRIM.P. 30(b).
- B. Determine whether it will instruct the jury before or after final argument. FED.R.CRIM.P. 30(c).
- C. Determine whether instruction will be sent to the jury room.
- D. Give counsel an opportunity to object outside presence of the jury.

IV. Objections to instructions

- A. Must be on the record
- B. Objection must state the matter objected to and the grounds objected on in order to preserve appellate review. *United States v. Bailey*, 227 F.3d 792 (7th Cir. 2000).

- C. Must specifically object to the failure of the court to give a requested instruction. Merely tendering a proposed instruction does not preserve error. *United States v. Walker*, 720 F.2d 1527 (11th Cir. 1983).
- D. Objections must be specific. Merely alleging an incorrect statement of law, without specificity, will not preserve error. If the objection is not supported by evidence, counsel should review evidence showing lack of evidentiary foundation.
- E. Object to argumentative instructions.

Robert's Rules of Advocacy:

1. Prepare jury instructions early in the trial preparation process. Early in the case, review the elements instruction as a framework for discovery and preparation.
2. Object to any instruction that tells the jury that their job is to find the truth.
3. Don't rely on pattern jury instructions. Proposed instructions must be molded to fit the factual content of each case.
4. Insist that element instructions require the jury to find proof beyond a reasonable doubt of each fact to constitute the crime charged. *United States v. Winship*, 397 U.S. 358 (1970)(quoting *Davis v. United States*, 160 U.S. 469 (1895)); see also *United States v. Walker*, 720 F.2d 1527 (11th Cir. 1983).
5. Don't permit an interested witness instruction that is focused on the defendant's interest in supplying a motive to lie. *United States v. Gaines*, 457 F.3d 238 (2nd Cir. 2006).
6. Where applicable, propose a theory of defense instruction. A theory of defense instruction must contain an accurate statement of law, reflects a theory that is supported by the evidence, and reflects a theory that isn't already part of the charge. *United States v. Eberhart*, 467 F.3d 659 (7th Cir. 2006)
7. Object to any instruction that directs a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. *United States v. Gaines*, 457 F.3d 238 (2nd Cir.2006).

Rule 32

Sentencing and Judgment

I. Introduction

Your client has been found guilty or has pled guilty. Now what do you do? You start preparations for the next phase of the case -- sentencing. Since the United States Supreme Court liberated sentencing courts from the mandatory guidelines, sentencing has become more complex, time consuming, and important.

Rule 32 outlines the procedures to be followed during the sentencing process.

II. Presentence Investigation

A. Presentence Interview

Rule 32 does not mandate that the defendant submit to a presentence interview (PSI) but if an interview is held, counsel has a right to be present. The defendant retains his 5th amendment rights. *Mitchell v. United States*, 526 U.S. 314 (1999).

The PSI is fraught with peril for the defendant and counsel needs to consider the following:

1. Refuse to let client be interviewed. Some defenders have adopted this position and deviate only if there is clear advantage to their client.
2. Participate but refuse to answer questions on offense conduct and criminal history.
3. Questions about past drug usage pose a balancing act. If you refuse to answer, you may eliminate potentially harmful sentence aggravating information but you also may eliminate eligibility for the 500 hour extensive drug treatment program and resultant time cut.

If your client does participate in the PSI, counsel or another staff person should always be present. Unfortunately, a survey conducted by the Office of Defender Services of probation officers indicated that counsel was only present for the PSI approximately 50% of the time.

One only need read *United States v. Sanchez*, 484 F.3d 803 (5th Cir. 2007) to realize the ramifications of counsel either not being present during the PSI or the ineffectiveness of representation. In *Sanchez*, the defendant arranged for two illegal immigrants to be transported on a semi-trailer where subsequently numerous persons died. The Fifth Circuit reversed the district court's *below* guideline sentence,

quoting the presentence report in which the defendant, Ms. Sanchez, acknowledged her prior involvement with immigration smuggling and the awareness that the aliens would be transported in a semi-trailer.

III. Presentence Report: Rule 32(c)(1)

- A. Proposed amendment: The Supreme Court has proposed an amendment to Rule 32d(2)(F) to allow the district court judge to request that the probation officer include information about 18 U.S.C. § 3553(a) factors.
- B. Information used by the court to evaluate sentencing factors must be reliable and evidence must possess sufficient indicia of reliability to support probable accuracy. *U.S. v. Lanterman*, 76 F.3d 158, 161 (7th Cir. 1996)

A strong presumption of unreliability attaches to statements that are:

1. Given with government involvement
2. Describe past events
3. Have not been subjected to adversarial testing (*United States v. Jones*, 371 F.3d 363, 369 (7th Cir. 2004))

IV. Problem Areas

- A. Confidential Information
Rule 32(d)(3)(B) requires the probation office to exclude from the presentence report any source of information obtained upon a promise of confidentiality. However, Rule 32(i)(1)(B) requires the court to give to the defense counsel and the attorney for the government a written summary, or to summarize *in camera*, any information excluded from the presentence report upon which the court will rely. The court must also give counsel a reasonable opportunity to comment. The Sixth Circuit recently addressed this issue in *United States v. Hamad*, ---F.3d---, 2007 WL 2049867 (6th Cir. 2007). The Sixth Circuit held that because Hamad did not have a reasonable opportunity to comment on the submitted documents or to rebut the information, the sentencing court must either obtain permission to disclose the information or refrain from basing the sentence upon it. Due to the district court's failure to allow Hamad this opportunity, and the reliance of the district court on this information in increasing Hamad's sentence, the Sixth Circuit reversed finding that his sentence violated Rule 32 (i). *Id.* at *9.
- B. Notice of the Court's Intention to Depart Upward or Impose an Above Guideline Sentence.
Rule 32(h) states that if the court is going to depart from the applicable sentencing guideline range on a ground not identified in the presentence report or the party's presentence submissions, it must give reasonable notice to the parties.

Unfortunately, despite the rule's apparent clarity, many circuit courts of appeal have interpreted the rule, in light of *Booker*, in a way that would negate its intent. The various circuits' positions are as follows:

1. District courts must provide advance notice to the defendant before *sua sponte* imposing either an upward departure or an upward variance. (Second, Fourth, Sixth, Ninth, and Tenth Circuits)
2. District courts must provide advance notice of the court's intention to impose an upward departure but requires no notice where the court will impose an upward variance pursuant to 18 U.S.C. 3553(a). (Third, Eighth, and Eleventh Circuits)
3. No advance notice is required for either departure or variance. (Seventh Circuit)

Robert's Rules of Advocacy:

If the court did not give presentence notice of its intent to impose an enhanced sentence, move for a continuance.

Argue the reasoning of *United States v. Burns*, 501 U.S. 129, 139-140 (1991) which states that advance notice of the court's intention to upwardly depart requires specific grounds for the departure and allows testing by the adversarial process.

Argue that the United States Supreme Court in *United States v. Rita*, 127 S.Ct. 2456 (2007), affirmed the importance of advance notice by including paragraph 32(h) in its determination that sentencing decisions must be subjected to adversarial testing. This also allows for adequate investigation and research.

Rule 32(e)(2) requires a minimum of 35 days to prepare for the sentencing hearing after the receipt of the presentence report. If you do not get it, move for a continuance.

C. Defendant's Right to Effective Allocution.

Rule 32(i)(4) - Opportunity to speak to the court. Before imposition of sentence, the court must give defendant's attorney and the defendant an opportunity to speak or present any information to mitigate the sentence.

In *United States v. Luepke*, -F.3d-, 2007 WL 2091227 (7th Cir. 2007), the Seventh Circuit held that the sentencing court erred when it "adjudged a definitive

sentence” before the defendant had an opportunity to address the court. The court can violate this right by denying the right altogether or granting it in “form only.” The sentencing court must actively take steps to “communicate effectively to the defendant that he has a meaningful opportunity to influence the sentence through his statement.”

Robert’s Rules of Advocacy:

Have the client write out a statement in advance of sentencing. Spend the time to work with him. The court will then have the defendant’s information when it is making sentencing decisions. It also avoids the client getting nervous and being unable to address the court at the sentencing hearing.

When the court attempts to use uncharged conduct and the government relies on hearsay, argue that the evidence supporting the accusation is not credible, accurate, or reliable.

D. The Court’s Consideration of Uncharged Conduct in Determining the Defendant’s Sentence.

In *United States v. Vitrano*, –F.3d–, 2007 WL 2050400 (7th Cir. 2007) the Seventh Circuit, relying on 18 U.S.C § 3661 held that “[t]he trial judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it might come.’ This has long been considered to include ‘reliable evidence of wrong doing for which the defendant has not been charged or convicted.’” *Vitrano, id.* at *2 (citations omitted).

The Seventh Circuit has maintained that departures are obsolete after *Booker*. The Supreme Court specifically rejected that contention in *United States v. Rita*, 127 S.Ct. 2456 (2007).

V. Objecting to Presentence Report

A. The defendant must object to any disputed and/or inaccurate information or allegation contained in the presentence report. Objections must be made within 14 days after receiving the proposed presentence report. Objections must be tendered to the probation officer and served upon the AUSA.

If counsel does not object, the district court is permitted to use the contents of the presentence report as part of its findings of fact.

B. Defendant must be prepared to object to the following items:

1. Computation of guideline offense level. Challenge any adjustment or enhancement in the PSR, including loss amount, amount of drugs, Chapter III adjustments (such as role in the offense), and especially any claim of relevant conduct.
2. Factual allegation of the offense. Any fact not objected to is admitted. *United States v. Gollhofer*, 412 F.3d 953, 955 (8th Cir. 2005).
3. Personal information.
4. Prior criminal record and characterization of prior convictions as crimes of violence.

Robert's Rules of Advocacy:

Try to include as much mitigating information in your objections to the presentence report which may also serve as a basis for a below guideline sentence. This is not required but strongly advised.

Rule 33

Motion for New Trial

I. Purpose

A. Rule 33 creates two bases for filing a motion for a new trial

1. Rule 33 authorizes the court, upon the defendant's request, to vacate a verdict or judgment if the verdict or judgment is "so contrary to the weight of the evidence that a new trial is required in the interest of justice. . . . [I]f the complete record, testimonial and physical, leave a strong doubt as to the defendant's guilt even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial." *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999).
2. Rule 33 also authorizes a motion based on newly discovered evidence.

II. Time for filing

- A. A motion for a new trial, based on any ground other than newly discovered evidence, must be filed within seven days of the guilty verdict.
- B. A motion for a new trial based on newly discovered evidence must be filed within three years after the verdict.

III. Scope of court's review

The court looks to the weight of the evidence and credibility of the witnesses to determine whether allowing the verdict to stand would result in a miscarriage of justice.

IV. Requirements for filing the motion

- A. Trial must have resulted in a guilty verdict
- B. Defendant must move for a new trial within the time limits set forth in Rule 33.
- C. Defendant must show: (1) the interests of justice require a new trial; (2) the verdict would result in a miscarriage of justice if allowed to stand; or (3) claim newly discovered evidence.

V. Interest of justice defined

The phrase "in the interest of justice" encompasses sufficiency of the evidence as well as procedural errors which prejudice the defendant. In order to show prejudice, the court must

be convinced that without the error, a different outcome would have resulted.

VI. Procedural errors that have supported the granting of a new trial

A. Prosecutorial misconduct

Improper comments must undermine fairness of the trial before the court can overturn a conviction. *United States v. Mitrione*, 357 F.3d 712, 719 (7th Cir. 2004).

B. Vouching

Improper vouching occurs when the prosecutor expresses his personal belief in the truthfulness of a witness or implies that his personal opinion is based on facts not before the jury. *United States v. Renteria*, 106 F.3d 765, 767 (7th Cir. 1997).

C. Knowingly presenting false testimony

1. The court must believe that the testimony of a material witness was false and that the jury would have reached a different conclusion absent the false testimony. *United States v. Woods*, 301 F.3d 556 (7th Cir. 2002); *United States v. Rouse*, 410 F.3d 1005 (8th Cir. 2005); *United States v. Fruth*, 36 F.3d 649 (7th Cir. 1994).
2. If the government knowingly presented false testimony, the defense only needs to show some likelihood that the false testimony affected the verdict. *United States v. Ogle*, 425 F.3d 471 (7th Cir. 2005).

D. *Brady* violation

Law enforcement agent's notes impeaching a significant portion of a witness' testimony were not turned over. To warrant a new trial, non-disclosure must be so serious as to have produced a different verdict, if available to defendant. *Strickler v. Greene*, 527 U.S. 263 (1999).

E. Outrageous government conduct

Challenged conduct must be shocking, outrageous, and clearly intolerable. (Citations omitted). It must violate our sense of fundamental fairness or shock the universal sense of justice. *United States v. Pitt*, 193 F.3d 751, 761 (3rd Cir. 1999)(citations omitted).

F. Procedural errors

1. Absence of defense witnesses at trial

Error contributed to jury verdict. *United States v. Wilkerson*, 251 F.3d 273 (1st Cir. 2001).

2. Evidentiary errors
Court's numerous erroneous evidentiary rulings had a substantial effect on the verdict. *United States v. Troy*, 52 F.3d 207 (9th Cir. 1995).
3. Improper jury instruction
Erroneous refusal to give theory of defense instruction. *United States v. Vicaria*, 12 F.3d 195 (11th Cir.1994).
4. Misjoinder of parties
United States v. Tarango, 396 F.3d 666 (5th Cir. 2005).
5. Improper denial of continuance
Defendant must show prejudice by the court's refusal to grant a continuance. In *United States v. Vesey*, 330 F.3d 1070 (8th Cir. 2003), on eve of retrial, the government gave notice of Rule 404(b) evidence and additional witnesses. The defense suffered prejudice as it was unable to arrange for defense witnesses.

G. Ineffective assistance of counsel

The district court can *sua sponte* consider effectiveness of counsel in determining whether to grant a motion for a new trial. *United States v. Wilkerson*, 251 F.3d 273 (1st Cir. 2001).

H. Juror misconduct

Case agent report is inadvertently sent to jury room where it was read by jurors. *United States v. Harber*, 53 F.3d 236 (9th Cir. 1995).

I. Newly discovered evidence

1. Evidence must be truly newly discovered rather than simply newly available. *United States v. Turns*, 198 F.3d 584 (6th Cir. 2000).
2. Claim for new trial based on newly discovered evidence must be presented within 3 years of the verdict.
3. In order to support a claim for a new trial, the defendant must show:
 - a. The evidence has been discovered since the trial
 - b. The defendant could not have discovered the evidence previously using due diligence.
 - c. The newly discovered evidence is material

- d. The newly discovered evidence is more than merely cumulative or impeaching
- e. The evidence is of such quality that it would probably produce a different result at trial

Robert's Rules of Advocacy:

It is imperative to give the judge the fullest opportunity to set aside a conviction against the client. Even if the motion for judgment of acquittal is denied, the judge may still hold serious reservations about the verdict. The defendant's motion for a new trial gives the court authority it did not have during its consideration of a Rule 29 motion to weigh the evidence and determine witness credibility.

Just file the motion!

Rule 35

Correcting or Reducing a Sentence

- I. Uses:
 - A. To correct arithmetical, technical, or clear error
 - B. To reduce a sentence for substantial assistance to law enforcement
- II. Correcting a Sentence
 - A. The district court has 7 days after sentencing to take action.
 - B. The district court's authority to correct a sentence for clear error is limited to cases in which an obvious error or mistake has occurred in the sentence, that is, error which would almost certainly result in a remand to the trial court. *United States v. Ward*, 171 F.3d 188 (7th Cir. 1999)(citations omitted).
 - C. An illegal sentence has been defined as "one which is not authorized by the judgment or conviction, or is in excess of the permissible statutory penalty for the crime, or is in violation of the constitution." *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004).
- III. Reduction of Sentence
 - A. Rule 35 motion MUST be made by the government.
 - B. Rule 35(b) applies in the following situations:
 - 1. Cooperation occurred before sentencing.
 - 2. Cooperation not complete prior to sentencing and the government chooses to seek downward departure via Rule 35
 - 3. Post-sentencing cooperation
 - C. Rule 35 creates two time frames for seeking a reduction in a defendant's sentence
 - 1. Motion made within one year of sentence

Court can consider assistance to law enforcement provided after the sentence is imposed, and, pursuant to (b)(3), can consider presentence assistance.

2. Motion made more than one year after sentence

The court's power to reduce a sentence is limited to consideration of defendant's substantial assistance which is:

- a. not known to defendant until 1 year or more after sentence
- b. provided within one year but which did not become useful until more than 1 year after sentencing
- c. not apparent to defendant and assistance was promptly provided to the government

C. All Rule 35 motions are subject to the provisions of U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e).

1. U.S.S.G. § 5K1.1 authorizes a court to reduce a sentence based upon defendant's substantial assistance to law enforcement.
2. 18 U.S.C. § 3553(e) authorizes the court, as part of a sentence reduction, to impose a sentence lower than the mandatory minimum. The government, as part of its §5K1.1 or Rule 35(b) filing, must include in its request that the court impose a sentence below the statutory mandatory maximum.

Robert's Rules of Advocacy:

1. Know your AUSA and his or her definition of "substantial assistance."
2. Interview defendant as to what information and assistance he can provide. Share a summary with the AUSA or agent and try to obtain a commitment that the assistance will qualify for a departure.
3. Be present for every interview with your client. Take copious notes. Try to keep track of other court cases affected by your client. Keep in contact with the agent.
4. If client cooperated by setting up deals and/or making controlled buys, have him keep notes with dates and times of his cooperation.
5. If client cooperation is going to extend beyond the scheduled sentencing date, consider postponing sentencing.

6. Provide AUSA with detailed list of client's assistance.
7. Know the AUSA and judge's style for handling § 5K1.1 or Rule 35 requests. For example, does the AUSA recommend 1 level less than he believes appropriate, giving the judge room to increase?
8. Know whether the court's practice is to grant or deny motions without hearing. Rule 43(b) provides that the defendant need not be present and is not entitled to counsel at a Rule 35 hearing.
9. Mark the one year post-sentencing date in your calendar in order to timely remind the AUSA of the Rule 35 deadline.