

TABLE OF CONTENTS

Dedication	iii
Acknowledgements	v
Contributing Authors	vii

CHAPTER 1

A Constitutional Framework and Evolving Issues

§ 1.01	Obligations of a Defense Attorney	1-3
	[1] Pre-Indictment	1-4
	[a] First Do No Harm	1-4
	[b] Investigating a Client’s Memory of Events	1-6
	[2] After Adversary Proceedings Begin	1-7
§ 1.02	Fourth Amendment Regulation of Searches and Seizures	1-10
§ 1.03	Fifth Amendment Rights	1-14
	[1] Introduction	1-14
	[2] The Grand Jury Process	1-14
	[3] Insufficient Indictments	1-15
	[4] The Double Jeopardy Clause	1-15
	[5] The Right Against Self-Incrimination	1-17
	[6] Due Process Rights	1-18
	[a] Procedural Due Process	1-19
	[b] Substantive Due Process	1-24
	[c] The Equal Protection Component of the Due Process Clause	1-25
§ 1.04	The Sixth Amendment	1-27
	[1] Introduction	1-27
	[2] Speedy Trial Rights	1-27
	[3] A Public Trial	1-28
	[4] An Impartial Jury	1-29

DEFENDING FEDERAL CRIMINAL CASES

	[5]	Venue	1-30
	[6]	Notice of Charges	1-30
	[7]	Confrontation Rights	1-31
	[8]	Compulsory Process	1-33
	[9]	Assistance of Counsel	1-33
§ 1.05		The Eighth Amendment's Bail Provision	1-35
§ 1.06		Pushing the Envelope: Splits in the Circuits, Open Issues and Trends	1-37
	[1]	Pre-Trial and Discovery Issues	1-37
		[a] Providing Information to the Government	1-37
		[b] Dismissal of the Indictment	1-38
		[i] Pre-Trial Motions and Waiver	1-38
		[ii] Pre-Indictment Delay	1-38
		[iii] Outrageous Government Conduct	1-38
		[iv] Double Jeopardy	1-39
	[c]	The Government's Discovery Obligations	1-40
		[i] Statements of the Defendant	1-41
		[ii] Documents and Tangible Objects	1-43
		[iii] Delayed Disclosure Under <i>Brady</i>	1-43
		[iv] Notes, Summaries or Reports of Witness Statements Prepared by Agents	1-45
		[v] Electronic Surveillance	1-45
		[vi] The Government's Obligation to Identify Co-Conspirators in Bills of Particulars	1-46
	[2]	Jury Trial Right	1-46
	[3]	Evidentiary and Trial Issues	1-47
		[a] Fourth Amendment Issues	1-47
		[b] Fifth Amendment Issues	1-52
		[c] Evidentiary Issues Related to <i>Crawford</i>	1-53
		[d] Perjury by Government Witnesses	1-55
		[e] Government's Treatment of Defense Witnesses	1-57
		[f] How the Concept of Reasonable Doubt Is Presented to a Jury	1-58

TABLE OF CONTENTS

xv

[4]	Post-Trial Issues— <i>Crawford</i> 's Application at Post-Conviction Proceedings	1-59	
[5]	Standards on Appeal	1-60	
	[a] Fourth Amendment Seizures	1-60	
	[b] Required Pre-Trial Motions	1-60	
	[c] Motions to Dismiss an Indictment	1-60	
	[d] Burdens of Proof on Appeal	1-62	
		[i] Plain Error Rule and Modified Plain Error Rule.	1-63
		[ii] Whether the Government Should Bear the Burden of Proof for Its Constitutional Violations	1-63
[6]	The Status of Some Proposed Reforms	1-64	
	[a] Reconsideration of Qualified Immunity	1-64	
	[b] Bail Reform and Decoupling Parole Violations from Payment of Court Fees	1-65	
	[c] Prisoner Rights Including the Impact of Covid-19	1-66	
	[d] Juvenile Rights	1-69	

CHAPTER 1A

Representation Prior to Indictment

§ 1A.01	Introduction.	1A-2	
§ 1A.02	Federal Criminal Investigations	1A-4	
	[1] Agencies Responsible for Investigating Federal Crimes.	1A-4	
	[2] Federal Crime Prosecution	1A-11	
	[3] Tools of Federal Investigation.	1A-14	
		[a] Witness Interviews	1A-15
		[b] Subpoenas	1A-17
		[c] Search Warrants and Related Techniques	1A-18
		[d] Undercover Investigations	1A-20
		[e] Electronic Surveillance.	1A-22

DEFENDING FEDERAL CRIMINAL CASES

	[i] Pen Registers, Stored Email, and Cell-Site Information	1A-22
	[ii] Title III Wiretapping	1A-28
	[f] Gathering Evidence from Outside of the United States	1A-35
[4]	Federal Grand Jury Investigation	1A-39
	[a] The Authority of the Grand Jury	1A-39
	[b] Grand Jury Secrecy	1A-42
	[c] The Privilege Against Self-Incrimination and Statutory Immunity	1A-45
§ 1A.03	Issues in Pre-Indictment Defense Representation	1A-46
	[1] Target/Subject Distinction	1A-46
	[2] Meeting with the Government	1A-47
	[3] Defense Investigation	1A-48
	[4] Issues that Arise when Deciding Whether to Cooperate with the Government	1A-51
	[5] Proffer Sessions	1A-52
	[6] Independent Representation for Corporate Counsel and Individual Employees, Officers and Directors	1A-58
	[7] Risks to the Individual Employee from Interviews with Corporate Counsel	1A-60
	[8] Fee Advancement and Indemnification	1A-64
	[9] Standards Applied in Deciding Whether to Charge a Corporation	1A-66
	[10] Deferred Prosecution Agreements, Non-prosecution Agreements and the Use of Corporate Monitors	1A-73
	[11] The Future of Corporate Criminal Liability	1A-82
§ 1A.04	Preindictment Presentation to the Government	1A-86

CHAPTER 1B**Pre-Trial Resolutions**

§ 1B.01	Introduction	1B-3
§ 1B.02	Declinations	1B-4
	[1] When Applicable	1B-4
	[2] Enforceability of Declinations in Court	1B-5

TABLE OF CONTENTS

xvii

	[a] Declinations Are Not Binding Contracts with the Government	1B-5
	[b] Declinations Are Not Admissible as Evidence of Innocence	1B-6
§ 1B.03	Non-Prosecution Agreements and Deferred Prosecution Agreements	1B-7
	[1] When Applicable	1B-7
	[2] Typical Terms	1B-7
	[3] Guidelines for Prosecutors	1B-8
	[4] Judicial Oversight of NPAs and DPA	1B-10
	[a] Judicial Review of the Merits of an NPA or DPA	1B-11
	[b] Judicial Review of an Alleged Breach of an NPA or DPA	1B-12
§ 1B.04	Immunity and Cooperation Agreements	1B-14
	[1] When Applicable	1B-14
	[2] Formal Immunity	1B-14
	[3] Informal Immunity	1B-17
§ 1B.05	Alford Pleas	1B-22
§ 1B.06	Plea Agreements	1B-23
	[1] When Applicable	1B-23
	[2] Factual Stipulations	1B-24
	[3] Agreements to Plead Guilty to Particular Charges	1B-24.1
	[4] Prohibition on Additional Charges for Described Conduct	1B-24.2
	[5] Agreed upon Sentencing Guidelines and Range	1B-27
	[6] Defendant Waivers	1B-27
	[a] Right to Indictment	1B-29
	[b] Right to <i>Brady</i> Material	1B-29
	[c] Right to FOIA Request	1B-31
	[d] Right to Plead Not Guilty	1B-32
	[e] Right against Self-Incrimination	1B-33
	[f] Statute of Limitations Defense	1B-34
	[g] Other Trial Rights	1B-35
	[h] Argument Regarding Guideline Calculation at Sentencing	1B-35
	[i] Right to Appeal	1B-35
§ 1B.07	Attacking a Plea Agreement on Appeal	1B-38
	[1] Establishing that the Plea Agreement Is Invalid	1B-39
	[2] Establishing that the Government Breached the Agreement	1B-40

DEFENDING FEDERAL CRIMINAL CASES

[3]	Establishing that the Waiver Itself Is Invalid	1B-40
[4]	Establishing that Enforcement of the Waiver Would Result in a “Miscarriage of Justice”	1B-41
[5]	Establishing that Ineffective Assistance of Counsel Rendered the Waiver Involuntary or Unknowing	1B-42
[6]	Establishing that the Sentence Was Not in Accordance with the Law	1B-43
[7]	Establishing that the Sentence Was Affected by Unconstitutional Considerations	1B-44

CHAPTER 1C**Crisis Communications and Media Strategy**

§ 1C.01	Introduction	1C-3
[1]	The Court of Public Opinion v. a Court of Law	1C-6
[a]	Litigating to Influence a Court v. the Public	1C-6
[b]	Understanding What “Cuts Through” to the Public	1C-7
[2]	The Purpose of a Media Strategy	1C-8
[a]	To Influence the Public	1C-8
[b]	To Obtain Pre-Trial Release and Bail Pending Appeal	1C-8
[c]	To Protect a Client’s Other Interests	1C-9
[d]	To Begin Establishing the Defense Theory of the Case	1C-9
[e]	To Keep a Check on the Prosecutor	1C-10
[i]	Touhy Demand for Pre- Trial Government Testimony	1C-11
[ii]	Pre-Trial FOIA Requests for Agency Documents	1C-13
[iii]	The Justice Manual’s “Confidentiality and Media Contacts” Policy	1C-15

TABLE OF CONTENTS

xix

§ 1C.02	The Role of a Media/Communication Strategist	1C-25
	[1] To Prepare Defense Counsel to Be Nimble and Outpace Crises.	1C-25
	[2] To Work as Part of the Legal Team.	1C-25
	[a] Kovel Letters	1C-25
	[b] In-house Crisis Communications Experts	1C-28
	[3] To Protect the Client’s Brand	1C-29
	[4] To Keep the Client in the Best Condition to Survive the Investigation/Charges.	1C-29
	[5] To Set the Client Up to Survive after the Criminal Matter Is Over	1C-29
§ 1C.03	Identify Your Client’s Interest.	1C-31
	[1] An Individual v. a Company’s Brand.	1C-31
	[2] Working with the Client’s Employer and Other Employees	1C-31
§ 1C.04	Check the Rules	1C-33
	[1] Rules Applicable during Investigations	1C-33
	[2] Rules Applicable during Pending Cases	1C-37
	[a] Press Conferences during Pending Cases.	1C-37
	[b] Leaking Confidential Documents	1C-37
	[c] Leaking Grand Jury Testimony.	1C-38
	[3] Statements that May Be Admissible against a Client	1C-38
	[4] Sanctions.	1C-39
§ 1C.05	Crafting the Message	1C-44
	[1] Who is the Audience?	1C-44
	[2] Public Statements.	1C-44
	[a] Providing Backgrounding v. Speaking “On the Record”	1C-44
	[b] Who Should Make a Statement?	1C-45
	[c] With Which Journalists Should You Speak?	1C-46
	[3] Repetition of the Message.	1C-46
	[4] The Impact of “No Comment”	1C-47
§ 1C.06	Weaving the Media Strategy into the Litigation Strategy	1C-49
	[1] Writing “Media-Friendly” Motions, Filings, and Briefs	1C-49

DEFENDING FEDERAL CRIMINAL CASES

	[2]	Considerations when Making Dispositive Motions	1C-49
	[3]	Amicus Briefs	1C-50
§ 1C.07		The Impact of a Successful Media Strategy . . .	1C-51
§ 1C.08		Preparing the Client Who Must Answer Questions Outside of Court	1C-53
§ 1C.09		After the Case Is Over	1C-54
	[1]	Positioning the Client to Discuss the Case	1C-54
	[2]	Strategizing the Message	1C-54
	[3]	Staying with the Client Post-Case	1C-54

CHAPTER 2**Bills of Particular**

§ 2.01		Introduction	2-2
§ 2.02		The Role of a Bill of Particulars in Obtaining a Fair Trial	2-5
	[1]	History and Requirements of the Rule Providing for a Bill of Particulars . . .	2-5
		[a] The Constitutional Bases for Bills of Particulars	2-5
		[b] The History of Rule 7(f)	2-7
		[c] Bills of Particulars in Modern Prosecutions	2-10
	[2]	The Purposes of a Bill of Particulars . . .	2-12
		[a] Preparation for Trial	2-12
		[b] To Avoid Prejudicial Surprise	2-14
		[c] Preclusion of Double Jeopardy	2-15
§ 2.03		Disputing Standard Prosecution Arguments Against Bills of Particulars	2-17
	[1]	When Defendants Have a Right to Evidentiary Detail	2-17
	[2]	When Defendants Have a Right to Specification of Details Provided in Other Discovery	2-19
	[3]	When an Indictment Provides Insufficient Detail	2-21
	[4]	Defendants' Need for Evidence of Uncharged Crimes	2-25
§ 2.04		Timing of Requests	2-27
	[1]	Informal Requests for Particulars	2-27
	[2]	Motions for Particulars	2-27

TABLE OF CONTENTS

xxi

§ 2.05	Necessity and Authority for Specific Particulars	2-29
	[1] All Cases: Specification of Date and Time of Alleged Activity	2-29
	[2] Fraud Cases: Specification of False Statements	2-32
	[3] Conspiracy Cases: Identification of Co-conspirators	2-35
	[4] RICO Cases: Specification of Enterprise and Racketeering Acts	2-39
§ 2.06	Affirmative Uses of Particulars	2-41
	[1] Preventing the Government from Switching Theories During Trial	2-41
	[2] Use of Amended Bills of Particulars	2-42

CHAPTER 3

Motions: Bail, Dismissal, Venue, Suppression, and Severance

§ 3.01	Introduction	3-4
§ 3.02	The Eighth Amendment's Limits on Bail, Related Statutes and Rules	3-6
	[1] Pretrial Bail	3-6
	[a] Release Prior to Trial	3-6
	[b] Release During Trial	3-10
	[2] Post Conviction Bail	3-10
	[a] Pending Sentencing	3-10
	[b] Pending Appeal	3-11
	[c] Pending Collateral Attack	3-12
§ 3.03	Pretrial Motion to Dismiss	3-14
	[1] Standards for Dismissal	3-14
	[2] Dismissal for Insufficient Evidence	3-18
	[a] Elements of a Sufficient Indictment	3-18
	[b] Nature of Evidence Supporting Indictment	3-20
	[c] Standards of Review	3-22
	[i] District Court Standard	3-22
	[ii] Appellate Standard	3-23
	[3] Dismissal for Delay	3-24
	[a] Pre-Indictment	3-24
	[i] Statute of Limitations	3-25

		[ii] Speedy Trial Act Violation	3-25
	[b]	Pretrial	3-27
		[i] Sixth Amendment Violation	3-27
		[ii] Speedy Trial Act Violation	3-31
		[iii] Rule 48 of the Federal Rules of Criminal Procedure	3-32
	[c]	Appeal	3-32
§ 3.04		Improper Venue	3-35
	[1]	Dismissal for Improper Venue Under Rule 18	3-35
		[a] Rule 18	3-35
		[b] Multi-Venue Offenses	3-37
		[c] Joinder of Multiple Defendants	3-38
		[d] Joinder of Multiple Offenses	3-38
		[e] Special Venue Statutes	3-39
		[i] Mail and Wire Fraud	3-39
		[ii] Securities Fraud	3-39
		[iii] Money Laundering	3-40
		[iv] Internal Revenue Offenses	3-40
	[f]	Challenging Venue: Procedural and Practical Considerations	3-40
		[i] Prior to Trial	3-40
		[ii] At the Close of the Government's Case	3-41
	[g]	Waiver of Proper Venue	3-42
	[2]	Motions for Change of Venue	3-43
		[a] Rule 21(a) and the Sixth Amendment Right to a Fair Trial	3-43
		[i] Presumed Prejudice	3-45
		[ii] Actual Prejudice	3-46
		[iii] Burden of Proof	3-47
		[iv] Standard of Review	3-47
		[v] Typical Cases Warranting Change of Venue Under Rule 21(a)	3-47
		[vi] Factors Considered in Ruling on Rule 21(a) Motion	3-48
		[vii] The Role of <i>Voir Dire</i> in a Rule 21(a) Motion	3-53
	[b]	Rule 21(b)	3-54
		[i] Location of Defendants	3-56

TABLE OF CONTENTS

xxiii

	[ii]	Location of Possible Witnesses	3-56
	[iii]	Location of Events	3-57
	[iv]	Location of Documents and Records	3-58
	[v]	Disruption of Defendant’s Business	3-59
	[vi]	Expense to the Parties	3-60
	[vii]	Docket Condition of Each District Involved.	3-60
	[viii]	Other Factors	3-61
§ 3.05		Motion to Suppress.	3-63
	[1]	Procedure	3-63
		[a] Timing of Filing Motion	3-63
		[b] Notice of Intent to Use Evidence	3-63
		[c] Prior Statements and Records of Witnesses	3-64
		[d] Waiver and Relief from Waiver	3-65
		[e] Evidentiary Hearing	3-66
		[f] Ruling on Motion and Appeal of Decision	3-67
	[2]	Substantive Grounds	3-68
		[a] Constitutional Violations	3-69
		[i] Fourth Amendment.	3-70
		[ii] Fifth Amendment	3-73
		[iii] Sixth Amendment.	3-75
		[b] Statutory Violations	3-77
	[3]	Burden of Proof	3-78
§ 3.06		Motions to Sever	3-79
	[1]	Standards for Severance	3-79
		[a] Misjoinder.	3-79
		[i] Joinder of Offenses— Rule 8(a).	3-80
		[ii] Joinder of Defendants— Rule 8(b).	3-81
		[iii] Attacking Joinder Under Rule 8	3-82
		[b] Prejudicial Joinder	3-86
		[i] Establishing Prejudice	3-86
		[ii] Attacking Joinder Under Rule 14: The Roadmap	3-87
	[2]	Burden of Proof	3-93
		[a] Misjoinder.	3-93
		[b] Prejudicial Joinder	3-94

DEFENDING FEDERAL CRIMINAL CASES

	[c] Attacking the Efficiency Assumptions of Joinder	3-94
§ 3.07	Motions for Judgment of Acquittal	3-96
	[1] Motions Before Submission to the Jury	3-98
	[2] Motions After Jury Verdict or Discharge	3-99
§ 3.08	Conditional Ruling on a Motion for a New Trial	3-101

CHAPTER 4**Government Disclosure Pursuant to Rule 16
and 18 U.S.C. § 3500**

§ 4.01	Introduction: Constitutional Underpinnings . . .	4-3
§ 4.02	Federal Rule of Criminal Procedure 16	4-7
	[1] Scope of Discovery	4-7
	[a] Statements of the Defendant	4-7
	[i] Generally	4-7
	[ii] Organizational Defendants	4-15
	[iii] Defendant's Prior Record	4-16
	[b] Documents and Tangible Objects	4-18
	[c] Reports of Examinations or Tests	4-29
	[d] Expert Witnesses	4-31
	[i] Triggering Expert Disclosure Obligations	4-31
	[ii] Scope and Timing of Expert Discovery	4-32
	[e] Grand Jury Materials	4-34
	[f] Witness Lists and Identities of Informants	4-36
	[2] Disclosure, Requirements at Sentencing, Forfeiture, Restitution and Other Hearings	4-41
	[3] Continuing Disclosure Obligations	4-43
	[a] Generally	4-43
	[b] After Trial	4-45
	[4] Obtaining Discovery of Materials That Are Not Discoverable Under Rule 16	4-45
	[a] Generally	4-45

TABLE OF CONTENTS

	[b] Protective and Modifying Orders	4-46
	[c] Parallel Proceedings	4-48
[5]	Obtaining Discovery	4-50
	[a] Letters and Motions	4-50
	[b] Local Rules and Practices	4-52
	[c] Department of Justice Guidance Regarding Criminal Discovery	4-53
[6]	Judicial Review of Nondisclosure Pursuant to Rule 16	4-55
	[a] The Trial Court	4-55
	[b] Appellate Review	4-56.4
§ 4.03	The Jencks Act, 18 U.S.C. § 3500 and Federal Rule of Criminal Procedure 26.2	4-57
	[1] Generally	4-57
	[2] “Statements” Subject to Disclosure	4-60.1
	[a] Written Statements by the Witness, Signed or Otherwise “Adopted or Approved”	4-60.1
	[b] “Substantially Verbatim” Recordings or Transcriptions of a Witness’s Oral Statement	4-60.3
	[c] Statements by the Witness to the Grand Jury	4-60.4
	[d] Notes, Summaries or Reports of Witness Statements Prepared by Government Agents	4-60.5
	[3] Relevance	4-60.6
	[4] “In the Possession of the United States”	4-60.7
	[5] Timing of Disclosure	4-61
	[a] In Connection with Trial	4-61
	[b] In Connection with Sentencing, Forfeiture, Restitution and Other Hearings	4-63
[6]	Obtaining Statements	4-63
	[a] Requests	4-63
	[b] Motions	4-65
	[c] Local Rules and Practices	4-66
[7]	Judicial Review of Nondisclosure Pursuant to 18 U.S.C. § 3500	4-68
	[a] The Trial Court	4-69
	[b] Appellate Review	4-70

§ 4.04	Related Government Obligations	4-73
	[1] Electronic Surveillance	4-73
	[a] The Defendant's Burden	4-73
	[b] Access to Recordings and Costs of Duplication	4-75
	[c] Identification of Recordings Capturing or Relevant to the Defendant	4-76
	[d] Preparing Transcripts	4-77
	[e] Quality Issues	4-80
	[2] Voluminous Documents	4-81
	[a] Access to Documents and Costs of Duplication	4-81
	[b] Identifying Material Relevant to the Defendant	4-82
	[3] Electronic Materials	4-85
	[a] Access to Electronic Materials and Costs of Duplication	4-85
	[b] Remedies for Inadequate Disclosure	4-87

CHAPTER 5

Disclosure Pursuant to *Brady v. Maryland*

§ 5.01	Introduction	5-3
§ 5.02	Requesting <i>Brady</i> Material	5-5
	[1] By Letter	5-5
	[2] By Motion	5-5
§ 5.03	The Elements of a <i>Brady</i> Violation: Evidence Favorable to the Accused	5-6
	[1] Exculpatory Evidence	5-8
	[2] Impeachment Evidence	5-9
	[a] Benefits Provided to Government Witnesses	5-12
	[b] Prior Statements and Interviews	5-14
	[3] Information Related to the Defense Theory of the Case	5-15
	[4] Evidence the Prosecution Does Not Intend to Use at Trial	5-16
	[5] Inadmissible Evidence	5-16
§ 5.04	Elements of a <i>Brady</i> Violation: Evidence That Was Undisclosed	5-19
	[1] Government's Knowledge	5-19

TABLE OF CONTENTS

xxvii

	[a] Other Government Agencies	5-20
	[b] Private Actors	5-23
	[c] Government Witnesses	5-23
	[d] Corporate Internal Investigations	5-24
	[2] Exceptions	5-25
§ 5.05	Elements of a <i>Brady</i> Violation: Materiality	5-29
	[1] Aspects of Materiality	5-29
	[2] Materiality Not Found	5-32
	[a] Defendant’s Own Statements	5-32
	[b] Cumulative Evidence	5-33
§ 5.06	Materiality From Other Perspectives	5-35
	[1] Materiality as Reviewed on Appeal	5-35
	[2] Problems with the Materiality Standard	5-37
	[a] Materiality as an Unworkable Standard for the Government	5-37
	[b] Materiality in the Pretrial Context	5-39
	[3] Materiality in Other Contexts	5-42
	[a] Materiality in the Securities Laws	5-42
	[b] Materiality Under Other Laws	5-43
	[4] Proposed New Materiality Inquiry	5-44
§ 5.07	When Information Must Be Disclosed	5-46
	[1] Prior to Testimony or Cross-Examination	5-47
	[2] Prior to Sentencing	5-48
	[3] Prior to a Plea	5-49
	[4] <i>Ex Parte</i> Disclosure Proceedings	5-50
	[5] Delayed Disclosure	5-51
§ 5.08	Classified Information Procedures Act and <i>Brady</i> Material	5-54
§ 5.09	Local Rules and Department of Justice Policy	5-56
§ 5.10	The Government’s Duty to Preserve Potential <i>Brady</i> Material	5-61
	[1] Exculpatory Value	5-62
	[2] Comparable Evidence	5-62
	[3] Bad Faith	5-63
	[4] Remedies	5-66
§ 5.11	The Burden of Proof	5-67
§ 5.12	<i>Brady</i> and Rule 33	5-69
	[1] Timing	5-69
	[2] Standards	5-69
§ 5.13	<i>Brady</i> on Collateral Review	5-71
	[1] The Section 2254 Heightened Standard for Collateral Review	5-71

	[a] Section 2254(d)(1)	5-72
	[b] Section 2254(d)(2)	5-74
	[2] The Section 2255 Limitations Period	5-75
§ 5.14	Civil Litigation Insights into <i>Brady</i> Rights	5-78
	[1] Absolute Immunity	5-79
	[2] Qualified Immunity	5-80
	[3] Municipal Liability	5-80
§ 5.15	Recently Enacted and Proposed Legislation	5-82
	[1] Federal	5-82
	[a] Due Process Protections Act	5-82
	[2] State	5-83
	[a] Georgia	5-83
	[b] New York	5-83
	[c] Virginia	5-83

CHAPTER 6

The Right to Cross-Examine Government Witnesses: *Crawford* and Beyond

§ 6.01	Sixth Amendment Confrontation Clause	6-3
	[1] What It Is	6-3
	[2] Purpose	6-4
	[3] Application	6-4
§ 6.02	Pre- <i>Crawford</i> Tests for Admissibility of Out-of-Court Statements	6-5
	[1] <i>Ohio v. Roberts</i> : Indicia of Trustworthiness	6-5
	[a] Unavailability	6-6
	[b] Indicia of Trustworthiness	6-8
	[i] Firmly Rooted Hearsay Exception	6-8
	[ii] Particularized Guarantees of Trustworthiness	6-9
	[2] Tests Governing Statements Inculpat- ing Defendant	6-10
	[a] <i>Bruton v. United States</i> : Inadmissibility of Accomplice's Confessions Inculpat- ing Defendant	6-11
	[b] Admission of Accomplice's Confession Redacted to Omit References to Defendant	6-11
§ 6.03	<i>Crawford v. Washington</i>	6-13

TABLE OF CONTENTS

xxix

[1]	Factual Background	6-13
[2]	Abrogation of Pre- <i>Crawford</i> Tests for Testimonial Statements	6-13
[a]	Right to Confront Witnesses Includes Right to Confront “Testimony”	6-14
[b]	Breaking Away from “Guarantees of Trustworthiness” Standard	6-14
[3]	The <i>Crawford</i> Approach: Testimonial vs. Non-Testimonial	6-16
[a]	Statements Held to Be Testimonial	6-16
[i]	Statements in Response to Investigating Officers, Prosecutors, Etc.	6-18
[ii]	Statements in Response to Other Professionals Called Upon to Aid in Prosecution	6-21
[iii]	Statements Reporting or Describing Criminal Activity	6-22
[iv]	Forensic Laboratory Reports	6-22
[b]	Statements Held to Be Non-Testimonial	6-30
[i]	Statements Made in Furtherance of a Conspiracy	6-30
[ii]	Business Records and Public Records	6-31
[iii]	Excited Utterances	6-36
[iv]	Statements of Then-Existing State of Mind	6-42
[v]	Statements Made for Purpose of Medical Diagnosis	6-43
[vi]	Statements by Children in Response to Social Workers, Counselors and Teachers	6-44
[vii]	“Casual” or “Idle Chatter” Statements	6-46
[viii]	Redacted Statements—Not Used as “Testimony” Against Defendant	6-48

DEFENDING FEDERAL CRIMINAL CASES

	[ix] Recorded Conversations	6-50
	[c] Dying Declarations	6-50
	[d] Statements Not Reviewed Under <i>Crawford</i> Standard	6-51
	[i] Statements Not Offered for the Truth of the Matter Asserted	6-51
	[ii] Statements Relied Upon by Expert Witness	6-54
	[iii] Forfeiture by Wrongdoing Exception	6-55
§ 6.04	Admissibility of Testimonial vs. Non-Testimonial Statements: The Death of <i>Ohio v. Roberts</i> ?	6-56.1
§ 6.05	Application of <i>Crawford</i> on Direct Appeal	6-60
	[1] Retroactive Application on Direct Appeal	6-60
	[2] Standard of Review	6-60
	[a] Harmless Error	6-60
	[b] Plain Error	6-62
§ 6.06	Applicability of <i>Crawford</i> in Other Proceedings	6-65
	[1] <i>Habeas Corpus</i> Proceedings	6-65
	[a] Standard for <i>Habeas Corpus</i> Relief	6-65
	[b] <i>Crawford</i> Does Not Apply Retroactively on Collateral Appeal	6-66
	[2] Sentencing Hearings	6-70
	[3] Parole and Probation Revocation Hearings	6-73
	[4] Probable Cause Hearings	6-75
	[5] <i>Batson</i> Hearings	6-76
	[6] Virtual, Closed-Circuit Testimony	6-76

CHAPTER 7

Tools for Attacking Typical Government Witnesses

§ 7.01	Introduction	7-3
§ 7.02	Obtaining Information from Third Parties	7-5
	[1] Fact Investigations, Investigators and Defense Experts	7-5

TABLE OF CONTENTS

xxxii

	[a]	The Defendant Has an Equal Right to Witnesses	7-5
	[b]	Investigators and Defense Experts	7-5
[2]		Subpoenas	7-7
	[a]	Pretrial Subpoenas for Production of Documents or Objects (Pretrial Subpoenas <i>Duces Tecum</i>)	7-7
	[i]	Obtain Favorable Evidence	7-7
	[ii]	Production Encouraged in Complex Cases	7-9
	[iii]	Limitations and Issuance of Subpoenas <i>Duces Tecum</i>	7-9
	[iv]	Motions to Quash or Modify Subpoenas <i>Duces Tecum</i>	7-11
	[v]	Legal Standing to Move to Quash or Modify	7-14
	[vi]	Special Situations in White Collar Cases Where Corporation Is Cooperating	7-15
	[b]	Trial Subpoenas	7-16
	[c]	Issuance, Form and Service of Subpoenas	7-18
	[i]	In General	7-18
	[ii]	Defendants Unable to Pay	7-19
[3]		Depositions	7-21
	[a]	Depositions Permitted Under Exceptional Circumstances	7-21
	[b]	Depositions as a Sanction for Prosecutorial Misconduct	7-25
	[c]	Possible Constitutional Limitations on Government Requests for Depositions	7-25
	[d]	Procedural Requirements for Depositions	7-27
	[i]	Notice and Timing	7-27
	[ii]	Manner of Taking Depositions	7-28
	[iii]	Depositions Conducted in Foreign Countries	7-28

§ 7.03	Limitations on the Testimony of Government Witnesses	7-31
[1]	Limitations on Opinion Testimony	7-31
	[a] Expert Witness Testimony	7-32
	[i] Evidentiary Rules	7-32
	[ii] Disclosure Rules	7-37
	[b] Lay Opinion Testimony	7-38
	[c] Summary Witness Testimony	7-45
[2]	Cross-Examination with Documents	7-46.1
	[a] Plea Agreements	7-47
	[b] Prior Statements to Law Enforcement	7-51
	[c] Grand Jury Testimony	7-53
	[d] Polygraph Results	7-54
§ 7.04	Jury Instructions	7-56
[1]	Informants, Accomplices, Immunized Witnesses, Cooperators and Defendants	7-56
	[a] Cautionary Instructions	7-56
	[b] Limiting Instructions	7-59
	[i] Guilty Pleas	7-59
	[ii] Civil Settlements	7-61
[2]	Law Enforcement Agents	7-62
[3]	Experts	7-63
	[a] Relevant Standards	7-63
	[b] Cautionary Instructions	7-65
	[i] In General	7-65
	[ii] Expert Law Enforcement Witnesses	7-66
[4]	Summary Witnesses	7-66

CHAPTER 8

False Testimony by Government Witnesses

§ 8.01	Introduction	8-2
§ 8.02	Elements of a Due Process Violation	8-4
	[1] False Testimony	8-4
	[2] Materiality	8-7
§ 8.03	Government Knowledge of the Falsity	8-13
§ 8.04	Pretrial Motions Based upon Perjury	8-17
	[1] Dismissal of the Indictment Based upon Perjury Before the Grand Jury	8-17
	[2] Suppression Based upon Pretrial Affidavits and Hearings	8-21

TABLE OF CONTENTS

xxxiii

§ 8.05	Trial Strategies to Deal with Perjury	8-26
§ 8.06	New Trial Motions	8-30
	[1] Requirements for Grant of New Trial	8-30
	[2] When the Government Knew or Should Have Known of Perjury	8-31
	[3] When the Government Was Unaware of Perjury	8-34
	[a] The Prospective “Probability” Standard	8-39
	[b] The Retrospective Probability Standard	8-42
	[c] The Possibility Standard	8-43
	[d] Circuits in Which the Standard Is Unclear	8-44
§ 8.07	Standard on Appeal	8-47
§ 8.08	Standard for <i>Habeas</i> Review	8-49

CHAPTER 9

The Fifth Amendment Right to Due Process

§ 9.01	Introduction: The Scope of the Fifth Amendment Due Process Clause	9-3
	[1] Substantive Due Process	9-3
	[2] Procedural Due Process	9-4
	[3] The Equal Protection Component of the Due Process Clause	9-6
§ 9.02	Pretrial Due Process Rights and Related Motions	9-7
	[1] Preindictment Delay	9-7
	[a] Prejudice Plus Tactical Advantage Standard	9-8
	[b] The Balancing Test	9-9
	[c] Actual Prejudice	9-11
	[2] Vindictive Prosecution	9-12
	[3] Selective Prosecution	9-18
	[4] Outrageous or Otherwise Improper Government Conduct	9-21
	[5] Grand Jury Abuse	9-28
	[a] Errors and Misconduct Before the Grand Jury	9-30
	[i] Failure to Present Exculpatory Evidence to the Grand Jury	9-30

	(ii) Discrimination in Selecting Grand Jurors	9-31
	[b] Perjury Traps	9-32
	[c] Remedying Fifth Amendment Grand Jury Violations	9-33
	[6] Unduly Suggestive Identification Procedures	9-35
	[7] Incarceration Without Charges	9-37
	[8] Extraterritoriality of the Offense	9-40
	[9] Prolonged Incarceration Without Bail	9-43
	[10] Competency Hearings and Forcible Medication of the Defendant	9-45
§ 9.03	Due Process Rights to a Fair Trial and Related Issues	9-48
	[1] Discrimination in the Selection of Petit Jurors	9-48
	[2] The Right to be Present	9-50
	[3] <i>Ex Parte</i> Submissions	9-52
	[4] Government Interference with Witnesses	9-54
	[a] Encouraging Witnesses Not to Meet with Defense Counsel or Testify	9-55
	[b] Withholding Immunity	9-59
	[c] Denials of Visas	9-62
	[d] Deportation	9-63
	[5] The Presumption of Innocence and the Right to Proof Beyond a Reasonable Doubt	9-65
	[6] The Right to Fair Notice	9-71
	[7] Improper Advocacy at Trial	9-72
§ 9.04	Due Process Rights Involving Plea Agreements	9-77
	[1] Breaches of Plea Agreements by the Government	9-77
	[2] The Government's Burden to Prove Breaches of Plea Agreements by Defendants	9-81
§ 9.05	The Right to a Speedy Appeal	9-83
	[1] Length of the Delay	9-86
	[2] Reason for the Delay	9-87
	[3] Assertion of a Speedy Appeal Right	9-87
	[4] Actual Prejudice to the Defendant	9-88
INDEX	I-1