



Landing Page

Welcome to 'Basic Relevant Conduct,' an Online Education program introducing the Relevant Conduct analysis used to apply the Federal Sentencing Guidelines. This program emphasizes real-world scenarios to illustrate the application of the Relevant Conduct analysis. It is recommended that you complete this course before moving on to the 'Basic Criminal History' course.

Introduction 1

Relevant Conduct is a foundational principle of guideline application. A federal statute at 18 United States Code section 3661 says that there shall be "no limitation" on the information about an offense or offender that the Court can consider in sentencing. There are certain constitutional limitations (such as race and nationality). As for determining the proper guidelines range, the relevant conduct provision in the Guideline Manual sets the limit of information that can be used in the application of the guidelines. That is, the relevant conduct analysis establishes what conduct is relevant in the application of Chapters Two and Three of the Sentencing Guidelines Manual. This includes base offense levels, specific offense characteristics, cross references and Chapter Three Adjustments. It is important to remember that sentencing accountability is not always the same as criminal liability, that is, what the defendant is convicted of may be broader or narrower than the relevant conduct analysis. When determining relevant conduct, three principles will control. First, the defendant will be accountable for acts the he or she did in furtherance of the offense of conviction. Second, the defendant may be accountable for certain acts of others that are in furtherance of the offense of conviction. Last, for certain offenses, the defendant may also be accountable for acts that are part of the same course of conduct or common scheme or plan as the offense of conviction.

Introduction 2

The relevant conduct guideline at §1B1.3, provides an analysis to determine the acts that are relevant for applying the guidelines. Relevant conduct is a hybrid approach that begins with the offense of conviction and then considers many real offense characteristics. Specifically, this analysis looks at acts of the defendant, and certain acts of others, that occur during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction. It is helpful to think of the analysis as answering two questions. The first one being who? And the second, when? That is, who committed the act and when did it occur? For example, if a defendant robs a bank with a gun, the relevant conduct analysis would provide an increase at the robbery guideline because the defendant possessed a gun (satisfying the "who" component) during the offense of conviction, in this case the robbery (satisfying the "when" component).

Introduction 3

In some cases, the defendant will be held accountable for certain acts of others that are part of a jointly undertaken criminal activity. The guidelines define "jointly undertaken criminal activity" as a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. Application note 3(A) to §1B1.3 outlines a three-step analysis that must be satisfied to hold the defendant accountable for the acts of others. First, the act must be within the scope on the jointly undertaken criminal activity. Second, the act must be in furtherance of the criminal activity and third, the act must be reasonably foreseeable in connection with the criminal activity.

Introduction 4

For certain offenses, the relevant conduct analysis will allow acts that are a part of the same course of conduct, or common scheme or plan to be included in the application of the guidelines. Offenses such as drug trafficking, fraud and theft, firearms and tax violations, to name a few, are subjected to what we often describe as “expanded” relevant conduct. The relevant conduct analysis will expand beyond the offense of conviction to include acts that are part of the same course of conduct or common scheme or plan as the offense of conviction.

Introduction 5 & Exercise Directions

Now, let’s get started working through what we’ve just covered. This program utilizes real-world scenarios to illustrate the application of the relevant conduct analysis. Read the exercise, work through your answer, and then listen to the explanation to check your work. Please be sure to download the Relevant Conduct one-pager to assist you in completing this course. A full transcript of this course is also available if you need it, those links are located on the left of the screen, in the Additional Resources column.

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Acts of the Defendant

Introduction

The defendant will be accountable for all acts and omissions that he or she has committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused that occur during the offense of conviction, in preparation for that offense, or to avoid detection or responsibility for the offense of conviction. Select the Next button in the lower right-hand corner of the screen to consider a few scenarios that deal with acts of the defendant. Remember, read the exercise, work through your answer, and then listen to the explanation to check your work. Good luck!

Exercise 1 of 2

Scenario - The defendant is convicted of one count of Bank Robbery, citing a specific robbery for which the applicable guideline is §2B3.1 (Robbery). It is determined that the defendant possessed a firearm during the course of robbing the bank. Will the §2B3.1(b)(2)(C) SOC “if a firearm was brandished or possessed, increase by 5 levels” apply?

Explanation - Yes, the increase for possessing a firearm will apply. The act of possessing a firearm was committed by the defendant and it occurred during the commission of the offense, satisfying both the “who” and “when” components of the relevant conduct analysis.

Exercise 2 of 2

Scenario - While the defendant was actually robbing the bank there was no indication that he possessed a firearm, however, after exiting the bank, in carjacking a vehicle for his getaway, the defendant discharged a firearm. Will the §2B3.1(b)(2)(A) SOC “if a firearm was discharged, increase by 7 levels” apply?

Explanation - Yes, the increase for discharging a firearm will apply. The act of discharging the firearm was committed by the defendant and occurred as an attempt to avoid detection or responsibility for the offense of conviction, that is the bank robbery. This satisfies both the “who” and “when” components of the relevant conduct analysis.

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Jointly Undertaken Criminal Activity

Introduction

When involved in a jointly undertaken criminal activity, the defendant will be held accountable for the acts of others that are within the scope of the jointly undertaken criminal activity, in furtherance of the criminal activity and reasonably foreseeable in connection with the criminal activity. All three parts of this analysis must be met to hold the defendant accountable for the acts of others. Application note 3(B) to §1B1.3 defines scope as the specific conduct and objectives embraced by the defendant's agreement. The court may consider explicit and implicit agreements when determining the scope of the defendant's jointly undertaken criminal activity. As a result, the accountability of the defendant for the acts of others is limited by the scope of the agreement to participate in the criminal activity. That is, scope is determined by the agreement to participate in the criminal activity and not based on the knowledge that defendant has about the criminal activity. Once the scope is determined, the acts of others must be in furtherance of that agreement and reasonably foreseeable in connection with the criminal activity. This is an objective standard and accordingly not based on what the defendant believes to be reasonable. Select the Next button in the lower right-hand corner of the screen to consider a few scenarios that deal with jointly undertaken criminal activity. Remember, read the exercise, work through your answer, and then listen to the explanation to check your work. Good luck!

Exercise 1 of 4

Scenario - The defendant is convicted of bank robbery for which the applicable guideline is §2B3.1. The co-participant possessed a firearm during the robbery, a fact unknown to the defendant until the co-participant brandished it. Will the §2B3.1(b)(2)(C) SOC for "if a firearm was brandished or possessed" apply for the defendant?

Explanation - Yes, the increase for brandishing a firearm will apply. The defendant did not brandish the firearm, however the defendant agreed to participate in a robbery with the co-participant, the brandishing was in furtherance of their agreement and it was reasonably foreseeable in connection with the robbery. The brandishing of the firearm occurred during the offense of conviction, thus satisfying the "who" and "when" components of the relevant conduct analysis.

Exercise 2 of 4

Scenario - The defendant is convicted of a count charging a three-year conspiracy to import 5 kg or more of cocaine, with multiple participants and multiple importations. The applicable guideline is §2D1.1 (Drugs). During the three years of the conspiracy, a total of 300 kg of cocaine was imported. It is determined that the defendant joined the conspiracy after its first year of operation, during which 100 kg had been imported. It is also determined that after the defendant joined the conspiracy, his undertaking was limited to two importations of 5 kg each. What quantity of drugs will be used to establish Defendant's base offense level at §2D1.1(a)(5)?

Explanation - Ten kg is the quantity of drugs that will be used to establish the defendant's base offense level at §2D1.1. When determining a defendant's scope of jointly undertaken criminal activity, that defendant's relevant conduct does not include the conduct of members of a conspiracy prior to defendant joining the conspiracy. This is often called the "bright line rule" and is found in Application Note 3(B) of the relevant conduct guideline. This rule applies even if the defendant knows of the conduct.

In this example, once the defendant joined the conspiracy, the scope of his jointly undertaken criminal activity was limited to the two importations. The acts of others in importing 5 kg on each of those two occasions were within the scope of the defendant's jointly undertaken criminal activity, in furtherance, and reasonably foreseeable. These acts occurred during of the offense of conviction,

satisfying the “who” and “when” components of the relevant conduct analysis.

Exercise 3 of 4

Scenario - The defendant is convicted of one count: Conspiracy to Commit Health Care Fraud (18 USC §§ 1349 & 1347) in the three years from January 2014 through December 2016. The applicable guideline is §2X1.1 (Conspiracy) which directs use of §2B1.1 (Fraud/Theft). The three-year conspiracy involved numerous fraudulent claims by a health clinic to Medicare for services never provided. The conspiracy included a total of 12 participants, with each fully involved in the fraud activity, but only during the period he/she was employed by the clinic. The defendant doctor joined the clinic and began participating in the illegal activity during the final ten months of the conspiracy, but the defendant doctor knew of all the preceding fraud conduct.

Does Defendant doctor’s relevant conduct include:

1. All the fraudulent acts by all the participants and all the resulting losses during the three-year conspiracy?
2. Only the fraudulent acts and resulting losses by the defendant doctor and other participants during the defendant doctor’s involvement in the conspiracy?
3. Only the fraudulent acts and resulting losses by the defendant doctor?

Explanation - The Defendant doctor’s relevant conduct includes only the fraudulent acts and resulting losses committed by Defendant doctor and the other participants during that doctor’s involvement in the conspiracy. When determining a defendant’s scope of jointly undertaken criminal activity, that defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to defendant joining the conspiracy. This is often called the “bright line rule” and is found in Application Note 3(B) of the relevant conduct guidelines. This rule applies even if the defendant knows of the conduct. Once the defendant did join the conspiracy, the facts support that the scope of his jointly undertaken criminal activity was the entirety of the conspiracy for the remaining ten months. Defendant’s relevant conduct includes all the acts he committed and the acts of others within the scope of his jointly undertaken criminal activity that were in furtherance of his undertaking, and reasonably foreseeable, that is the remaining ten months of the conspiracy. Those acts were committed during the offense of conviction satisfying the “who” and “when” components of the relevant conduct analysis.

Exercise 4 of 4

Scenario - The defendant is convicted of one count of conspiracy to traffic 1 kg or more of heroin during a period of 100 weeks for which the applicable guideline is §2D1.1 (Drugs). The conspiracy involved 100 occasions of heroin being transported into the district from a major city in a nearby state. One kg of heroin was transported on each occasion. The defendant’s undertaking involved only two of those occasions, #51 & #52, although he was aware of the other occasions. The defendant never carried a firearm nor did he aid, abet, counsel, command, induce, procure, or willfully cause his co-participants to do so, however, one of his co-participants on occasion #51 carried a gun.

1. For what quantity of drugs is Defendant accountable?
2. Will Defendant get the 2-level increase for the SOC at §2D1.1(b)(1): “If a . . . firearm . . . was possessed . . .” ?

Explanation - First, the defendant will be accountable for two kg of heroin. As we have discussed, the defendant’s relevant conduct includes acts he did that occurred during the offense of conviction, satisfying the “who” and “when” components of the relevant conduct analysis. When determining a defendant’s scope of jointly undertaken criminal activity, that defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to defendant joining the conspiracy. This is often called the “bright line rule” and is found in Application Note 3(B) of the

relevant conduct guidelines. This rule applies even if the defendant knows of the conduct. – in this example, the “bright line rule” takes the first 50 transportations of a kilo each off the table in the determination of defendant’s relevant conduct. Once Defendant joined the conspiracy, the scope of his jointly undertaken criminal activity was limited to the two transportations, #51 and #52. If the acts of other participants on those two occasions were within the scope of the Defendant’s jointly undertaken criminal activity, in furtherance, and reasonably foreseeable –and they occurred “during the commission of the offense of conviction” they will satisfy the “who” and “when” components of the relevant conduct analysis. Based on the facts in this case, each of the kilos on those two occasions are relevant conduct for Defendant, and the 2 kg are used to establish Defendant’s base offense level at §2D1.1.

Second, the defendant will get the 2-level increase for the “firearm” SOC at §2D1.1(b)(1). While Defendant himself did not possess a firearm, the co-participant was within the scope of Defendant’s jointly undertaken criminal activity, specifically, transportation #51; the co-participant possessed the firearm in furtherance of Defendant’s jointly undertaken criminal activity; and it was reasonably foreseeable. The co-participant’s act of possessing the firearm occurred during the offense of conviction, satisfying the “who” and “when” components of the relevant conduct analysis.

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Expanded Relevant Conduct

Introduction

For certain offenses, relevant conduct will expand to allow for acts that are part of the same course of conduct, common scheme or plan as the offense of conviction. These offenses must be of a type that would group under §3D1.2(d), such as drug trafficking, fraud and theft, firearms and tax violations to name a few. Application note 5(B) to §1B1.3 defines both common scheme or plan and same course of conduct. Common scheme or plan focuses on the offenses being connected by common victims, common accomplices, common purpose or similar modus operandi. Same course of conduct focuses on the offenses being connected by similarity, regularity or temporal proximity. Select the Next button in the lower right-hand corner of the screen to consider a few scenarios that deal with expanded relevant conduct. Remember, read the exercise, work through your answer, and then listen to the explanation to check your work. Good luck!

Exercise 1 of 4

Scenario - The defendant is convicted of a sale of 1 kg of cocaine on a single occasion for which the applicable guideline is §2D1.1. The sale was to a gang member engaged in user-amount sales. It is determined that the defendant additionally sold 1 kg of cocaine to a gang member each week for 40 weeks. What quantity of drugs will be used to determine Defendant’s base offense level at §2D1.1(a)(5)?

Explanation - Forty-one kg is the quantity of drugs that will be used to determine the defendant’s base offense level at §2D1.1. Note that the Chapter Two offense guideline in this case, §2D1.1, is on the “included list” at §3D1.2(d), and therefore subjected to “expanded” relevant conduct to include acts of the defendant and certain acts of others that are part of the same course of conduct or common scheme or plan as the offense of conviction. The defendant’s relevant conduct in this example, includes the kg in the offense of conviction, because Defendant sold those drugs during the offense of conviction, satisfying the “who” and “when” components of the relevant conduct analysis. But wait, we aren’t finished with the relevant conduct analysis! Because the relevant conduct analysis in the application of the Chapter Two guideline, §2D1.1, includes acts in the same course of

conduct or common scheme or plan as the offense of conviction, the defendant will be responsible for the 40 additional kilos he sold. That is, the facts establish that those 40 sales were in the same course of conduct or common scheme or plan as the offense of conviction.

Exercise 2 of 4

Scenario - The defendant is convicted of felon in possession of a firearm, a pistol, on a specific date. The applicable guideline is §2K2.1 (Firearms). A search of defendant's house the day after he had been arrested in possession of the firearm (the offense of conviction) revealed two additional firearms, both pistols, one with an obliterated serial number.

1. How many firearms will be counted for the §2K2.1(b)(1) SOC for number of firearms?
2. Will the §2K2.1(b)(4)(B) SOC for obliterated serial number apply?

Explanation - First, three firearms will be counted in the application of the §2K2.1(b)(1) SOC for the number of firearms. Note that the Chapter Two offense guideline in this case, §2K2.1, is on the "included list" at §3D1.2(d), and therefore is subject to "expanded" relevant conduct to include acts of the defendant and certain acts of others that are part of the same course of conduct or common scheme or plan as the offense of conviction. The defendant's relevant conduct in this example, includes the firearm in the offense of conviction, because defendant possessed that firearm during the offense of conviction, satisfying the "who" and "when" components of the relevant conduct analysis. Because the relevant conduct analysis in the application of the Chapter Two guideline, §2K2.1, includes acts in the same course of conduct or common scheme or plan as the offense of conviction, the defendant will be responsible for the two additional firearms he possessed, because the facts establish that those two firearms were in the same course of conduct or common scheme or plan as the offense of conviction.

Second, the SOC for obliterated serial number at §2K2.1(b)(4)(B) will apply. This is because one of the firearms in defendant's relevant conduct had an obliterated serial number.

Exercise 3 of 4

Scenario - The defendant is convicted of one count of bank robbery for which the applicable guideline is §2B3.1. There were no injuries in this robbery, however, on the day prior to the robbery of conviction, the defendant committed another bank robbery in a similar manner, and in which he struck a teller, resulting in serious bodily injury. In the application of the robbery guideline, will the §2B3.1(b)(3)(B) SOC for serious bodily injury apply?

Explanation - No, the increase for serious bodily injury will not apply. Note that the Chapter Two offense guideline for robbery, §2B3.1, is on the "excluded list" at §3D1.2(d), and therefore not subjected to expanded relevant conduct. As a result, the relevant conduct analysis does not include acts of the defendant and certain acts of others that were part of the same course of conduct or common scheme or plan as the offense of conviction. In this case, the relevant conduct analysis is limited to acts of the defendant, and certain acts of others, that occurred during the offense, in preparation for, or to avoid detection or responsibility for the offense of conviction.

Exercise 4 of 4

Scenario - The defendant is convicted of one count of Mail Fraud (18 USC § 1341) citing the submission of a fraudulent claim of \$5,000 to an insurance company on a specific date. The applicable guideline is §2B1.1 (Fraud). In the same month that the defendant made the fraudulent claim in the count of conviction, he also submitted fraudulent \$5,000 claims of the same nature to ten additional insurance companies. Which of the following acts and losses are included in Defendant's relevant conduct:

1. The fraudulent act and resulting loss in the count of conviction?
2. The fraudulent acts and resulting losses related to the ten additional insurance companies?

Explanation - The defendant's relevant conduct will include a total of \$45,000 loss. Specifically, as to the offense of conviction, the defendant committed the act of fraud during the commission of the offense of conviction resulting in the \$5,000 loss and satisfying the "who" and "when" components of the relevant conduct analysis. Additionally, note that the applicable Chapter Two offense guideline in this case, §2B1.1, is on the "included list" at §3D1.2(d), and therefore is subject to "expanded" relevant conduct to include acts of the defendant and certain acts of others that are in the same course of conduct or common scheme or plan as the offense of conviction. In this example, the facts support that the ten additional false claims were in the same course of conduct or common scheme or plan as the offense of conviction. Therefore, there is an additional \$40,000 loss that will be included as relevant conduct.