Federal Sentencing Tips

Approximately 94 percent of all federal criminal defendants plead guilty. Seventy-five percent of the remaining individuals who proceed to trial are convicted. There is, therefore, a 97 percent chance that a person charged with a federal crime will ultimately face a judge for purposes of sentencing. "How much time am I going to do?" For most individuals, this is a key concern. The following tips will help attorneys and their clients obtain the lowest possible sentence.

Sentencing Memorandum

Studies suggest that 80 percent of the time, a judge has a "tentative sentence" in mind even before the sentencing hearing begins. Accordingly, the best way for a defense attorney to influence the judge's selection of a "tentative sentence" is to file a sentencing memorandum, which fully sets forth the facts and arguments supporting the requested disposition, approximately seven days before sentencing (unless otherwise required by local rule). If the defense attorney presents the judge with a solid memorandum that uses the 18 U.S.C. § 3553(a) factors to demonstrate why a sentence below the guideline range is "sufficient, but not greater than necessary" to achieve the goals of sentencing, including character letters from people willing to offer insight into a client's true nature notwithstanding their awareness of the offense of conviction, counsel will go a long way toward achieving the desired sentence. Waiting until the actual hearing to make the sentencing case, as has been a historic practice in state courts, makes it far less likely that the court will give appropriate weight to the defense's position.

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Documentation

Document, document, document. Rather than merely asserting the existence of mitigating factors, the defense attorney should provide as much supporting evidence as possible. For instance, if the client has a physical or mental impairment, or a drug or alcohol dependency issue, the attorney should corrobate that fact with a doctor's letter or report and with medical and treatment records (under seal, preferrably via the Probation Office so that the information is appended to the PSR and given to the federal Bureau of Prisons (BOP)). Counsel should provide empirical evidence showing that treatment is more likely to reduce the client's risk of reoffending than incarceration. Similarly, if the client has a military service record or a history of good works, counsel should provide appropriate documents or testimonials. Judges will not nec-

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essarily take the client's word on anything. He is, after all, a convicted felon. Even if the court does accept the client's word, evidentiary documents will flesh out and add weight to the sentencing presentation.

Departure Policy Statements

The prevailing feeling in the defense community since *Booker* is (1) that applications for a sentence below the guideline range should be couched as requests for variances or for non-Guidelines sentences, and (2) that the days of making a motion for a "downard departure" have passed. This position has strong appeal, since it allows defense counsel to explain how the client's personal characteristics or the particular circumstances of the offense relate to the purposes of sentencing.[1] Over 80 percent of all sentences below the guideline range are variances under 18 U.S.C. § 3553(a), while less than 20 percent are based in whole or in part on a departure.[2] At the same time, a court must "consider" departure policy statements if raised by a party in support of a departure. And some judges still prefer to engage in departure analysis. It is therefore important that a defense lawyer show, if she can, and if the judge prefers departures, how the policy statements in Parts 5H and 5K call for a lower sentence. Even though a single mitigating factor may not warrant a downward departure, a combination of factors might.[3] The defender must present the court with every credible mitigating factor that the case presents, both in terms of "departure" and in terms of "variance" and/or "non-Guidelines sentence." Even if the defendant does not get a sentence below the guideline range, mitigating factors can often help in obtaining a sentence at the low end of the range, which is especially important when the offense level and/or the criminal history score render high guidelines.

Creative Arguments

The defense team should be creative and let judges be judges. After considering guidelines departure factors, the lawyer should think of things that make the defendant's case unusual. Things that are unusual about the client or the offense, that is, things that take the case outside the guidelines "heartland," can be good grounds for a departure. But the defender must not stop there. Anything about the client, the offense, and the sentences that similarly situated defendants have received can support an argument that a sentence below the bottom of the guideline range is "sufficient, but not greater than necessary" to meet the goals of sentencing, and can support an argument that a sentence within the range is "greater than necessary" to meet those goals. As an example, recent economic realities have resulted in a growing trend to argue that the cost of incarceration should be factored into whether a sentence is "greater than necessary." Such an argument carries greater force when the court understands what the client would be doing if not incarcerated (*i.e.*, working, supporting a family, paying taxes), which in turn will decrease the likelihood that the client will recidivate.

Relevancy of Mental Health

Guideline Section 5H1.3 previously provided that defendants' "mental and emotional conditions" were "not ordinarily relevant." By amendment (Amend. 739), that provision now provides "[m]ental and emotional conditions *may be relevant* in determining whether a departure is warranted," especially "[i]n certain cases … to accomplish a specific treatment purpose."[4] Counsel can thus now argue under either this policy statement or a defendant's "history and characteristics," 18 U.S.C. § 3553(a)(1), that the BOP will not likely treat a specific area requiring accommodation and, therefore, a variance is warranted. The cost of treating a client's conditions further supports a cost-related mitigation argument, particularly in light of the BOP's chronic budgetary problems and peristent overcrowding.

Substantial Assistance Reduction

In many cases, even though the client cooperates, the government refuses to file a 5K1.1 motion for downward departure based on substantial assistance. When faced with this unpleasant situation, defense counsel should either seek a downward departure based on "super/extraordinary acceptance of responsibility" or, since the "government motion requirement" of 5K1.1 is now an advisory guideline policy only pertinent to departure, argue that even without a 5K motion, the cooperation would make a lower sentence "sufficient," and a higher one "greater than necessary," to meet the goals of sentencing. Every circuit to have considered the issue has ruled that a sentencing court may consider a defendant's cooperation as part of its § 3553(a) analysis, and grant a variance on that basis even in the absence of a government motion. Even when the government does file a substantial assistance motion, the defense attorney is permitted, unless otherwise precluded by the plea agreement, to argue for a more generous reduction, and the court will be free to grant a greater reduction. While a substantial assistance reduction cannot be based on noncooperation grounds, experience shows that judges unwilling to grant relief for non-5K1.1 reasons oftentimes grant a more generous 5K1.1 reduction than recommended by the government when presented a compelling mitigation case, especially since such an approach insulates them from appellate review.

Debriefing

If the client is a cooperating witness, the defense attorney should accompany the client to any debriefings. Not only will the attorney be able to clear up any future dispute as to what the client said, but the attorney's presence will often facilitate the discussions, particularly if he has debriefed and prepped the client in advance.

Forms and Documents

Defense counsel should accompany the client to probation officer meetings that are part of the Presentence Investigation Report (PSI) process. Since probation officers are overburdened, counsel should obtain in advance the forms and documents needed, and have the client complete and bring them to the initial interview (subject to counsel's prior review). If case law or other materials support the defense's sentencing position, it is a good idea to bring copies to the meeting, highlighting the relevant portions. Probation officers, most of whom are not lawyers, often prefer highlighted cases to memoranda of law, which they find off-putting.

Buying In

When meeting with the probation officer, the defense lawyer should find out the "dictation date," i.e., the date by which the first draft of the PSI must be dictated. When possible, it is extremely helpful to have the probation officer and the Assistant U.S. Attorney (AUSA) buy into the client's position regarding offense behavior, role in the offense, and any grounds for relief from the

Guidelines before the dictation date. "Buying in" does not mean paying off anybody. It means getting the probation officer and AUSA to agree that the defense's position is not unreasonable. Probation officers often have a psychological investment in their original draft PSI, which can make it difficult to convince them to change a PSI. By putting effort into trying to get a good initial draft, the defense will not have to file as many objections.

Character Letters

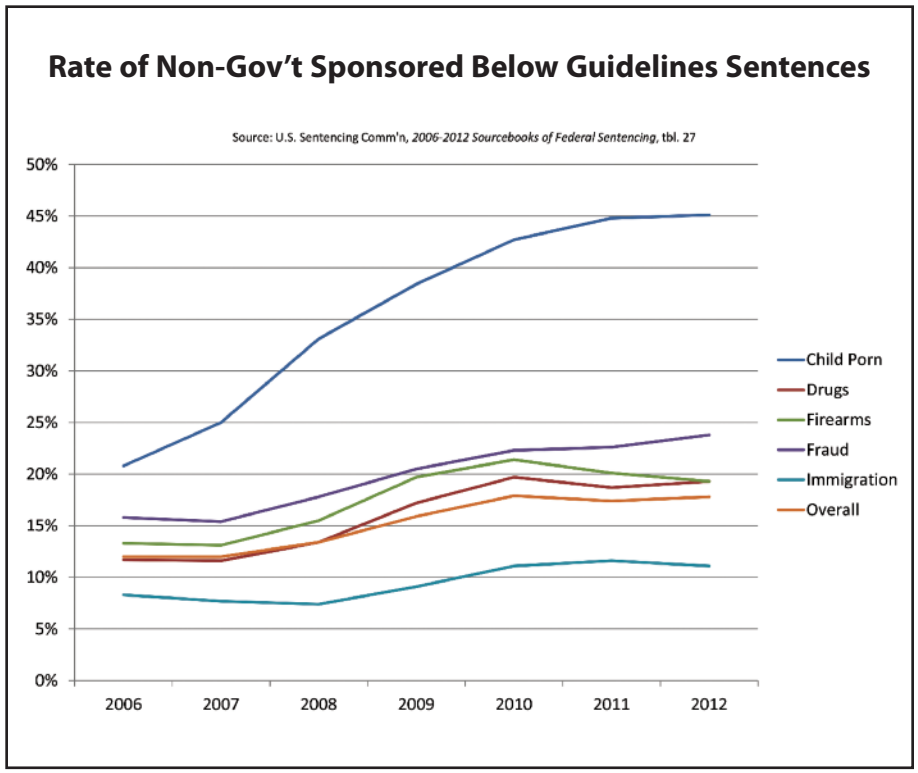
Defenders must educate probation officers about clients before prosecutors have had an opportunity to poison the well. One way to do so is by providing probation officers with favorable character letters. Defenders can provide clients with a character instructional letter to send to family, friends, and supporters with guidance on how to write a character letter.

Trends

Below-guideline variance sentences are on the rise while sentences within the guidelines continue to decrease. According to the statistics compiled by the U.S. Sentencing Commission since *Booker,* nongovernment-sponsored below-guideline sentences have increased from 12 percent of all sentences imposed in 2006 to 17.8 percent in 2012. Conversely, within-guideline sentences have decreased from 61.7 percent of all sentences imposed in 2006 to 52.4 percent in 2012. The increase in below-guideline sentences is even more encouraging when looking at particular offense categories. For example, nongovernment-sponsored below-guideline sentences for child pornography offenses — perhaps the most controversial of all types of guideline sentences — have more than doubled from only 20.8 percent of all such sentences imposed in 2006 to 45.1 percent in 2012. The chart shows the trends for nongovertment-sponsored below guidelines sentences in the top five offense categories as well as the trend for sentences overall.

Sentencing Advocate

These trends reinforce the importance of using a sentencing specialist able to help humanize the client, preferably someone familiar with the federal system's many nuances. If the client cannot afford this service, the defense attorney should ask for funds under the Criminal Justise Act, noting that such providers typically bill at below the CJA rate, meaning that the court receives information pertinent to the disposition process that attorneys are not typically trained to elicit at a cost savings. Sentencing advocates, who are akin to capital mitigation specialists (though their case work-ups are not as intensive), are often social workers, former U.S. probation officers, or criminologists. Their training makes their interviewing technique more effective than that of most lawyers, and often allows them to obtain information a lawyer cannot. For example, a forensic social worker with a background in psychiatric social work is better able to recognize when a client has a mental illness, which may provide a ground for diminished capacity-type relief. These advocates are also better able to identify and develop information concerning unique family circumstances. The National Alliance of Sentencing Advocates & Mitigation Specialists (NASAMS) has listings for advocates around the country. Judges always want to know why the defendant committed the offense, and why he will not do it again. A sentencing presentation that can help answer the "why" questions goes a long way toward securing the lowest possible sentence.



Life Expectancy

For clients who are older or facing significant sentences, the defense attorney should make the court aware of the client's life expectancy. Data on life expectancy is readily available online through the Centers for Disease Control and Prevention, among many other places.[5] While there is an absence of studies measuring the impact of incarceration on life expectancy, significant anecdotal evidence supports the contention that extended incarceration significantly reduces life expectancy. Data from any life expectancy chart should be augmented by arguments specific to the client and, if appropriate, where the client will serve time. Some facilities are more onerous than others and hard time does not help life expectancy. This argument meshes well with arguments regarding susceptibility to abuse in prison depending on the characteristics of the offender, the nature of the offense, and the likely designated prison.

State Sentences, Federal Sentences

Traditionally, federal courts did not consider any disparity between the punishments meted out by state courts vis-à-vis federal courts for the same or similar conduct. After *Booker*, that has changed.[6] Depending on the jurisdiction, the statutory maximum penalties for certain state offenses often can be dramatically lower than their federal counterparts. Likewise, good-time cred-

its and other opportunitiues for early release (*e.g.*, parole) can be far more generous at state levels than at the federal level, meaning that a state offender not only will receive a far less onerous sentence for the same or similar conduct as his federal counterpart, but may also serve far less time as an overall percentage of the sentence imposed. Such comparisons both support arguments regarding unwarranted disparity and, more importantly, serve as a measure of the disproportionate effect that the federalization of crime and the guidelines have had on the particular offense.

Sentences in Similar Cases

Sentencing judges and appellate courts are often concerned with unwarranted disparity as compared with other defendants and cases. To bolster any inclination the court may have to exercise leniency — both when considering how the disposition might be received in the court of appeals or the court of public opinion — the defense attorney must emphasize the sentences other judges have imposed in similar cases in the sentencing district and around the country. Supporting statistics can be found in the Sentencing Commission's *Interactive Sourcebook* and on the Federal Defenders' website.[7]

Criminal History Points

While the addition of one criminal history point may not change a defendant's Criminal History Category (CHC), it can still be important to object to these seemingly harmless additions, and then to appeal if the district court denies the objection. Normally, a criminal history point that does not affect the sentencing range is "harmless error" — but not always. In *United States v. Vargas*,[8] the Seventh Circuit remanded for resentencing based on a seemingly inconsequential criminal history point. The court reasoned that the error was not "harmless" because it "might have affected" the district court's denial of the defendant's motion for downward departure based on the defendant's contention that his CHC significantly overrepresented the seriousness of his criminal history.[9] Criminal history points can also impact prison placement.

Home Confinement Credit

While the BOP will not credit an inmate's sentence for time served on pretrial release under home confinement or in a halfway house if that placement was a condition of bond, as opposed to an alternative custody arrangement,[10] courts are nonetheless free to account for such time as a basis for a variance. *Gall* provides useful language concerning the punitive nature of home detention, depending on the nature and scope of court-ordered conditions.

Lateral Departure Or Variance

Finally, the defense attorney should seek a "lateral" departure or "variance" that requires the client to serve the same amount of time the Guidelines call for but under more favorable conditions. For example, if the Guidelines call for a 21-month sentence, the attorney should ask the judge to impose a sentence of seven months of incarceration, followed by supervised release with a special condition that the client serve seven months in Residential Corrections Center (RRC or halfway house) and then followed by seven months' home confinement and an appropriate amount of community service. This adds up to the same 21 months that the client would normally serve. However, it actually requires more time since the client will not receive good conduct time credit for any portion of the sentence. While the client will serve the entire 21 months, the conditions of confinement will be better, and the opportunitites for the client to work and support a family will be greater.

Notes

1. *See Pepper v. United States*, 131 S. Ct. 1229, 1242-43 (2011); *Gall v. United States*, 552 U.S. 38, 53-60 (2007).

2. U.S. Sentencing Commission, *2012 Sourcebook of Federal Sentencing Statistics*, Table N.

3. *See* USSG § 5K2.0 Commentary.

4. Emphasis added.

5. *See* http://www.cdc.gov/nchs/fastats/lifexpec.htm.

6. *See, e.g., United States v. Clark*, 434 F.3d 684, 687 (4th Cir. 2007) ("the consideration of state sentencing practices is not necessarily impermissible per se").

7. The sourcebook is available on the U.S. Sentencing Commission's website (http://www.ussc.gov) and on the Federal Defenders' website (http://www.fd.org) (go to the Sentencing Resources page, then click Deconstructing the Guidelines).

8. *United States v. Vargas,* 230 F.3d 328 (7th Cir. 2000).

9. *See* USSG § 4A1.3 (p.s.).

10. *See Reno v. Koray*, 515 U.S. 50 (1995). ■

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