Practice Tips: Part 1

Statistics issued by the federal government indicate that 94 percent of all indicted federal criminal defendants plead guilty, and 75 percent of the remaining individuals are convicted at trial—that's a 97 percent likelihood that a federal criminal defendant will face sentencing. For most defendants, then, answers to the questions "How much time am I going to do?" and "Where am I going to do it?" are of key concern. The following tips will help defense counsel obtain for clients the lowest possible sentence served at the best possible facility under terms that facilitate release at the earliest possible opportunity.

Tip 1: Answer the "why" questions. The most important two questions a sentencing judge seeks answers to are: Why did the clients do it and why, if the judge gives them a break, won't they do it again? (*See* Alan Ellis, *Answering the "Why" Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation*, FED. SENTENCING REP. (May/June 1999) *at* http://www.alanellis.com/html/pub/pub4.html).

Tip 2: When meeting with a probation officer, ask for the date by which the officer must dictate the first draft of the presentence investigation report (PSI). Probation officers often have a proprietary interest in their original drafts and getting them changed is often very difficult, requiring that you file objections. Hence, you want the best draft version you can get.

Tip 3: Accompany clients when they meet with the probation officer during the preparation of the PSI. Probation officers are often overburdened, so obtain in advance the necessary documents and have your client complete and bring them to the initial interview. If you have cases supporting the issues that you plan to dispute in the U.S. Sentencing Guidelines, bring them and highlight the relevant sections. Remember, probation officers are not lawyers and sometimes have a difficult time with memoranda of law.

It's greatly advantageous prior to the PSI dictation to have both the probation officer and the prosecutor "buy in" to your views of what your client's role and behavior were when committing the offense, as well as any grounds for a downward departure or variance.

Tip 4: File a presentence memorandum five to seven days before sentencing. In 80 percent of cases, statistics show, judges come to the bench with their minds made up as to the sentence they will impose. Unless you have a great dog-and-pony show for the court, it's likely your client will receive this "tentative" sentence. It may go a long way in helping a judge determine a favorable sentence if you supply a solid presentence memorandum that includes character letters, community service reports, mental health evaluations, and treatment reports. Start by proposing a sentence that you believe is "sufficient but not greater than necessary" to meet the purposes of 18 U.S.C. § 3553(a)(2), and then explain your reasoning.

Tip 5: Many clients make the effort to comply with the purposes of sentencing under 18 U.S.C. § 3553(a), only to have the prosecution refuse to file a 5K1.1 motion for a downward departure based on "substantial assistance." Faced with this unpleasant situation, seek a downward departure based on "super/extraordinary acceptance of responsibility." Spell out the cooperation a client has provided; it may persuade some judges, many of whom are opposed to the government's unilateral power to control such decisions, to depart downward as much as if a 5K1.1 motion had been filed. Also, post-*Booker*, judges can now impose a sentence that is below the advisory guidelines (*not* a mandatory minimum sentence) without a government motion for cooperation.

Tip 6: Seek a lateral departure or variance that addresses the conditions of confinement rather than its length of time. For example, if the guidelines call for a 21-month sentence, ask the judge to impose a sentence of seven months of incarceration, followed by supervised release conditioned on seven months in a correctional component of a community corrections center (CCC), followed by seven months of supervised home confinement and

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an appropriate amount of community service, and, if needed, treatment. This not only adds up to the 21 months called for under the guidelines, but may exceed it because the client will not receive good conduct credit, which could otherwise reduce such a sentence to 18 months.

As ranges in the sentencing guidelines are now advisory, urge the court, when appropriate, to impose a higher split-sentence than previously allowable under zone C. For example, if the guidelines call for a range of 15-21 months, ask the judge to impose a sentence of eight months in prison with a supervised release of seven months of home confinement. If the opportunity presents itself, argue for probation or time served, followed by supervised release with eight months in a halfway house and seven months of home confinement, community service, and, if needed, treatment.

Tip 7: When a defendant enters a guilty plea, absent a binding stipulation as to the sentencing guidelines, the client has no idea what the sentencing will be. Sentencing authorities now recognize the need for a preplea PSI—perhaps even a settlement conference—before a magistrate or judge unrelated to the case. This offers a third-party view of the base offense level and the likelihood of an upward or downward adjustment. Sometimes it's helpful to see what the magistrate or judge would recommend if he or she were the sentencing judge. It allows your client to make a realistic, intelligent, and voluntary decision whether or not to enter a guilty plea.

Tip 8: *Be creative*. Don't restrict yourself to downward departures identified in the sentencing guidelines. Think of things that make your case unusual. In addition to an unusual offender, the offense behavior may be considered unusual in and of itself, specifically when it is less serious than envisioned by the sentencing guidelines. This offers grounds for considering the case "unusual" as defined by *Koon v. United States*, 518 U.S. 81 (1996) as one that is outside of the heartland of the guidelines, thus justifying a downward departure. Despite the new availability of nonguideline variances, don't shy from departures. To avoid a legislative "*Booker* fix," judges today agree it's better to depart from the guidelines than grant a variance that leads to a below-the-guidelines sentence. I like to use the argument that the defendant has suffered enough (loss of job, a divorce, an extended stress-related illness). Because one of the purposes of sentencing pursuant to 18 U.S.C. § 3553(a)(2)(A) is "to provide just punishment" you can argue that the defendant has been sufficiently punished. (*See* Michael R. Levine, *108 Mitigating Factors*, http://www.fd.org/pdf_lib/108Mitigating_Factors.pdf).

Tip 9: The U.S. Sentencing Commission has prepared a "post-*Booker*" manual for judges, probation officers, and lawyers that advises judges to give "substantial weight" to the advisory guidelines. If the judge in your case indicates that "substantial weight" was given to the sentencing guidelines, you should object on the ground that such a sentencing practice makes the guidelines as binding as they were before *Booker*, thus violating both the Sixth Amendment and the interpretation of section 3553, adopted by *Booker*'s remedial majority. Alternately, defense counsel can argue that because the "*weighted*" approach effectively makes the guidelines binding, thereby triggering the Sixth Amendment, a court may use this approach to enhance a sentence *only* if it relies solely on facts proven to a jury beyond a reasonable doubt or admitted by the defendant or that it finds by proof beyond a reasonable doubt or, at least, by clear and convincing evidence. Even in cases in which a court has not indicated that it will give "substantial weight" to the guidelines, defense counsel should argue that the judge must base all guideline adjustments on facts proven beyond a reasonable doubt or by clear and convincing evidence.

Tip 10: Use 18 U.S.C. § 3553(a) factors as a guide to structure your sentencing memorandum, but keep in mind that you are no longer bound by the U.S. Sentencing Guidelines. Argue for a traditional departure where the facts support it, but when they don't, use factors listed in 18 U.S.C. § 3553(a) to argue for a nonguideline sentence below the range. Remind the court that the guidelines are only one of seven equally important factors it must consider in determining a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing under section 3553(a)(2).

Tip 11: Before *Booker,* the guidelines prohibited a court's reliance on certain offender characteristics for downward departures. (*See* U.S.S.G. §§ 5H1.4 (drug and alcohol abuse) and 5H1.12 (lack of youthful guidance or a disadvantaged upbringing).) Courts were also prohibited from relying on other factors, except in extraordinary circumstances. (*See* U.S.S.G. §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition

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and appearance), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), and 5H1.11 (charitable acts).) Today, these limitations no longer restrict a court from imposing a sentence below the guideline range. Not only does 18 U.S.C. § 3553(a)(1) *require* a court to "consider . . . the history and circumstances of the defendant," but section 3661 provides that "no limitation shall be placed on the information concerning the background, character and conduct of the defendant which a court may receive and consider for the purposes of imposing an appropriate sentence."

Tip 12: If you think a client is crazy, get an evaluation by a mental health professional. If there is evidence of head trauma, particularly with loss of consciousness, have a neuropsychologist, who specializes in brain injury, conduct the tests. Although the disorder may not justify a downward departure under U.S.S.G. § 5K2.13 (diminished capacity), it may be grounds for a departure based on extraordinary mental or emotional problems (U.S.S.G. 5H1.3), or, a variance or below the guidelines sentence based on factors in 8 U.S.C. § 3553(a). ■

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