

## Federal Prison Practice Tips

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Approximately 94 percent of all federal criminal defendants plead guilty. Seventy-five percent of individuals who proceed to trial are convicted. Accordingly, there is a 97 percent chance that a person charged with a federal crime will ultimately face a judge for purposes of sentencing. For most, “How much time am I going to do?” and “Where am I going to do it?” are key concerns immediately following a finding of guilt. We offer the following tips to help attorneys and their clients secure placement at the best possible facility in which to serve their sentences under terms and conditions that will facilitate release at the earliest possible opportunity.

**PSI report.** A defendant’s presentence investigation (PSI) report is the Bible in terms of Bureau of Prisons (BOP) placement and programming. It is imperative that counsel ensure the document’s accuracy, even where a particular issue may not

affect the court’s sentencing decision. When determining a prisoner’s security level, the BOP “scores out,” among other things, the individual’s criminal history points, as calculated (the BOP does not account for findings that the score overstates the defendant’s offense history); *verified* education level, meaning a diploma or GED must be documented; and substance abuse history. To the extent a client may qualify for the BOP’s 500-hour residential drug abuse program (RDAP), it is important that the defendant candidly discuss his or her drug and/or alcohol history with probation during the PSI interview.

**Medical/mental health.** Do not “oversell” medical and mental health issues to the probation office. Because the BOP operates on a care level system, inaccurate clinical information may result in a disfavored placement (e.g., farther from home) in the BOP’s attempt to accommodate issues identified in the PSI report. Similarly, make every effort to substantiate a client’s medical and/or mental health problems, including medication, and have that information reflected in and/or appended to the PSI report. Whatever valid criticism of correctional health care may exist, the BOP cannot be faulted for failing to predict those problems from which a prisoner suffers if the information was available to, but withheld from, the court.

**Recommendations.** The BOP generally gives due consideration to judicial recommendations concerning placement and programming. In order for such recommendations to carry the weight sought, they must be specific (i.e., not just “close to home”) and consistent with policy. A recommendation supported by a well-crafted supporting rationale has a far greater effect than a generic recommendation of a particular facility. This is particularly important given the constancy of prison overcrowding. We have even found that where a prisoner is designated to a disfavored facility, the designation can be changed with an amended judgment or other court issuance that offers a well-reasoned statement in support of redesignation.

**Prerelease.** Through the Second Chance Act, Congress encouraged the BOP to make prerelease (halfway house and/or home confinement) available to all prisoners who are not subject to removal and/or detainers for the final year of their sentences, with home confinement limited to the final 10 percent of a prisoner’s sentence up to six months. Where appropriate, defense counsel should ask courts to recommend that the BOP “maximize the defendant’s prerelease time.” Additionally, while a judicial recommendation is necessary before the BOP will consider directly committing an eligible prisoner (e.g., minimum security, serving a relatively short sentence) to a halfway house, the BOP sees halfway



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houses' principal mission as aiding in reentry. Bed space priority is thus given to prerelease inmates, rendering the direct commitment option meaningless in most districts. Such realities should be addressed at sentencing inasmuch as courts can fashion sentences that make use of halfway houses notwithstanding the BOP's practices (e.g., probation or time served followed by supervised release, with a halfway house placement condition).

**BOP changes.** BOP programming options change over time. In this regard, please be aware that (a) Federal Correctional Institution (FCI) Butner, North Carolina, is no longer missioned with housing or "treating" sex offenders (though sex offenders may be placed in the general population, like any other institution); (b) the BOP no longer offers RDAP for native Spanish speakers—all classes are in English; (c) the intensive confinement center (boot camp) program has been abolished; (d) FCI Waseca, Minnesota, is now a female facility; and (e) the BOP is in the process of bringing online a secure female facility (SFF) in Aliceville, Alabama (similar to SFF Hazelton, West Virginia), and a men's institution in Berlin, New Hampshire, with the activation process also underway at United States Penitentiary (USP) Yazoo City, Mississippi, and FCI Hazelton.

**Extra day.** A year-and-a-day sentence results in an inmate serving approximately 47 days less than if sentenced to 12 months because a sentence of 12 months or less does not provide for good conduct time. (See *Barber v. Thomas*, 130 S. Ct. 2499 (2010); 18 U.S.C. § 3624(b)(1).)

**Aliens.** Generally, non-US citizens are ineligible for minimum-security (federal prison camp) placement and, in fact, are housed in contract facilities operated by private companies. However, if US Immigration and Customs Enforcement (ICE) or the Executive Office for Immigration Review (EOIR) determines that deportation proceedings are unwarranted, or there is a finding not to deport at the completion of deportation proceedings, an otherwise qualified individual may be eligible for camp placement if the BOP is (timely) provided necessary documentation.

**Federal trumps state.** Many clients face both federal and state charges and/or sentences. This is a very complex area fraught with landmines. Issues concerning time credits in such situations are typically highly fact-dependent. Because federal sentences are usually longer and because confinement within the BOP is often seen as more desirable than state imprisonment, the presumptive preference for most clients is that the federal case controls. In such instances, counsel should confirm what

jurisdiction exercises primary custody over the client and, if it is the state, work to effect the client's transfer to primary federal custody (e.g., bonding out on the state case, persuading state prosecutors to drop their case). The *Federal Sentencing Guidelines Manual*, section 5G1.3, directs when and how courts are to adjust sentences to account for undischarged terms of imprisonment, though, as with the entire manual, provisions are merely advisory, meaning courts are free to deviate from the Sentencing Commission's approach to these complicated issues. Furthermore, *Setser v. United States*, 132 S. Ct. 1463 (2012), which recognizes a federal court's ability to order that a federal sentence run concurrent with an as yet imposed state sentence (a scenario that presents where the state has primary custody and the state case does not resolve before the federal case), expands the opportunity for a federal sentence to capture time served in state custody. (See 18 U.S.C. §§ 3584, 3585.)

**Unresolved charges.** The BOP routinely treats unresolved charges as carrying a detainer, even when none has been lodged. This results in the application of additional security points and possibly placement at a more secure institution, particularly for individuals who otherwise qualify for minimum-security placement. Accordingly, where a client is sentenced while in primary federal custody and has a state case that may resolve soon thereafter with a sentence of time served or better (i.e., no additional term of imprisonment), counsel should ask the federal court to both hold the judgment in abeyance until after the state sentencing and direct probation to amend the PSI report to reflect the state resolution before it sends the report electronically to the BOP via eDesignate. If the court refuses such a request, counsel should obtain and forward a certified copy of the state disposition to the BOP, preferably via probation and eDesignate, before the client's designation package is processed.

**It's in the mail.** Before your client surrenders, check with the facility (usually the records office or the case management coordinator) to make sure that the PSI report and the judgment have arrived. These days, with electronic communication, these documents will be sent to the facility by the Designation and Sentence Computation Center (DSCC) via e-mail. In the past, the hard copy documents often didn't arrive on time and the inmate, having arrived without anyone knowing who he or she was, risked being placed in the special housing unit (SHU) pending receipt of the information. This risk has been substantially reduced; but nonetheless, it doesn't hurt to check. ■