Bloomberg Law

White Collar Crime Report™

SENTENCING

Two experts on federal sentencing discuss the proposed amendment to the U.S. Sentencing Guidelines regarding acceptance of responsibility and challenging relevant conduct. The authors argue that any revised commentary to U.S.S.G. § 3E1.1 should make clear that challenges to relevant conduct, as well as arguments in favor of departures and variances, should not necessarily preclude a downward adjustment for acceptance of responsibility.

The U.S. Sentencing Commission's 2017 Amendment Cycle: Acceptance of Responsibility and Relevant Conduct

By Alan Ellis and Mark H. Allenbaugh

Historically, defendants who plead guilty to federal offenses almost always receive a two to three-level downward adjustment for acceptance of responsibility under the U.S. Sentencing Guidelines. According to the Background commentary to USSG § 3E1.1, ''[t]he reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense . . . is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.'' According to the Commission's 2015 raw sentencing datafile, there were 71,003 individuals sentenced during fiscal year 2015. Nearly 97 percent pleaded guilty, with 89.4 percent of those who pleaded guilty receiving an adjustment for acceptance of responsibility. While not categorically precluded from receiving an acceptance of responsibility adjustment, those defendants convicted after trial almost never receive the adjustment in practice. (See USSG § 3E1.1, commentary n.2).

Application Note 1 to USSG § 3E1.1 sets forth several non-exclusive factors for a court to consider when awarding a downward adjustment for acceptance of responsibility. Among these considerations is whether the defendant ''truthfully admit[ed] the conduct comprising the offense(s) of conviction, and truthfully admit[ed] or not falsely den[ied] any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).'' While a defendant is not required to ''affirmatively admit'' relevant conduct and may ''remain silent in respect to relevant conduct beyond the offense of conviction'' without jeopardizing his ability to receive the downward adjustment for acceptance, ''falsely den[ying], or frivolously contest[ing]'' relevant conduct will preclude a downward adjustment for acceptance of responsibility. USSG § 3E1.1, commentary n.1). And it is the contesting of relevant conduct that has presented a problem for practitioners and their clients with respect to receiving a downward adjustment for acceptance of responsibility.

Concerns

According to the Commission, it has received concerns:

> that the Commentary to § 3E1.1 . . . encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessments of relevant conduct. These commenters sug-

gest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility. Furthermore, probation officers who, like courts, are not bound by any plea agreements, will sometimes include adjustments not contemplated by the parties. However, increasingly, defendants are challenging the scope of relevant conduct during the sentencing process. (See U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines* at 70 (Dec. 19, 2016) (hereinafter ''Proposed 2017 Amendments''), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf).

Guilty pleas pursuant to plea agreements constitute the majority of guilty pleas. In addition to setting forth the elements of the offense to which the defendant is pleading guilty, they also generally require the defendant to admit certain relevant conduct germane to determining the appropriate advisory sentencing range.

Thus, the Commission's clarification of a defendant's ability to contest relevant conduct will have a significant impact on practice.

Furthermore, regardless of any plea agreement, Presentence Investigation Reports (''PSRs'') sometimes also include additional sentencing enhancements. In light of the existing commentary to USSG § 3E1.1, it is not entirely clear as to the extent a defendant may contest relevant conduct, if at all, and still be eligible for the downward adjustment for acceptance of responsibility.

Chilling Effect

In light of the comments the Commission has received regarding the possible chilling effect of the current commentary on challenging relevant conduct, it is proposing to delete the following language from Application Note 1 to USSG § 3E1.1: ''a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.'' In its stead, the Commission proposes the following: ''a defendant who makes a nonfrivolous challenge to relevant conduct is not precluded from consideration for a[n acceptance of responsibility] reduction.''

Thus, it is clear the Commission believes merely challenging relevant conduct should not *ipso facto* preclude acceptance of responsibility. The question it seeks comment on, therefore, is:

> What additional guidance, if any, should the Commission provide on what constitutes ''a non-frivolous challenge to relevant conduct''? Should such challenges include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to include other sentencing considerations, such as departures or variances? Should the Commission instead remove from § 3E1.1 all references to relevant conduct for which the defendant is accountable under § 1B1.3, and reference only the elements of the offense of conviction? (Proposed 2017 Amendments at 73-74).

As relevant conduct, more than even the elements of an offense, determine the application of the guidelines and the ultimate offense level, the ability to challenge relevant conduct (which is not otherwise stipulated to as part of a plea agreement) is quite important to ensure not only full vindication of a client's Sixth Amendment right to effective assistance of counsel, but also to develop robust jurisprudence on the application of enhancements generally. While pleading guilty certainly serves an important societal role in terms of conserving limited prosecutorial resources, and is an integral part of the rehabilitation and reconciliation process, it should not act as a *de facto* blanket waiver of a defendant's ability to litigate non-frivolous sentencing factors. In other words, the two- to three-level downward adjustment for acceptance of responsibility should not act as both a carrot and a stick—a stick in the sense of precluding defendants from challenging relevant conduct determinations.

Clarification

The Commission is to be applauded for seeking to clarify the commentary to USSG § 3E1.1 to ensure that non-frivolous challenges to relevant conduct do not automatically preclude downward adjustments for acceptance of responsibility. This will help to ensure that USSG § 3E1.1 continues to act like the carrot that it was intended to be, and not like a stick chilling robust advocacy.

The authors believe that to avoid unnecessary confusion, any revised commentary to USSG § 3E1.1 should also note that challenges to relevant conduct in the form of departures and variances also fall under the broad scope of legitimate challenges that still may warrant an adjustment for acceptance of responsibility.

Alan Ellis, a past president of the National Association of Criminal Defense Lawyers and Fulbright Award winner, is a criminal defense lawyer with offices in San Francisco and New York. Mr. Ellis has 50 years of experience as a practicing lawyer, law professor and federal law clerk. He is a nationally recognized authority in the fields of federal plea bargaining, sentencing, prison matters, appeals, habeas corpus 2255 motions and international prisoner transfer for foreign inmates. Mr. Ellis has successfully represented federal criminal defendants and inmates throughout the United States. He is a sought-after lecturer in criminal law education programs and is widely published in the areas of federal sentencing, Bureau of Prisons matters, appeals and other post-conviction remedies, with more than 120 articles and books and 70 lectures, presentation and speaking engagements to his credit. He can be reached at AELaw1@alanellis.com.

Mark H. Allenbaugh is a co-founder of Sentencing Stats, LLC (www.sentencingstats.com), a consulting firm providing federal sentencing data and expert analyses to attorneys and their clients nationwide. Mr. Allenbaugh also is a consultant to the Law Offices of Alan Ellis. Prior to entering private practice, he served as a staff attorney for the U.S. Sentencing Commission. He is a co-editor of Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice (2nd ed., Foundation Press, 2002). He can be reached at mark@sentencingstats.com.

  WCR ISSN 1559-3185

In sum, the act of pleading guilty to offense conduct should be welcomed and encouraged (where appropriate) and courts should liberally award this downward adjustment even in those instances that defendants challenge relevant conduct including advocating for departures or variances.

Finally, the authors note that on March 21, 2017, Judges Charles Breyer and Michael Reeves were confirmed by the Senate to become Sentencing Commissioners. Their confirmation brings the total number of seated Commissioners to four, enough to constitute a quorum. If the Commission wishes to vote on the proposed amendments and others, it will need to act fast. Any proposed amendments must be voted on unanimously by the four and submitted to Congress by May 1, 2017 for them to take effect by November 1, 2017, barring Congressional action to the contrary (although Congress has rarely vetoed Commission amendments: a mere four times in the 30-year history of the Commission). Otherwise, any amendments will have to wait at least a whole amendment cycle. Hearings on alternatives to incarceration are set for April 18, 2017.

Stay tuned for further updates.