

Practice Tips: Part 2

Statistics indicate the likelihood that a federal criminal defendant will face sentencing is 97 percent. For most federal criminal defendants “How much time am I going to do?” and “Where am I going to do it?” are two key concerns. In the Winter 2006 issue of *Criminal Justice* we offered a dozen tips to help you obtain for your client the lowest possible sentence. Here are more tips to help your client serve his or her sentence at the best possible facility under terms and conditions that will facilitate release at the earliest possible opportunity.

Tip 1: Ask the sentencing judge to recommend a particular prison or prisons, and state a reason for the recommendation. When judges say they don’t like to recommend particular places of confinement at sentencing, it is often because they believe they are not “correctional experts,” able to determine where a client should serve his or her sentence, and because they often get letters from the Bureau of Prisons (BOP) advising them that their recommendations cannot be honored in a particular case. To increase your chances of getting a judicial recommendation, make certain your client’s security level qualifies him or her for the facility you are requesting. Let the court know that not only does BOP welcome such recommendations, *see* BOP Program Statement 5100.07, but by statute it is required to consider them. (*See* 18 U.S.C. § 3621(a)(4)(B).) Moreover, bureau statistics show that it honors judicial recommendations in the overwhelming majority of cases in which the defendant qualifies for a particular recommended institution.

Without a recommendation, your client may not wind up in the facility for which he or she qualifies (as close to his or her home as possible) due to prison overcrowding. Should there be only one slot open at a prison and two defendants who want

that placement, the one with the judicial recommendation is more likely to get it. Where both defendants have recommendations, the one whose judge has stated reasons for the recommendation will generally get it. It may help to provide the court with a copy of the bureau’s Program Statement 5100.07, flagging the page that deals with judicial recommendations.

Tip 2: Remember, it is better for your client to receive a sentence of a year and a day than a sentence of one year (or even a sentence of 11 months). A year-and-a-day sentence results in significantly less time—approximately 46 days less than a 12-month sentence—because only sentences of more than one year qualify for good conduct time credit. (*See* 18 U.S.C. § 3624(b).) Note: Although section 3624(b) provides for 54 days of good conduct time a year, the BOP does not award 54 days to an inmate serving a year-and-a-day sentence because such a prisoner does not actually serve a year, and, thus, under BOP’s interpretation of this law, does not earn the full 54 days.

Tip 3: Before you request pretrial release under home confinement or even confinement in a halfway house as a condition of bond, remember that once your client is sentenced, the BOP will not give your client credit for that time.

Tip 4: When you review your client’s presentence investigation report (PSI), be on the lookout for “public safety factors.” Since a PSF disqualifies a defendant from prison camp placement, it is important to correct any erroneous information that might be considered a PSF by the BOP. Examples of PSFs include deportable alien, high-level/high-volume drug trafficking, conviction of sexual offenses (including child pornography), serious telephone abuse in white-collar cases, and sentences of more than 10 years to serve.

Tip 5: Consider the BOP’s Residential Drug Abuse Program (RDAP) as a way to reduce your client’s sentence. Pursuant to 18 U.S.C. § 3621(e), the Bureau of Prisons has implemented a nine-month RDAP that can enable an inmate to obtain up to a 12-month reduction in sentence and generally a six-month halfway house/home confinement placement for those who successfully participate in and complete the program. (*See* http://www.bop.gov/policy/progstat/5330_010.pdf; *see also* “Getting Out Early: BOP Drug Program,” 20 (No. 2) CRIM. JUST.



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68 (Summer 2005) for a description of the RDAP program and a list of institutions offering the program.)

Tip 6: The possibility of the time reduction under section 3621(e) is an important factor in plea negotiations and sentencing. Charge bargaining can result in a better chance at RDAP eligibility (for example, by ensuring that the defendant is not convicted of a crime—such as a violent felony—which would make him or her ineligible for sentence reduction). Contesting a “gun bump,” U.S.S.G. § 2D1.1(b)(1), or the existence of a prior conviction for certain offenses can also increase a defendant’s chances of receiving a sentence reduction for participating in RDAP. The Supreme Court has approved the BOP’s exercise of discretion to deny early release to defendants with prior convictions for certain offenses, as well as to defendants who received an enhancement for possessing a gun. (*Lopez v. Davis*, 531 U.S. 230 (2001).)

Tip 7: Judicial recommendations for RDAP and documentation of substance abuse in the PSI help establish eligibility for treatment. The BOP requires that the inmate’s substance abuse problem (including alcoholism and prescription drug abuse) be substantiated in the presentence report to make him or her eligible to participate in residential treatment. A clear indication in the presentence report of a substance abuse problem that existed within one year of the defendant’s incarceration, and a sentencing court’s recommendation that the defendant participate in residential treatment, will help avoid problems of eligibility for early release. There are, however, ways around this.

Tip 8: A growing number of inmates are losing substantial credit towards their federal sentences because the BOP is narrowly interpreting 18 U.S.C. § 3585(b), which governs credit for prior custody, to prohibit “double credit” on concurrent sentences imposed by different jurisdictions. Under BOP policy, any time credited toward a state sentence cannot be credited toward a federal sentence, even if the state sentence resulted from related conduct, and even if the judge, whether state or federal, ordered the sentences to run concurrently. (BOP Program Statement 5880.28.) This BOP interpretation sometimes converts a concurrent sentence into a consecutive sentence, regardless of the language in the judgment. To avoid this problem in the first place, consider asking the court to impose a lower sentence on this basis. (*See, e.g.*, U.S.S.G. § 5G1.3(b)(1) (“the court shall adjust the sentence for any period of imprisonment already

served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons”), and § 5G1.3, appl. notes 3(E) and 4 (providing for downward departures).)

Tip 9: The interplay between state and federal sentences has always been a vexing issue. For an excellent discussion of state versus federal custody and service of multiple sentences contact David Beneman, Maine CJA Resource Counsel, at P. O. Box 465, Portland, ME 04112, or at Beneman@maine.rr.com for his excellent article on the subject.

Tip 10: Consider hiring a mitigation specialist. We have one in our firm, who is a forensic licensed clinical social worker, and is available to outside counsel. You can also contact the National Association of Sentencing Advocates, 514 Tenth Street, NW, Suite 1000, Washington, D.C. 20004, phone (202) 628-0871, www.sentencingproject.org/nasa. Mitigations specialists, or sentencing advocates as they are often called, develop individualized sentencing plans for lawyers whose clients face conviction and the prospect of incarceration. The individualized sentencing plans are used by defense lawyers to offer alternatives to lengthy incarceration to prosecutors during plea negotiations, to probation officers during the presentence phase, and to courts at sentencing. Typically, the focus of their sentencing proposals is on substance abuse and/or mental health treatment, victim restitution, community service, and avoidance of future misconduct. By helping judges understand the clients’ life story, they help the lawyer argue for alternatives to lengthy incarceration.

Tip 11: Visit our Web site (www.alanellis.com) and read the following sentencing articles online: “Representing the White Collar Client in a Post-Booker World”; “Baker’s Dozen: Federal Sentencing Tips for the Experienced Advocate, Part I”; “Baker’s Dozen: Federal Sentencing Tips for the Experienced Advocate, Part II”; “Answering the ‘Why’ Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation”; “Securing a Favorable Prison Placement.”

Tip 12: Visit Sentencing Law and Policy blog, <http://sentencing.typepad.com>. Join listserves, such as BOPWatch at <http://groups.yahoo.com/group/> (free, though participants must register with Yahoo), and Nacdl.listserv@nacdl.org (open to NACDL members only.) ■