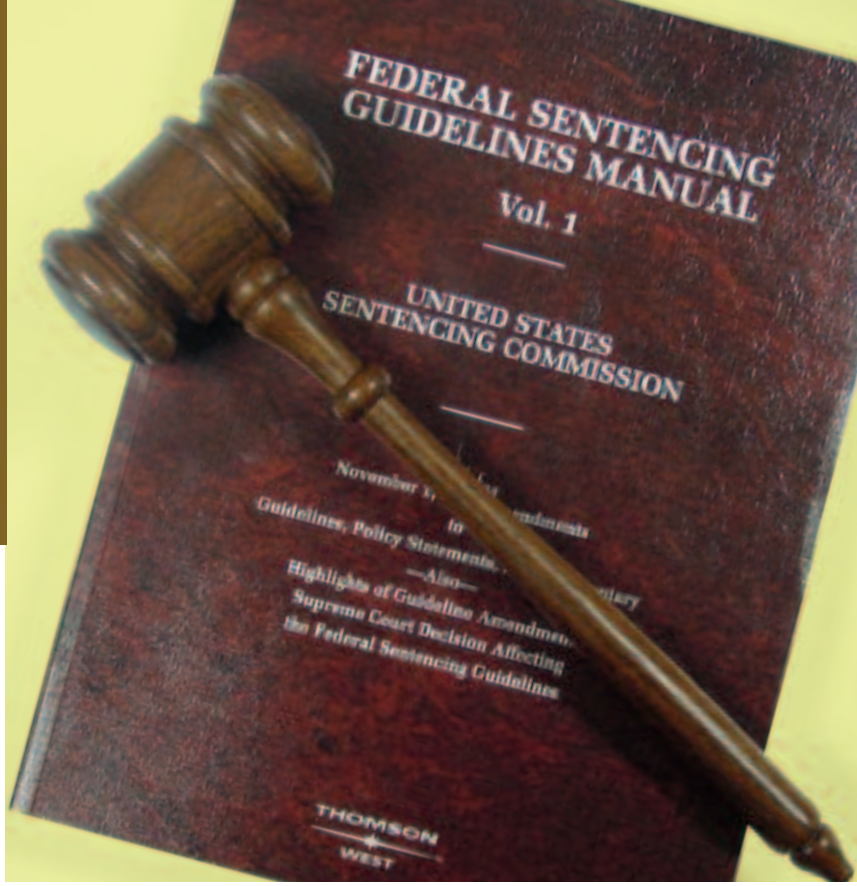
REPRESENTING WHITE COLLAR CLIENTS IN A POST-*BOOKER* WORLD



Sentencings are becoming more and more frequent in federal cases. According to Department of Justice statistics, 90 percent of all cases brought against federal defendants in 2002 resulted in conviction. Other figures show that guilty pleas rose to a high of 95.75 percent in 2003. Of the remaining cases that went to trial, acquittals only occurred in about 23 percent of all cases tried.[1] In short, it is safe to say that approximately 19 out of 20 defendants charged in federal court wind up in front of a sentencing judge.

Before the Sentencing Reform Act of 1984, which brought us the United States Sentencing Commission and the sentencing guidelines, defendants convicted of white collar crimes — tax evasion, fraud, antitrust offenses, insider trading, and embezzlement — could often expect to receive sentences of probation. The sentencing commission saw this as a "problem," which it "solved" with "guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases."[2]

Short periods of confinement quickly rose to lengthy terms of incarceration. Then along came *Booker*.

United States v. Booker

On January 12, 2005, the Supreme Court handed down its decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*.[3] *Booker* has two majority opinions — an opinion by Justice Stevens, which holds that the Federal Sentencing Guidelines, as interpreted in *Blakely v. Washington*,[4] violate the Sixth Amendment, and an opinion by Justice Breyer, which remedies that violation by striking language from the Sentencing Reform Act (SRA) that makes the guidelines mandatory.

Because the guidelines are now advisory, in cases sentenced after *Booker,* they are simply one factor among several that sentencing courts must consider in fashioning a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Courts will still be required to "consider" the guideline range, as well as any bases for departure from that range, but they will no longer be *required* to impose sentence within that range — even where there is no basis to "depart." Under 18 U.S.C. § 3553(a), the key requirement is that the sentence in each case be "sufficient, but not greater than necessary:"

(A) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) To afford adequate deterrence to criminal conduct;

(C) To protect the public from further crimes of the defendant; and

(D) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[5]

It is important to remember that when judges factor into a sentence the best way to provide defendants with needed rehabilitation, as required by § 3553(a)(2)(D), they are at the same time required to "recognize[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation."[6] These four purposes can be summarized as retribution or "just desserts," deterrence (specific and general), incapacitation, and rehabilitation.

In determining whether the sentence is minimally sufficient to comply with the § 3553(a)(2) purposes of sentencing, the court must consider several factors listed in other subsections of § 3553(a). These factors are:

1. The nature and circumstances

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of the offense and the history and characteristics of the defendant;
2. The kind of sentences available;
3. The [advisory] guidelines and policy statements issued by the sentencing commission;
4. The need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and
5. The need to provide restitution to the victims of the offense.[7]

These directives often conflict with the kinds of sentences previously required by the guidelines, which in most cases offer no alternative to prison, even though in some cases, a defendant's education, treatment or medical needs may be better served by a sentence that permits the offender to remain in the community.

Title 18 U.S.C. § 3553(a)(7) directs courts to consider "the need to provide restitution to any victims of the offense." In many cases, imposing a sentence of no or only a short period of imprisonment will best accomplish this goal by allowing the defendant to work so that he can pay back the victim. Not only do the guidelines not permit this kind of creative sentence, they forbid departures to facilitate restitution.[8]

After *Booker,* courts are no longer bound by the departure methodology of the guidelines. Instead, a court may justify a sentence outside the calculated guideline range by factors that would not have previously permitted a departure from the guideline range. The *Booker* decision allows courts to consider factors that the guidelines previously precluded. In one of the earliest post-*Booker* decisions, Judge Lynn Adelman of the Eastern District of Wisconsin noted:

> Under § 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, U.S.S.G. § 5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties and responsibilities, § 5H1.6, his socio-economic status, § 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, §5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history. Thus, in cases in which a defendant's history and character are positive, consideration of all of the § 3553(a) factors might call for a sentence outside the guideline range.[9]

Judge Adelman concluded in that case that a sentence below the sentencing guidelines was justified. The defendant, a bank employee, had pleaded guilty to misapplication of bank funds by a bank officer. The defendant's guideline range was 37-46 months, after upward adjustments for loss, more than minimum planning, and abuse of position of trust. However, after considering all of the relevant factors, Judge Adelman imposed a sentence of one year and a day. In concluding that such a sentence was appropriate, Judge Adelman considered the defendant's motive for the offense, his responsibility for providing care of his elderly parents, and his history and character, which were exemplary before the offense conduct.

For the reasons cited by Judge Adelman, *Booker* will lead to more individualized sentencing, because now the sentencing guidelines are only one factor out of many that sentencing judges must consider. When courts had to impose sentence within the guideline range (barring a departure), they were limited to considering the factors listed by Judge Adelman to determine where in the range to impose sentence. It is now possible for courts to disagree with the judgment of the sentencing commission as to what the appropriate sentence should be.

After *Booker*, 18 U.S.C. § 3661 takes on new importance. That section provides that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence."

The sentencing commission has recently been urging judges, probation officers and attorneys to employ the following three-step methodology in imposing sentences:

STEP ONE: Calculate the now advisory guidelines according to old rules of the manual to arrive at a guideline range;

STEP TWO: Determine if a "departure" is warranted on the grounds authorized and addressed in the manual;

STEP THREE: Determine if a non-guideline sentence or "variance" is warranted under § 3553(a).[10]

Some judges have urged their colleagues to use this three-step process to demonstrate their adherence to the guideline process, even though it is only advisory, in an effort to persuade Congress not to tinker with law as it exists post-*Booker*.

With this in mind, here are some practice tips on how to obtain a lower sentence than called for by the advisory guidelines and any permitted departures.

First of all, do not acquiesce to the commission's suggested methodology. As far as the "advisory" guidelines are concerned, neither the statute itself nor *Booker* suggests that any one of the factors listed in 18 U.S.C. § 3553(a) (such as the sentencing range determined by the sentencing guidelines) is to be given greater weight than any other factor. Indeed, the guidelines and policy statements are only two of the many factors courts must consider.[11]

Practice Tips

• Answer the "why" questions. The most important two questions that you can answer for the sentencing judge is "why your client did what he did" and "why, if the judge takes a chance on him, he won't do it again."

• At the beginning of your sentencing memorandum, propose a sentence that you believe is "sufficient but not greater than necessary," and then go on to explain why.

• The United States Sentencing Commission has prepared a "post-*Booker*" manual for judges, probation officers, and attorneys. The commission advises judges to give "substantial weight" to the advisory guidelines. If the judge indicates that he or she is giving "substantial weight" to the sentencing guidelines, defense counsel should object on the ground that such a sentencing practice would make the guidelines as binding as they were before *Booker,* thus violating both the Sixth Amendment and the interpretation of Section 3553 adopted by the remedial majority in *Booker*. In the alternative, defense counsel should argue that since

the "*weighted*" approach in effect makes the guidelines binding, thereby triggering Sixth Amendment protections, 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. 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, in the alternative, by clear and convincing evidence.

• Object to the presentence investigation report if it does not include all information relevant to Section 3553(a) purposes and factors.

• Use 18 U.S.C. § 3553(a) as a guide to structure your sentencing memorandum, but keep in mind that you are no longer bound by the sentencing guidelines. Where the facts support a traditional guidelines departure, argue for it. But when they don't, use the factors listed in 18 U.S.C. § 3553(a) to argue for a non-guideline 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 set forth in § 3553(a)(2).

• After *Booker,* district courts must still state reasons for the sentences they impose.[12] When that sentence is outside the guideline range, Section 3553(c)(2) still requires the court to explain in the judgment and commitment order why the sentence is outside the guideline range. When you argue for a sentence below the guideline range, prepare a written statement of reasons that the judge can adopt. Should the government appeal, a well-reasoned justification for the sentence can help ensure that it will meet the new test for "reasonableness."

• *Booker* has almost returned sentencing to pre-guideline days in which arguments that humanize a defendant and mitigate guilt can produce a sentence as low as probation (unless probation is precluded by law or unless a mandatory minimum applies). An important difference between pre-guideline sentencing and post-*Booker* sentencing is that a judge now must "consider" a list of seven factors (only one of which is the advisory guideline range) before imposing a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. Section 3553(a)(2).

• Section 3553(a) requires a court to fashion a sentence that is "sufficient, but not greater than necessary" to achieve the goals of sentencing — one of which is to provide a defendant with the rehabilitation he needs.[13] At the same time, 18 U.S.C. § 3582(a) requires the court to "recognize [that] imprisonment is *not* an appropriate means of promoting correction or rehabilitation." (Emphasis added.) After *Booker,* it will therefore be possible in some cases to argue that these two requirements support a sentence without any term of imprisonment so as to meet a defendant's need for educational, vocational or medical services as part of his rehabilitation.

• Pre-*Booker,* the guidelines prohibited a court from relying on certain offender characteristics for downward departures.[14] Now that the guidelines are no longer mandatory, these limitations no longer restrict a court from imposing a sentence below the guideline range. Remember, not only does 18 U.S.C. § 3553(a)(1) *require* a court to "consider … the history and circumstances of the defendant," but § 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."

• *Booker* offers new opportunities to defendants who entered into pre-*Booker* plea agreements that preclude their seeking downward departures. Such defendants can seek non-guideline sentences or "variances" based on factors that would not previously have justified departures. In some cases, they may even be able to argue for lower sentences based on factors that may previously have justified departures.

• After *Booker,* a non-binding plea agreement that stipulates to the guideline calculation may still be helpful with a judge who has a strong inclination to follow the now-advisory guidelines. Plea agreements under Rule 11(c)(1) (C) that lock in a particular sentence or cap a sentence may now become more common as a way to restore some of the certainty to sentencing that was taken away by *Booker.*

• After *Booker,* the government has less leverage to force a defendant to waive the right to appeal or the right to seek a downward departure or a non-guideline sentence. The defense should now agree to such waivers only when the government gives it something substantial in exchange.

• After *Booker,* cooperation will remain an important way for defendants to earn lower sentences, but in cases without mandatory minimums, it will not be as critical for plea agreements to include a government promise to file a § 5K1.1 motion. A court may now impose a below-the-guidelines sentence based on a defendant's cooperation even without a government motion. In a case with a mandatory minimum, it will still be important to lock in a government's obligation to file a motion pursuant to 18 U.S.C. § 3553(e).

• In appropriate circumstances, considering that the zones in the guidelines are now also advisory, urge the court to impose a higher split sentence than was previously allowable under Zone C of the guidelines. For example, if the guidelines call for a 15-21 month range and you believe that a non-guideline sentence is appropriate, ask the sentencing judge to impose a sentence of eight months followed by supervised release with a special condition of seven months' home confinement.

• Moreover, if the opportunity presents itself, argue for probation or time served followed by supervised release with a special condition of eight months in a CCC (halfway house) followed by seven months of home confinement. Throw in some community service and you might wind up with a sentence that your client will be thrilled with.

• If you think your client is crazy, guess what? He may be crazy. Consider having him evaluated by a mental health professional, such as a psychiatrist, psychologist, or social worker. If there is evidence of head trauma, particularly head trauma that left your client unconscious, have him evaluated by a neuropsychologist, a mental health professional who specializes in brain injury. While a mental disorder may not rise to the level that would justify a diminished capacity downward departure under U.S.S.G. § 5K2.13, it still may be grounds for a lower sentence, either through a departure for extraordinary mental or emotional problems as suggested by U.S.S.G. § 5H1.3, or after taking into account the factors listed in 18 U.S.C. § 3553(a).

• Consider hiring a mitigation specialist. We have two in our firm, both of whom are forensic licensed clinical social workers. They are available to outside counsel. You can also contact the National Association of Sentencing Advocates, 514 Tenth Street, NW, Suite 1000, Washington, DC 20004, phone 202-628-0871, fax 202-628-1091, *www.sentencingproject.org/nasa.* Mitigation specialists, or sentencing advocates, as they are often

called, develop individualized sentencing plans for attorneys whose clients face conviction and the prospect of incarceration. Defense attorneys use these individualized sentencing plans during plea negotiations to offer alternatives to lengthy incarceration to prosecutors, and during the pre-sentence phase and at sentencing to propose sentencing alternatives to probation officers and courts. Sentencing proposals typically focus on substance abuse and/or mental health treatment, victim restitution, community service, and the avoidance of future misconduct. By helping judges understand clients' life stories, they help attorneys argue, often successfully, for alternatives to lengthy incarceration.

• Read the following articles on sentencing, which can be found on our Web site (*www.alanellis.com*):

a. *Baker's Dozen: Federal Sentencing Tips For The Experienced Advocate, Part I*
b. *Baker's Dozen: Federal Sentencing Tips For The Experienced Advocate, Part II*
c. *Answering The 'Why' Question: The Powerful Departure Grounds Of Diminished Capacity, Aberrant Behavior, And Post-Offense Rehabilitation*

• Read the following works on sentencing:

a. Michael R. Levine, 108 MITIGATING FACTORS (May 1, 2005 ed.) (latest monthly update available from the author at 503-546-3927).
b. BOOKER LITIGATION STRATEGIES MANUAL: A REFERENCE FOR CRIMINAL DEFENSE ATTORNEYS, Federal Defender's Office, Eastern District of Pennsylvania (April 20, 2005).

• Visit Sentencing Law and Policy blog, *http://sentencing.typepad.com*.

• Join the NACDL and BOPWATCH listservs. Nacdl.listserv@nacdl.org; *http://groups.yahoo.com/group/BOP-Watch/*.

Below The Guidelines Sentences

Mitigating factors justifying sentences below the advisory guideline range in white collar crime cases include, but are not limited to:

• **Collateral Consequences.** In *United States v. Gaind*,[15] a pre-*Booker* case, the Court reasoned that a sentence below the guideline range was justified based on the ways in which the defendant had already been punished for his criminal conduct (he had been civilly prosecuted by the Office of the Comptroller and had to pay $75,000, suffered adverse publicity in a small town, ruined his business and suffered ill health and the death of his wife). The Court concluded that "the primary purposes of sentencing were partially achieved before the case was filed ... and [that the collateral punishment] partially satisfied the need for just punishment."

• **Out-of-Character Conduct.** Factors that can now justify a lower sentence in any case include: (1) a defendant's behavior that is a marked departure from the past, (2) an absence of pecuniary gain, (3) prior charitable and good deeds, (4) efforts to mitigate the effects of the crime, (5) long-term employment coupled possibly with recent unemployment, (6) an absence of prior criminal conduct, (7) the unlikelihood that the defendant will repeat the criminal conduct, (8) the defendant's motivation for committing the crime, (9) the conditions under which the defendant was operating when he committed the offense, such as the pressure of losing a job, (10) psychological disorders that defendant was suffering from when he committed the offense. Support this basis for a lower sentence with letters from friends and family that express shock at defendant's atypical, out-of-character behavior.

• **A Defendant Is Able To Make Restitution If No Imprisonment Is Imposed.** Title 18 U.S.C. § 3553(a)(7) requires the sentencing court to consider the need to provide restitution to any victims of the offense. For crimes committed after October 27, 2003, the guidelines prohibited departures based on defendant's fulfilling a restitution obligation.[16] Not only does this prohibition lose its bite after *Booker*, but the requirement found in § 3553(a)(7) that the court take the need to provide restitution into account in fashioning sentences means that when a defendant's ability to pay restitution hinges on his continued ability to work, defense counsel may be able to convince the court not to impose any incarceration. Similarly, when defendants have already paid restitution, defense counsel may once more cite that fact to argue for lower sentences.

- **The Defendant's Age.** In *United States v. Nellum*,[17] a judge imposed a sentence below the guideline range on a 57-year-old defendant, because a sentence within the guideline range would mean that the defendant would be over the age of 70 at his release. The court found that the likelihood of recidivism for a man his age was very low citing a May 2004 government study. Consider arguing also, as a mitigating factor, that elderly inmates are more vulnerable to abuse and deprecation, have difficulty in establishing social relationships with younger inmates, and sometimes need special physical accommodations in a relatively inflexible physical environment. Moreover, first-time offenders are "easy prey for more experienced predatory inmates."[18]

- **Super Or Extraordinary Acceptance Of Responsibility.** For crimes committed on or after October 27, 2003, the guidelines eliminate this basis for departure. U.S.S.G. § 5K2.0(p)(2). Post-*Booker*, however, this is a mitigating factor and can be a ground for a below-the-guideline sentence. Super acceptance of responsibility can be based on post-offense restitution,[19] admission of guilt or other crimes about which government had no knowledge,[20] and forbearance of defenses to meritorious claims.[21]

- **Post-Offense Rehabilitation.**[22]

- **Post-Sentence Rehabilitation.** For crimes committed on or after November 1, 2000, U.S.S.G. §5K2.19 prohibits downward departures for post-sentencing rehabilitative efforts even if exceptional. Post-*Booker*, post-sentencing rehabilitation is a mitigating basis for a below-the-guidelines sentence at a resentencing following a reversal of defendant's conviction and/or sentence.

- **Extraordinary Family Circumstances.** For crimes committed on or after October 27, 2003, U.S.S.G. § 5H1.6 makes it more difficult to obtain a departure based on family ties or responsibilities. Post-*Booker,* extraordinary family circumstances or responsibilities, especially where incarceration will have a deleterious effect on innocent family members, can be a basis for a below-the-guideline sentence.

- **Defendant's Incarceration Would Cause A Loss Of Jobs Of Innocent Employees**. Because a small business will always be harmed whenever the owner is convicted of an offense and imprisoned, courts have generally not departed downward based on harm to innocent employees, except in extraordinary cases.[23] Post-*Booker*, however, this can be a strong argument for a below-the-guideline sentence.

- **Diminished Capacity.** For crimes committed after October 27, 2003, U.S.S.G. § 5K2.13 requires that diminished capacity must have "contributed substantially" as opposed to "significantly" to the commission of the offense. In light of *Booker*, even if an offender does not meet the criteria for a U.S.S.G. § 5K2.13 departure, his mental state may nonetheless be a basis for a below-the-guideline sentence.

- **Drug Or Alcohol Dependence Or Abuse — Gambling Addiction.** For crimes committed on or after October 27, 2003, the guidelines prohibit a departure on these grounds. *Booker* changes this result.

- **Other Factors.** For an exhaustive list of mitigating factors, see Michael R. Levine's "108 Mitigating Factors." [The latest monthly update is available from the author at 503-546-3927.]

Guideline Calculation

After *Booker,* courts will still calculate a defendant's guideline range in much the way as they did before *Blakely.* Judges will determine the offense level using the application principles established by the guidelines. As before, they will select the offense guideline based on the offense of conviction and will make other guideline decisions using "relevant conduct." Courts will probably still make factual determinations using the preponderance of the evidence standard although, arguably, they should be held to a higher standard such as "clear and convincing" evidence or even "beyond a reasonable doubt."[24]

Because the guidelines for economic crimes are driven by monetary factors, the first challenge defense attorneys face is to ensure that those figures are accurately calculated. For example, defense counsel must first make sure that the figure proposed by the presentence investigation report does not count the same money twice.

In some fraud cases, a defendant may supply a victim with a good or service — albeit not of the quality promised. Although the loss used to calculate the guideline offense level is generally reduced by the value of the good or service provided,[25] there are several exceptions to this rule. The guidelines now provide that no credit be given in two situations: (1) where a defendant falsely posed as a licensed professional, and (2) where the defendant falsely represented that the goods provided had received approval under a government regulatory scheme.[26]

Just as there are fraud cases in which victims receive something of value, there are also fraud cases in which defendants have no intent to cause financial loss to anyone. For example, a defendant may lie about his debts to obtain a loan that he fully intends to repay. If the defendant then defaults after repaying a portion of the debt, the loss under § 2B1.1 is *necessarily* the loss the victims actually sustain, since there is no intended loss. This is significant, because the guidelines provide that if the loss a defendant *intends* to inflict is greater than the loss his victims actually sustain, the sentencing court is to consider the intended loss in setting the offense level.[27] If a defendant who intends no loss had pledged assets to secure the debt, then the loss is reduced by the value of those assets.[28] The Ninth Circuit has held that this application note does not apply when intended loss is greater than actual loss.[29]

Where defendants *intend* loss, then the intended loss is used if it is greater than the actual loss.[30] It is important to remember that "intended" loss is not the same thing as "possible" loss. In *United States v. Titchell*,[31] the district court found an "intended" loss of over $17 million, because the defendant sent out 119,575 fraudulent invoices billing over $17 million. The court of appeals reversed, because the defendant "intended" the loss to be only $647,000, since when the defendant developed the scheme, he understood that a 3 percent return was the norm.

In the past, courts have differed on how to apply the intended versus actual loss principle in Ponzi schemes, where defendants do not *intend* for *all* victims to lose money. In a Ponzi scheme, the defendant deceives his victims into "investing" money, which the defendant steals, rather than invests. Defendants in such cases will often use "investments" by later victims to pay "profits" to earlier ones. This practice helps keep the scheme going by making it appear that the "investments" are producing significant returns for investors.

In the past, some courts reduced the loss by the money the defendant paid to some victims — other courts did not.

The Sentencing Commission resolved this conflict in November 2001 by amending U.S.S.G. § 2B1.1, Appl. Note 3(F)(iv), to provide that money paid to victims as part of the scheme may reduce loss — but only to the point that a victim is repaid money he or she had previously "invested." The guidelines do not reduce loss by the "profits" made by some victims, because those "profits" do not reduce the loss to any victim.

Defense counsel in fraud cases also need to ensure that losses that were not caused by the fraud do not affect the guideline offense level. For example, in *United States v. Rothwell*,[32] although the defendant's fraud caused the Small Business Administration to pay him progress payments on a disaster relief loan, the fraud did not cause any loss to the bank. That loss was caused by the defendant's lack of funds. In *United States v. Randall*,[33] a bankruptcy fraud case, HUD and the VA lost money when they foreclosed on properties whose mortgages they insured. Although the district court included these losses in the guideline calculus, the court of appeals reversed, because they were not caused by the defendant's fraud (*i.e.*, her lying about her name, social security number, and prior bankruptcies). The court found that the agencies would have incurred the same losses even without the bankruptcy fraud.[34]

The guidelines provide for upward adjustments under certain circumstances when the offense affects a "financial institution."[35] Whenever a presentence report attempts to apply one of these adjustments, defense counsel need to determine whether the institution involved qualifies as a "financial institution" as that term is defined in U.S.S.G. § 2B1.1, Application Note 1. In *United States v. Miles*,[36] for example, the court of appeals reversed the sentence in a Medicare fraud case, because Medicare is not a "financial institution."

In general, only losses to victims that are directly caused by fraud are included in loss. Consequential damages, such as "[i]nterest of any kind, finance charges, late fees, penalties, amounts based on agreed-upon return or rate of return, or other similar costs,"[37] are not included.[38] In *United States v. Izydore*,[39] the Court of Appeals held that a $210,158 bankruptcy trustee's fee should not have been included in loss, because although it was a consequence of the defendant's fraud, it was not money "taken" by the defendant.[40] If the interest, finance charge, late fee, or penalty is "substantial," U.S.S.G. § 2B1.1, Appl. Note 19(a)(*iii*) suggests that it could be a basis for an *upward* departure.

A similar principle applies in tax cases, where "tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203."[41]

The guidelines handle price-fixing cases somewhat differently. The offense level in such cases is not controlled by "loss," but by "volume of commerce," *i.e.*, sales made as part of the price-fixing scheme. Significantly, the guidelines limit the application of relevant conduct in price-fixing cases, by providing that:

> For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation.[42]

This limitation of the "relevant conduct" principle of U.S.S.G. § 1B1.3 is important, since without it, a defendant would also be responsible for the volume of commerce attributable to other companies involved in the price-fixing (so long as they were "reasonably foreseeable [and] in furtherance of the jointly undertaken criminal activity," and met the other criteria of U.S.S.G. § 1B1.3.[43]

A more contentious question in price-fixing cases is whether all sales during the period of price-fixing are included in the "volume of commerce." The Sixth Circuit held in *United States v. Hayter Oil Co.*[44] that they are, regardless of whether the sales were at or below the fixed price. Although *Hayter Oil* has been criticized,[45] at least one other court has followed the Sixth Circuit's lead.[46] The Second Circuit broke ranks with the Sixth Circuit, holding in *United States v. SKW Metals & Alloys, Inc.*,[47] that the government must prove that sales were in some way "affected" by the price-fixing scheme before they may be included in the volume of commerce. The court of appeals nevertheless granted the government's appeal and remanded for resentencing, because the district court had excluded *all* sales below the fixed price.[48] The court of appeals disapproved of this finding, reasoning that some sales below the fixed price could nevertheless have been "affected" by the scheme.

Departures

While courts have departed downward in white collar cases for the same "offender-related" reasons they depart downward in other cases, other mitigating "offense related" circumstances are unique to white collar offenses. For examples of "offender-related" departures, *see* Alan Ellis, *Let Judges be Judges! Downward Departures After Koon* (pts. 1-7), CRIMINAL JUSTICE (Winter 1998 through Summer 1999).

The theft/fraud guideline suggests the appropriateness of a downward departure in "cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense."[49]

Downward Departures Have Also Been Granted Where:

- the defendant did not profit personally from his fraud.[50]
- the defendant had a good faith belief that his conduct was lawful.[51]
- the defendant's business would fold and his innocent employees suffer if he were imprisoned.[52]
- it was improbable that the scheme would succeed.[53]

In a wage tax withholding case, the First Circuit acknowledged that the district court could depart downward based on the defendant's intent to pay the withholding tax once his business became stable, but remanded for resentencing and for the district court to consider the concerns of the court of appeals with respect to the extent of the lower court's previous departure.[54] The court also held that unlike in fraud cases, multiple causes for the extent of loss in a tax case are not a basis for departure. In a tax evasion case, the Third Circuit has approved a departure based on prosecutorial manipulation of the indictment where the tax evasion was incidental to the underlying embezzlement case and the sentencing court found it was unusual for the government to charge tax evasion in addition to embezzlement in such a case.[55]

The guidelines for white collar crime are harsh, but solid investigation, creative thinking, and persuasive advocacy can often be combined to protect our clients from overly severe and excessive punishment.

Notes

1. Annual Report of the Administrative Office of the U.S. Courts (Statistical Years 1996-2003).

2. U.S.S.G. Ch. 1 Pt. A § 4(d).

3. 543 U.S. –, 125 S.Ct. 738, 160 L.Ed.2d 621 (Jan. 12, 2005).

4. 542 U.S. 296 (2004).

5. 18 U.S.C. § 3553(a)(2).

6. 18 U.S.C. § 3582(a).

7. At least one court has characterized these factors as taking into account the nature of the offense, the history and character of the defendant, and the needs of the public and any victims of the crime. *See* United States v. Galvez-Barrios, 355F.Supp.2d 958, 960 (E.D.Wis. 2005).

8. *See* United States v. Seacott, 15 F.3d 1380, 1388-89 (7th Cir. 1994).

9. United States v. Ranum, 353 F.Supp.2d 984 (E.D. Wis. 2005).

10. The commission uses the term "variance" to mean a sentence below the otherwise applicable guideline range which cannot be justified as a "departure."

11. *See* United States v. Booker, 125 S.Ct. 764-65 (noting that the guideline range is only one of many factors a sentencing court must consider in determining a sentence).

12. 18 U.S.C. § 3553(c). *See* United States v. Webb, 403 F.3d 373, 385 n. 8 (6th Cir. 2005).

13. 18 U.S.C. § 3553(a)(2)(D).

14. *See* U.S.S.G §§ 5H1.4 (drug and alcohol abuse), and 5H1.12 (lack of youthful guidance or a disadvantaged upbringing). Courts were 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 and appearance), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), and 5H1.11 (charitable acts).

15. 829 F.Supp. 669 (S.D.N.Y. 1993), *aff'd.* 31 F.3d 73 (2nd Cir. 1994).

16. U.S.S.G. § 5K2.0(d)(5).

17. 2005 WL 300073 (E.D. Ind. Feb. 3, 2005).

18. Correctional Health Care Addresses the Needs of Elderly and the Chronically Ill and Terminally Ill Inmates, U.S Department of Justice, National Institute of Corrections, 2004 edition, pp. 9-10. It should be noted that throughout the report, the elderly are defined as age 50 or older.

19. United States v. Kim, 364 F.3d 1235 (11th Cir. 2004).

20. United States v. Demonie, 25 F.3d 343, 349 (6th Cir. 1994).

21. United States v. Faulks, 143 F.3d 133 (3d. Cir. 1998).

22. *See, e.g.*, United States v. Sally, 116 F.3d 76, 82, (3d Cir. 1997) ("defendant achieves real gains in rehabilitating himself and changing his behavior"); United States v. Maddalena, 893 F.2d 815, 818 (6th Cir. 1989) (holding that district judge may consider defendant's "efforts to stay away from drugs as a basis for departing from the guidelines"); United States v. DeShon, 183 F.3d 888, 889-90 (8th Cir. 1999) (district court did not abuse its discretion in departing based on the defendant's extraordinary post-offense rehabilitation, evidenced by his renewed church life, acceptance of responsibility, hard work and diligence, strengthened family relationships, and participation in counseling); United States v. Jones, 158 F.3d 492, 503 (10th Cir. 1998) (district court did not abuse its discretion in departing downward based on defendant's post-offense rehabilitation evidenced by his regular work, counseling, and support of his children).

23. *See* United States v. Milikowsky, 65 F.3d 4 (2nd Cir. 1995) (finding extraordinary circumstances, Court affirms departure based on harm to innocent employees); *cf.* United State v. Olbres. 99 F.3d 28 (1st Cir. 1996) (remanding for district court to consider whether extraordinary circumstances exist to support departure based on harm to innocent employees; United States v. Sharapan, 13 F.3d 781 (3d Cir. 1994) (reversing departure — no extraordinary circumstances); United States v. Mogel, 956 F.2d 1555 (11th Cir.) (business ownership not basis for departure) *cert. denied*, 506 U.S. 857 (1992); United States v. Rutana, 932 F.2d 1155 (6th Cir.) (reversing departure — no extraordinary circumstances), *cert. denied*, 502 U.S. 907 (1991).

24. *See* United States v. Johansson, 249 F.3d 848, 853-54 (9th Cir. 2001) (clear and convincing standard); United States v. Thomas, 355 F.3d 1191, 1202 (9th Cir. 2004) (reasonable doubt). *See also* United States v. Huerta-Rodriguez, 355 F.Supp.2d 1019, 1928 (D. Neb. Feb. 1, 2005) ("it can never be 'reasonable' to base any significant increase in a defendant's sentence on facts that have not been proven beyond a reasonable doubt"); United States v. Ochoa-Suarez, 2005 WL 287400, 2005 U.S. Dist. LEXIS 1667 (S.D.N.Y. Feb. 7, 2005) (rejecting leadership adjustment, because no finding beyond a reasonable doubt by a jury that defendant qualified as a manager or supervisor under U.S.S.G. § 3B1.1).

25. *See* U.S.S.G § 2B1.1, Appl. Note 3(E)(i). *See also* United States v. Bolden, 325 F.3d 471 (4th Cir. 2003) (loss in Medicare fraud case did not include payments for legitimate services); United States v. Renick, 273 F.3d 1009 (11th Cir. 2003) (loss in CHAMPUS case which involved legitimate as well as fraudulent billing may not be determined by arbitrary estimate of fraudulent portion); United States v. Silver, 245 F.3d 1075 (9th Cir. 2001) (DoD defrauded when defendant provided generic parts instead of name brand parts as required by contract — loss reduced by value of generic parts even though the DoD threw them out); United States v. Hayes, 242 F.3d 1144 (3d Cir. 2001) (defendant hired as social worker after she forged her qualifications — loss was the salary she received, less the value of the services she provided); United States v. Fiorillo, 186 F.3d 1136 (9th Cir. 1999) (per curiam) (loss does not include price paid by victim for disposal of hazardous waste, which defendant properly handled); United States v. Sublett, 124 F.3d 693 (5th Cir. 1997) (loss does not include value of counseling provided by qualified counselors); United States v. Parsons, 109 F.3d 1002 (4th Cir. 1997) (legitimate expense reimbursement requests not included in loss); United States v. Alburg, 818 F.Supp. 1306 (N.D. Cal. 1993) (loss reduced by value of work performed).

26. *See* U.S.S.G § 2B1.1, Appl. Note 3(F)(v).

27. U.S.S.G § 2B1.1, Appl. Note 3(A).

28. U.S.S.G .§ 2B2.2, Appl. Note 3(E)(ii). *See* United States v. Henderson, 19 F.3d 917, 927-28 (5th Cir. 1994) (applying this principle); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (same). United States v. Wells, 127 F.3d 739 (8th Cir. 1997) (loss reduced by value of future payments to bank on leases assigned as collateral); United States v. Downs, 123 F.3d 637 (7th Cir. 1997) (loss

reduced by value of assets pledged).

29. United States v. McCormac, 309 F.3d 623, 627-28 (9th Cir. 2002) (where defendant did not intend to repay loan, loss is not reduced by value of collateral).

30. U.S.S.G § 2B1.1, Appl. Note 3(A).

31. 261 F.3d 348 (3d Cir. 2001).

32. 387 F.3d 579 (6th Cir. 2004).

33. 157 F.3d 328 (5th Cir. 1998).

34. *See* also United States v. Daddona, 34 F.3d 163 (3d Cir. 1994) (where defendant, a registered agent of Employers Insurance of Wausau, did not purchase construction bond as promised, loss was not cost of completing failed project, since fraud did not cause project to fail; loss was money insurance company was required to pay); United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) (where defendant misrepresented that he had clear title to condominiums, loss was cost to clear title, not unrelated reduction in value of condominiums); United States v. Stanley, 12 F.3d 17 (2d Cir. 1993) (although defendant used fraudulent mailing to induce purchases of overpriced bonds, people who did not receive the mailing also bought bonds; court excluded losses incurred by the latter group from guideline calculation).

35. *See* U.S.S.G § 2B1,1(b)(13).

36. 360 F.3d 472 (5th Cir. 2004).

37. U.S.S.G § 2B1.1, Appl. Note 3(D)(*i*).

38. *See* United States v. Seward, 272 F.3d 831 (7th Cir. 2001) (attorneys and executor's fees not included in loss in fraud against an estate).

39. 167 F.3d 213, 223 (5th Cir. 1999).

40. *See also* United States v. Sablan, 92 F.3d 865 (9th Cir. 1996) (value of bank employees' time spent meeting with FBI and each other to discuss offense is consequential loss not included in guideline calculation).

41. U.S.S.G § 2T1.1, Appl. Note 1. See United States v. Hopper, 177 F.3d 824, 832 (9th Cir. 1999) (applying this principle); United States v. Pollen, 978 F.2d 78, 91 n.29 (3d Cir. 1992) (criticizing, but applying rule in evasion of collection case).

42. U.S.S.G § 2R1.1(b)(2).

43. *See* United States v. Heffernan, 43 F.3d 1144, 1147 (7th Cir. 1994) (applying this principle).

44. 51 F.3d 1265 (6th Cir. 1995).

45. See Henry D. Fincher, *Fining the Market: The Bumbling Price-Fixer and the Antitrust Guideline*, 8 FED.SENT.REP. 244 (1996).

46. *See, e.g.,* United States v. Andreas, 1999 WL 51806 (N.D. Ill, Jan. 27, 1999).

47. 195 F.3d 83 (2d Cir. 1999).

48. *See* United States v. SKW Metals & Alloys, Inc., 4 F.Supp.2d 166 (W.D.N.Y. 1997).

49. U.S.S.G § 2B1.1, Appl. Note 19(C). See, *e.g.,* United States v, McBride, 362 F.3d 360 (6th Cir. 2004) (although intended loss drives offense level even where scheme to defraud could not have succeeded, impossibility of scheme can be a basis for departure); United States v. Lauersen, 348 F.3d 329 (2d Cir. 2003) (where multiple adjustments result in very high offense level that substantially overstates seriousness of offense, district court may depart downward); United States v. Kushner, 305 F.3d 194 (3d Cir. 2002) (remanded to consider departure where defendant voluntarily turned in preprinted checks with a face value of $455,203.99); United States v. Gregorio, 956 F.2d 341 (1st Cir. 1992) (downward departure appropriate where degree of loss was caused by downturn in economy); United States v. Graham, 146 F.3d 6 (1st Cir. 1998) (loss overstates culpability where lower loss attributed to similarly situated defendants); United States v. Monaco, 23 F.3d 793 (3d Cir. 1994) (loss overstates seriousness where defendant had no intent to steal); United States v. Stuart, 22 F.3d 76 (3d Cir. 1994) (affirming loss calculation based on face value of stolen bonds, but suggesting appropriateness of departure on remand where defendant received little money for participation in offense, causing loss to overstate seriousness of offense).

50. *See, e.g.,* United States v. Broderson, 67 F.3d 452 (2d Cir. 1995).

51. *See, e.g.,* United States v. Jasin, 25 F.Supp.2d 551 (E.D.Pa. 1998), *aff'd*, 191 F.3d 446 (3d Cir. 1999) (table).

52. *See, e.g.,* United States v. Olbere*s*, 99 F.3d 28 (1st Cir. 1996); United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995); United States v. Somerstein, 20 F.Supp.2d 454 (E.D.N.Y. 1998). But see United States v. Crouse, 145 F.3d 786 (6th Cir. 1998) (rejecting departure); United States v. Morken, 133 F.3d 628 (8th Cir. 1998) (same); United States v. Rutana, 18 F.3d 363 (6th Cir 1991) (same), *cert. denied,* 502 U.S. 907 (1991); United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) (same).

53. United States v. Stockheimer, 157 F.3d 1082 (7th Cir. 1998) (victims paid $500 for a pad of blank certified money orders which the defendant said could be presented to creditors to pay off debts. The debtors attempted to pay off $80 million in debt, which the district court held as the loss, even though no creditors fell for the transparently bogus scheme. Court of appeals reversed to allow district court to consider departure); United States v. Ensminger, 174 F.3d 1143 (10th Cir. 1999) (rejecting loss enhancement where fraud had no possibility of success).

54. United States v. Brennick, 134 F.3d 10 (1st Cir. 1998).

55. United States v. Lieberman, 971 F.2d

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