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## SENTENCING

Inmates often say that 99 percent of lawyers don't know the first thing about the Bureau of Prisons and the 1 percent who do are all doing time themselves. Understanding these practice tips will decrease the 99 percent number.

### INSIGHT: Tips on Getting Your Client Into the Best Prison and Released at the Earliest Possible Opportunity



By ALAN ELLIS

#### Bureau of Prisons Designation and Placement—Five Key Things Counsel Can Do

Once a defense attorney understands how the Bureau of Prisons (BOP) system works, there are five primary things he or she can do to ensure that a client serves their time in the best facility.

1. Prepare the client for the presentence interview. The BOP places primary reliance on a prisoner's self-reporting to the U.S. Probation Office presentence report writer. Whatever is in the Presentence Report (PSR) is presumptively valid unless corrected, and any claim, for example, of substance abuse or physical problems that the PSR does not plainly substantiate is treated as suspect.

2. Ensure the accuracy of the information on which the BOP will rely to make its designation decision, particularly the PSR.

3. Score the client and search for Public Safety Factors (PSF) to determine the appropriate security level. PSF's (such as "deportable alien") can preclude camp placement for otherwise qualified defendants.

4. Consult with the client to determine which facility at the appropriately-calculated security level the client prefers and then ask the sentencing judge to recommend that facility to the BOP, as well as to provide reasons in support of that recommendation. Counsel should, of course, suggest reasons as part of his or her request.

5. In appropriate cases, request self-surrender.

#### The Presentence Report

**Accuracy of Presentence Report.** The most important thing defense counsel can do to ensure designation to the lowest security prison possible is to make sure that any inaccurate information in the PSR is corrected. The BOP relies extensively on the information contained in the PSR to decide where a defendant will do time, as well as to make other important correctional decisions (such as whether a defendant is eligible for the BOP's Residential Drug Abuse Program—RDAP). The content of the PSR is presumptively valid unless corrected, and any claims later made which the PSR does not substantiate will be treated as suspect. It is for good reason that the PSR is known as the "bible" by prisoners and BOP staff. If defense counsel objects to inaccurate information at the time of sentencing and the judge sustains those objections, defense counsel must make sure that the PSR is corrected before it is sent to the BOP or, at a minimum, that formal findings are made by the judge pursuant to Fed.R.Crim.P. 32(c)(1) and attached to the PSR before it is forwarded

to the BOP. A finding made in the “Statement of Reasons” will also suffice and is sometimes more important than the PSR. See Statement of Reasons Trumps Erroneous Presentence Report.

**Accuracy of Criminal History Score.** Carefully review the PSR’s Criminal History Score (CHS) for accuracy. The addition of one criminal history point may not change a defendant’s CHS, but it can negatively impact prison designation. Since the BOP now uses Criminal History Points to calculate an individual’s security level (see Program Statement 5100.08), Criminal History Points can affect the type of facility to which the offender may be assigned, even if the judge sentences below the guideline range.

**Drug Abuse or Alcoholism.** Confirm that the PSR adequately documents any drug (illegal or prescription) abuse or alcoholism. Unfortunately, defense lawyers and defendants often tend to downplay substance abuse problems, under the mistaken belief that revealing such problems can harm the client by blackening their character. Unless a client’s substance abuse problem is adequately documented in the PSR, he or she may not qualify for the RDAP and will not get the opportunity to earn up to a one-year reduction in sentence pursuant to 18 U.S.C. § 3621(c)(2), which permits such a reduction for nonviolent inmates who successfully complete the RDAP in a BOP facility.

**Medical and Mental Health Issues.** Don’t overstate medical and mental health issues to the Probation Officer for inclusion in the PSR. 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 PSR. Make every effort, however, to substantiate a client’s medical and/or mental health problems, including medication, and have that information reflected in and/or appended to the PSR. Whatever valid criticism of correctional health care may exist, the BOP cannot be faulted for failing to deal with the problems for which an inmate suffers if the information was available to but withheld from the court.

**Client Address in PSR.** Since “release residence” is defined by the BOP as the defendant’s legal address that’s listed on the PSR, the BOP will attempt to house your client near that address and place them in a nearby halfway house toward the end of their sentence. If that address is not only far from family and friends who want to visit your client, but also far from the area to which your client intends to relocate upon release, you should consider requesting that another address be used.

**Citizenship.** Ensure that if your client is a naturalized U.S. citizen, the citizenship is verified by the U.S. Probation Officer and duly noted as verified in the PSR. This is not generally a problem for persons born in the United States, but can be especially important for a naturalized citizen, because if such citizenship is not verified in the PSR at the time of initial designation by the BOP, an individual who might otherwise be eligible for placement in a minimum-security camp instead will be designated at least to a low-security prison or a private prison contract institution for deportable aliens. Provide the U.S. Probation Officer with the client’s naturalization certificate.

Generally, non-U.S. citizens are ineligible for minimum-security (federal prison camp) placement and, in fact, are housed in contract facilities operated by

private companies. However, if U.S. Immigration and Customs Enforcement (ICE) or the Executive Office for Immigration Review (EOIR) determine that an individual has been convicted of an offense which is not a deportation offense and therefore proceedings are unwarranted, or if there is a finding not to deport at the completion of deportation proceedings, an otherwise qualified non-U.S. citizen may be eligible for camp placement if otherwise qualified and assuming necessary documentation is timely provided to the BOP.

## Law and Policy

BOP designation and placement is governed by 18 U.S.C. § 3621 and more clearly Program Statement 5100.08, Inmate Security Designation and Custody Classification.

**Judicial Recommendations.** The BOP generally gives due consideration to judicial recommendations concerning placement and programming. In order for such recommendations to carry the weight sought, however, they must be specific (i.e., not just “close to home”) and consistent with policy. A recommendation supported by a well-crafted rationale carries more weight than a generic recommendation of a particular facility. Specific, well-reasoned recommendations are especially important in these days of prison overcrowding. We have even successfully found that where an offender is designated to a particularly unfavorable facility, the designation can be changed with an amended Judgment or other court issuance with a well-founded statement in support of redesignation.

**Factors in Designation Decision.** 18 U.S.C. § 3621(b) requires the BOP to consider certain factors when making any designation decision, including pre-release placement. The factors include offender-specific variables such as “the history and characteristics of the prisoner,” “the nature and circumstances of the offense,” and the sentencing court’s statements concerning a sentence’s purpose or facility recommendations. See Bureau of Prisons Program Statement 5100.08 Security Designation and Custody Classification Manual and Securing a Favorable Prison Placement.

**Detainers Count.** In scoring for designation and placement, BOP counts detainers. The type of detainer can increase an inmate’s security level. BOP initially treats unresolved charges as a detainer, even when none has been lodged. If the individual arrives with pending charges, the BOP will send out Detainer Action Letters, but this could take up much valuable time. This results in 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 and has a case that may resolve soon thereafter with a sentence to run concurrent with and to be absorbed within the instant sentence or no additional term of imprisonment, counsel should ask the court to:

- (1) hold the judgment in abeyance until after the pending case’s disposition, and
- (2) direct U.S. Probation to amend the PSR to reflect the resolution before it sends the report to the bureau.

If the court refuses such a request, counsel should obtain a certified copy of the disposition (if state) and forward it to the U.S. Marshall and Designation and Sentence Computation Center (DSCC) of the BOP before the client’s designation package is processed. If federal,

there is no need to have it certified, as DSCC can confirm on PACER, if the case information and document number are included. Please note that concurrent state sentences will remain as detainers until completed.

**Statement of Reasons.** The BOP reviews the judgment in a criminal case, the PSR and the Statement of Reasons to ensure any judicial recommendations requiring BOP action are addressed. As a matter of policy, the BOP Designation and Sentence Computation Center staff must contact, but rarely does, the court if a Statement of Reasons is not received at the time a requested designation is made (Program Statement 5100.08). The Security Designation Data Section of the Inmate Load and Security Designation Form (BP-337) contains the sentencing, programming recommendations and background information from the judgment, the *Statement of Reasons* and the PSR. This information is used to determine an inmate's security level. In determining "Severity of Current offense," Bureau of Prisons' staff must review the Statement of Reasons and ensure the information provided is appropriately used in classifying the inmate. In short, a Statement of Reasons sometimes carries more weight in the eyes of the BOP than a presentence report if it corrects or clarifies what is in the PSR. It can determine an inmate's security level, RDAP eligibility, programming, and other BOP matters. If the PSR is not to your liking, ask the judge to issue a Statement of Reasons and give him or her your proposed language for it. See Statement of Reasons Trumps Erroneous Presentence Report.

**Review the Judgment.** After your client is sentenced, make sure you carefully review the judgment. If you requested that the judge recommend a particular facility and you proposed language in support for the court to use, ensure it is in the judgment. Often the clerk prepares the judgment and doesn't get it right. To overcome this, our law firm submits a written proposed recommendation to the prosecutor in advance of sentencing and, once we receive the prosecutor's non-objection, we submit it to the court and the clerk at sentencing noting that the government does not object to the recommendation language being placed in the judgment.

**Residential Reentry Center (RRC) Direct Placement Process.** A judicial recommendation is *required* for the BOP to consider directly committing an otherwise qualified defendant to a Residential Reentry Center (RRC) halfway house, as it did historically. However, in keeping with the BOP changing the name of halfway houses from Community Corrections Centers to Residential Reentry Centers (RRCs), the mission of these intermittent confinement facilities has also changed. Placement priority for RRCs' limited bed space which has recently been further decreased is given to prisoners with identified transitional need, usually meaning individuals needing halfway house services to help facilitate reintegration into the community at the conclusion of a sentence. Accordingly, while technically available, direct RRC placement is not a realistic option in most jurisdictions given the dearth of available beds. An alternate approach is to ask the court to forego a term of imprisonment and instead sentence a defendant to probation or time served or a short sentence followed by supervised release conditioned on halfway house placement. In this way, the BOP is removed from the decision-making process.

## Sentencing Computation

**Reduced Sentence.** A year and a day sentence results in an inmate serving approximately 47 days less than he would serve on a 12-month sentence because the 12-month sentence does not provide for good conduct time (see 18 U.S.C. § 3624(b)(1)).

**Complications of Federal and State Charges.** 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 confinement within the BOP is often seen as more desirable than state imprisonment, the presumptive preference for most clients is that the federal case control. In such instances, counsel should confirm what jurisdiction exercises primary custody over the client and, if it is the state, work to affect the client's transfer to primary federal custody (e.g., bonding out on the state case; persuading state prosecutors to drop their case). Furthermore, *Sester v. United States*, 132 S.Ct. 1463 (2012), which recognizes a federal court's ability to order a federal sentence run concurrent with a yet-to-be-imposed state sentence (a scenario that would present 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. An excellent article discussing the interaction between federal and state sentences by former BOP's Northeast Regional Counsel Hank Sadowski is contained in the BOP's Legal Resources Guide.

## RDAP

The BOP's has a 500-hour comprehensive drug and alcohol treatment program that is highly popular. As stated earlier, it is commonly called RDAP and is located at various facilities. It is popular mainly because it is the only program within the BOP that enables an inmate to get the amount of time that he must serve reduced. It also has a high lack of recidivism and lack of relapse rate. It also provides for four to six months in a halfway house as part of the outpatient counseling part of the program that helps the inmate transition into a drug free lifestyle in the community.

## Ineligibility for Early Release for Completing RDAP

Inmates who have a current or prior felony or misdemeanor conviction that is less than ten years old for:

- homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide);
- forcible rape;
- robbery;
- aggravated assault;
- arson;
- kidnapping; or
- an offense that by its nature or conduct involves sexual abuse offenses committed upon minors.

**Amount of Reduction.** The BOP has implemented a sliding scale for the amount of a sentence reduction:

those serving 30 months or less are ineligible for more than a six-month reduction; those serving 31 to 36 months are ineligible for more than a nine-month reduction; and those serving 37 months or longer are eligible for the full 12 months. (See P.S. 5331.02, § 10.)

**Ineligibility for RDAP.** The following categories of inmates are not eligible for the RDAP program:

- Immigration and Customs Enforcement detainees;
- Pretrial inmates;
- Contractual boarders (for example, state or military inmates); and
- Inmates with detainers that preclude halfway house placement.

**RDAP Qualification.** To qualify for RDAP, one must generally have at least 24 months or more remaining to serve, a verifiable, documented pattern of substance abuse or dependence within the 12-month period preceding arrest on the underlying offense; have no serious mental or cognitive impairment precluding full program participation; be halfway house-eligible (which precludes participation by removable non-U.S. citizens and those with detainers); and sign acknowledgement of program responsibilities.

## Pre-Release and Re-Entry: Halfway House and Home Confinement

In addition to the statutory factors in 18 U.S.C. § 3624(c)(1), BOP personnel must also look to the controlling program statement (Program Statement 7310.04) and operations memoranda. See Memorandum from D. Scott Dodrill, Assistant Dir., Corr. Programs Div., Revised Guidance for Residential Reentry Center (RRC) Placements (June 24, 2010) (setting forth guiding criteria). Other factors include available contract halfway house bed space, which is usually at a premium; the length of time an individual has served, their community resources or lack thereof, and an inmate's conduct during confinement. In short, pre-release placement, and the programming and community access it provides, is intended to reduce the risk of recidivism, meaning that priority is given to those inmates who pose a greater risk to re-offend upon completion of their sentences. See The U.S. Bureau of Prisons' Pre-Release Program—Getting Out Early.

All inmates without detainers are eligible for pre-release not to exceed 12 months but this generally means halfway house for the last six months of their sentence. Again, this by policy is based on need. Inmates who are at a lower risk to reoffend, with lower sentences, and more community resources, (for example, a home, a job, etc.) receive less halfway house time than those who are at a higher risk to reoffend (longer sentences and/or lack of community resources).

Moreover, because of lack of funding, the BOP has reduced the number of halfway houses they have contracted with further reducing the amount of bed space available. Recently, RDAP graduates who used to receive six months of halfway house placement as part of their transitional care component of their program are now receiving in many cases only four months.

**Second Chance Act.** The Second Chance Act merely codified what had previously been BOP policy, that is, to allow inmates to serve the last 12 months of their sentence in a Residential Reentry Center for extraordinary reasons. See also, The U.S. Bureau of Prisons' Pre-Release Program—Getting Out Early. Through the Second Chance Act of 2007 (Public Law 110-199, 122 Stat. 657 (2008)), Congress directed the BOP to ensure that each federal prisoner serve a portion of his or her term of imprisonment, not to exceed one year, “under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions usually include a residential reentry center—a halfway house. 18 U.S.C. § 3624(c)(1).

Under 18 U.S.C. 3624(c)(2), an inmate is eligible to serve the last six months or ten percent of his sentence, whichever is less, in home confinement. Inmates who have strong community resources and are not in need of the help halfway house placement can afford are more likely to receive direct home confinement than others. Generally, they must report to the halfway house for processing for up to a week before being placed in home confinement. The halfway house is responsible for the home confinement program and monitors the inmate's behavior while on home confinement. See The U.S. Bureau of Prisons' Pre-Release Program—Getting Out Early.

## Author Information

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