

Probation Officers Advisory Group to the United States Sentencing Commission
May 29 & 30, 2002
Washington, D.C.
Minutes of Meeting

Probation Officers Advisory Group members in attendance were: Cathy Battistelli, Chair Colleen Rahill-Beuler (2nd Circuit); Joan Leiby (3rd Circuit); Eliabeth Ervin (4th Circuit); Barry Case (5th Circuit); Tim Searcy (6th Circuit); Rex Morgan (7th Circuit); Craig Saigh (8th Circuit), Felipe Ortiz (9th Circuit); Ken Ramsdell (9th Circuit), Debbie Marshall (10th Circuit); Ray Owens (11th Circuit); Doug Mathis (11th Circuit); and Theresa Brown (D.C. Circuit).

May 29, 2002

The meeting opened with welcoming new POAG members Tim Searcy, Felipe Ortiz, and Doug Mathis. It was also noted that Craig Saigh was representing the 8th Circuit as Jim Mitzel had a conflict and was unable to attend the meeting. David Wolfe was also unable to attend the meeting due to a training conflict. Pamela G. Montgomery, Director and Chief Counsel of the Office of Education and Sentencing Practice expressed her appreciation for POAG members attending the meeting and explained the Commissioners were scheduled to meet the beginning of June to discuss their agenda for the upcoming year. Ms. Montgomery also mentioned that on May 16, 2002, the House subcommittee held a meeting on the current proposal regarding the mitigating role cap in the drug guideline to a level 30. Discussion also occurred regarding the crack/cocaine ratio and the May 22, 2002 paper submitted to Congress by Judge Murphy. It appeared that Senator Biden was in favor of capturing the violence associated with drug transaction rather than merely looking at drug quantity. It does not appear that any action on the crack/cocaine ratio will occur this year. Ms. Montgomery also advised that the new ad hoc groups on Native American Issues and Organizational Guidelines would be meeting in the near future. In addition, Ms. Montgomery updated the group about the proposed amendments sent to Congress this year. She also indicated that the Recidivism Study was expected to be finished this summer.

POAG members were provided with the following information from various staff members regarding issues pertaining to Chapter 4, the drug guidelines and Immigration guidelines.

Chapter 4 Working Group

Krista Rubin advised that this group is still considering categories for a “true first time offender” and a Category VII. The inequities and problems associated with USSG § 4A1.2(c) were discussed, as well as related case definitions and overrides ensuring consistency with career offender provisions.

Drug Group

Rachel Pierce and Allen Dorhoffer mentioned they are looking at changes to the drug guideline to

consider all drugs, not just the crack/cocaine issue. There was also a discussion about attempting to get away from drug quantity. These changes would be dependent on Congress and possible specific offense characteristics were being examined. College interns were currently reviewing cases and looking at the function performed by the defendant (for example, at least 67% of crack offenders were deemed to be street level dealers). The drug working group found presentence reports very helpful and the roles of the defendants identified in the reports were illustrative for the group.

5G1.3

While there is a pending change to this guideline in the proposed guideline amendments this year, more work may still need to be done on this issue regarding the wording, “fully taken into account.”

POAG members asked staff about HelpLine Calls and which guidelines appear to result in the most questions. According to staff, sex offenses, fraud, mitigating roles, money laundering, and immigration guidelines generate a large volume of questions. In addition, POAG asked for a current list of Circuit Conflicts to help formulate a starting point for problematic areas.

At the present time, none of the 2002 amendments will be retroactive.

Pam Montgomery discussed the collection of presentence reports and stated the process is not a smooth as the Commission would like. A meeting is scheduled in July with various chiefs to develop a better process and with the AO regarding PACTS presentence input.

Prior to ending the morning session, the group discussed the Palm Springs training conducted earlier this month and the results of the surveys. All of the members were surprised by some of the comments from the group in California regarding acceptance of responsibility and some definitions in Chapter 4.

Pam Montgomery invited POAG to the national training in Miami Beach, FL next year. Ms. Montgomery stated she thought it worked well to have POAG handle the probation officer breakout session but that she would like to have POAG recognized earlier in the training and suggested the possibility of a social event. One of Ms. Montgomery's goals is to make certain that probation officers are on panels for their perspective on the issues.

Afternoon Session

Welcome by Commissioner John Steer

Commissioner Steer welcomed the group and advised of the importance input from the field is to the Commissioners. Indicated that our day to day interactions and experience with the SGL's and practical issues surrounding their application are carefully considered by the USSC.

Role of the District Rep

The group discussed the issue that the charter should better define the role of the District Representative. In addition, it was thought that POAG needs more specific information and feedback from the district reps in order to best represent the circuit.

Suggested language for Charter: *District representatives should be involved in the day to day operations of the SGL's. The district representative will provide the Circuit representative with input regarding guideline issues as they impact their district. The response should represent a consensus from the district. The district should provide the circuit representative the name of the district representative if it changes.*

Change in the Charter for Circuit Representatives to POAG

The following change was specifically requested by the USSC:

Terms last for no less than 10 meetings.

No more than 3 members rotate off at a time

The first meetings for new members should be the Spring proactive meeting.

POAG agreed with these suggested changes and will amend the Charter.

Alan Dorhoffer - briefing on Immigration Issues:

20% of all federal cases are immigration related with 90% of those being 2L1.2 cases

There appear to be several reoccurring questions or problems with this guideline:

1.) Crime of violence, as defined in application note 1(B) is worded differently than in other parts of the GL's. There are some concerns over this lack of uniformity. As it currently reads, it is a more narrow focus than the definition provided in 4B1.2.

2.) Under application note 1(B) of 2L1.2, there has been some confusion over what standards must be met. Crime of violence is defined in 2L1.2 under application note 1(B)(ii); you do not have to meet both prongs listed under (I) and (II). (II) is a non-exhaustive list of the types of offenses to consider, but does not include all of the offenses that can be considered. *Circuits must refer to case law for guidance on this matter.*

3.) For 2L1.2(b)(1)(B), simple possession convictions do not count unless they have as an element, a trafficking characteristic.

4.) There has been an interpretation problem with application note 1(A)(iv), regarding the meaning of sentence imposed. If you have a sentence of imprisonment with all of it being suspended, it can be interpreted differently:

- a.) It is still less than 13 months, so 2L1.2(b)(1)(B) is the correct GL
- b.) 2L1.2(b)(1)(C) is the GL that would automatically kick in

This issue has been brought to the attention of the Commissioners; it is not known if it will be clarified in the coming amendment cycle or not.

5.) The definitions at 8:1101(a)(43) are different than GL definitions.

6.) Revocations: Chapter 4 tells you to add the revocation to original sentence; 2L1.2 is silent on revocations. Again, not known if this will be addressed in the upcoming amendment cycle.

7.) Some misdemeanors may meet the guideline definition of felony/aggravated felony, depending on how the misdemeanor is defined.

The USSC's approach for many, if not all GL issues is often to follow the lead of case law and wait and see how systematic a problem may really be. All issues cannot be foreseen; as much discretion as possible is given to Court's to allow them to have as much control and influence as possible.

Other Issue:

General discussion on applying acceptance of responsibility; POAG asked if we had a position regarding it's typical applicability. Different circuits appear to have different standards.

PROBATION OFFICERS ADVISORY GROUP MORNING SESSION - May 30, 2002

Chair Battistelli began the morning session by polling POAG for issues of concern in their circuits. Each issue was discussed and a consensus reached as to those to be addressed. An issue regarding Criminal Livelihood - USSG §4B1.3, was referred to a subcommittee for further study to determine if an enhancement recommendation is warranted for repeat fraud/white collar offenders. Toward this end, POAG was to solicit copies of PSRs for the subcommittee on defendants with a pattern of fraudulent behavior, whether or not the prior behavior resulted in a criminal conviction. The subcommittee will present their report for discussion at a later meeting.

Criminal History - First Time Offenders/Category VII

POAG discussed at length the definition of a "true first time offender" and finally agreed that a working definition is not viable. The resulting recommendation was for a change in the language in USSG §4A1.3 to allow a departure below the lower limit of Criminal History Category I on the basis of adequacy of criminal history, thereby making it an encouraged departure. An Aberrant Behavior departure in conjunction with a §4A1.3 departure could also be appropriate in providing relief to those defendants with no prior criminal history.

Discussion ensued regarding a Criminal History Category VII or higher category. Numerous problems were identified in developing higher categories. Even though the guidelines provide for an upward departure under USSG §4A1.3, these departures rarely occur. POAG agreed to recommend in lieu of higher criminal history categories, the addition of language to assist courts in imposing a guided departure along with specific examples.

USSC Staff Director Timothy McGrath addressed POAG in an open forum. Mr. McGrath noted the continuing struggle over the crack/powder cocaine disparity and stated the Commission elected not to move forward with an amendment but instead a recommendation to Congress to reduce the ratio. Information was provided by Mr. McGrath as to the hearings on Capitol Hill regarding this issue and the proposed drug amendments, particularly the mitigating role cap. Mr. McGrath indicated that the Criminal Law Committee endorsed all of the guideline amendments submitted to Congress.

Mr. McGrath outlined the Commission's upcoming meetings and training events. It was noted that the Commission terms expire for Commissioners Kendall and Johnson and that no nominations for these positions have been made by President Bush.

A new USSC e-mail broadcasting system is being implemented and Mr. McGrath stated POAG would be placed on the mailing list. Mr. McGrath also discussed the USSC data collection from the field. The Commission is aware that 85 to 90% of the information requested from thief Probation Officers is "not really missing" but is a software problem which improperly codes documents. In order to rectify this problem, the Commission is working to devise a new method of collection through meetings with various Chiefs and the AO. The Commission should then be able to concentrate on collection of the remaining percentage of presentence reports that are needed but are not on hand.

Criminal History - Expunged Cases

The suggestion was made that the Commission look at what is driving the expungement; for example, was the case expunged because of exoneration? It was pointed out that there is a distinction between public record expungement and retention for criminal records. Also, it was noted that there is some case law against going back to look at records of cases which have been expunged. From place to place, several factors vary; for example, the reason for expungement, the availability of records, and whether the expungement was granted only to restore civil rights.

A consensus was reached that this area is not a very widespread problem, but there is disparity. It was

agreed to request more guidance in application.

Related Cases

There is some case law in this area, specifically the 6th and 10th Circuits. One point of confusion is the definition of “intervening arrest.” It was noted that some problem areas are really problems because more training needs to be developed.

Pam Montgomery asked that POAG include this issue in its position paper.

4A1.2(c) - Sentences Counted and Excluded

One member reported that the survey conducted in Palm Springs did not identify this section of the guidelines as problematic. Other members noted that there are geographical differences in the way it’s applied and that a problem arises when a conviction of an offense listed in 4A1.2(c) keeps an offender from qualifying for the safety valve. A suggestion was made that perhaps §§4A1.1(d) and (e) should not be applied based on such a conviction. Another person mentioned that in Alabama there are wide differences; for example, probation might be kept open as long as an offender owes money. Pam Montgomery commented that the Commission is waiting for the completion of recidivist studies. Members agreed that §§4A1.1(d) and (e) should be re-examined.

The Group reached a consensus, that a problem does occur in cases involving §4A1.2(c) when the safety valve is an issue. A suggestion was made that if §4A1.1(d) is not applied, then the problem would be avoided; that is, it’s not necessary to revise application of §4A1.1(e) as it is unlikely that section would apply in connection with a minor prior offense.

4A1.2(k) - Revocations of Probation, Parole, Mandatory Release, or Supervised Release

Pam Montgomery described “Consent Calendar” items. Such items are issues that can be cleared up by “tweaking” the guidelines. On various issues, U.S. Sentencing Commission staff prepare changes, which are presented to the Sentencing Commission.

The Group reached a consensus, asking that this issue go on the Consent Calendar with a request that language be cleared up. It was noted that “partial revocations”—those where the judge orders “revoke and reinstate”—result in argument regarding whether additional days of imprisonment are to be counted. One member stated that in his district, additional days are counted. He also noted that varying terminology such as “admonishment” or “sanction” is used.

Role Adjustments

Discussion was undertaken on this area for two reasons: there is a circuit conflict and the new drug guideline amendment providing for a cap on offense level for minor participants calls for clearing up this area. Pam Montgomery reminded the Group that a minor role adjustment is not precluded for a defendant who is only held accountable for the amount of drugs with which he was directly involved. One member noted that the guidelines say precious little regarding minor role, especially “the minus three” adjustment under §3B1.2. Others agreed, adding that it is difficult for probation officers to respond to objections in this area. It was suggested that more explanatory language is needed, a list of examples could be added including examples of what type of conduct in which the adjustment “could apply” and “do not apply”.

A discussion then followed regarding the types of cases where the question of minor role is raised. A member stated that years ago, a minor role was applied in many cases where, because of the way relevant conduct was determined and all defendants were held accountable for all of drugs distributed during a conspiracy. He added that in his district, no mitigating role is applied if the defendant is held accountable for only the quantity directly attributable to that defendant. Pam Montgomery commented that the guidelines require “multiple participants,” and that can cause a problem. Another member mentioned that in his district drivers are often just “hired hands” who don’t always know what quantity they are transporting. Many drivers are poor peasant Mexicans or homeless people.

Others noted that in some cases, the question of role is “given up” during plea negotiations, while someone else stated that in her experience judges want more guidance regarding aggravating role as well as mitigating role. The advisability of examples was raised again and one member pointed out that there used to be examples, but they were removed in 2001 (Amendment 635).

The Group reached a consensus, asking the Commission to provide non-exhaustive lists relevant to mitigating and aggravating role.

5G1.3 - Discharged terms of imprisonment

The Group identified two problems. One arises when a mandatory minimum sentence is applicable and the other involves the wording “fully taken into account”

The Group reached a consensus, identifying this area as problematic and agreed to raise the issue with the Commission.

Methamphetamine Laboratory Enhancements

There was a short discussion about the methamphetamine laboratory enhancements. POAG reached a consensus that it's a training issue and will also be addressed by case law.

A position paper will be prepared by Cathy Battistelli and Elisabeth Ervin and forwarded to Ms. Montgomery. The meeting was adjourned at approximately 12:30 pm.