Federal Sentencing Advocacy: **Tips for Beginning Practitioners**
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Federal defense attorneys cannot provide zealous and effective representation to any client unless they are familiar with the Federal Sentencing Guidelines. The Sentencing Reform Act of 1984 did away with parole at the federal level and laid the groundwork for a system of sentencing guidelines that increased the predictability of sentencing outcomes along with the importance of informed, aggressive sentencing advocacy at every stage of the criminal process. The United States Sentencing Commission wrote guidelines that essentially provide fixed, narrow ranges of potential imprisonment that directly relate to the judge's findings on disputed issues pertaining to important sentencing facts and the application of guideline provisions to those facts. One important change from past practice: The guidelines provide for a short period of imprisonment for white collar criminal offenders, rather than the previous norm of simple probation.

The sentencing scheme requires that counsel, in addition to traditional considerations, heavily weigh the following:

- the sentencing impact of defendant cooperation;
- pre- and post-indictment plea bargaining on issues such as what offenses will be charged or eventually pled to;
- how significant sentencing facts and disputed issues of guideline application might be resolved to limit the defendant's exposure; and
- the uncertainty of possible sentencing outcomes.

In order to provide aggressive advocacy, counsel must know how the guidelines work and consider their impact at each stage of the process. More than 90 percent of all individuals facing federal criminal charges enter a guilty plea. (*1995 United States Commission Annual Report, Appendix B*). The likelihood of an plea of guilty, combined with the dangers the guidelines pose to the unwary, and the benefits that can be derived from an early and properly structured agreement with the government, triple the lawyer's responsibility. Aggressive advocacy means an attorney must understand the guidelines well enough to calculate the applicable guideline range, identify the uncertain facts and factors that may affect it, and educate the client to these realities. Even if your client has not yet been indicted or the government has not provided discovery, you should not be deterred from performing this task. No effective lawyer can wait until the client has pled guilty before calculating the guideline range.

When computing your client's guideline range, place yourself in the shoes of the prosecutor and judge. Factor in all possible adverse statutory mandates, factual findings, guideline adjustments, and departure grounds, and come up with a "worst-case scenario." Likewise, determine the "best-case scenario" that would result if all uncertain or otherwise disputed facts or factors fall your way. Finally, identify the most important uncertain or disputed facts and factors; these are the areas where the most effective advocates shine, both in the structuring of protective plea agreements and stipulations and in litigating the issues that remain unresolved. You should explain to the client every

factor in the calculation process so that at the time of sentence surprises will be minimized. Request from your client all information on prior convictions or juvenile adjudications, regardless of whether they have been expunged, as well as any foreign or tribal convictions and diversionary dispositions. This information is necessary to compute criminal history, to ascertain whether the client is a career offender, and whether his or her criminal history is underrepresented. Also, although the guidelines do not assign specific weights to arrests or other conduct that did not result in conviction, ask your client about such instances. It both refreshes the client's memory as to the full range of his or her previous convictions, and helps you prepare for possible arguments by the government that the client's criminal history (based on convictions counted by the guidelines) may be underrepresented by the guidelines. (*See* U.S.S.G §4A1.3.) Gathering this information is protected under the attorney-client privilege. Also review the pretrial services report, which will contain most of this information.

Relevant conduct provision

The sentencing guidelines are a modified real offense sentencing system that at the outset operates from the offense of conviction, yet combines that with important offense elements. Each guideline may cover one or more statutory offense. A given guideline will provide a base offense level and specific offense characteristics that adjust the base level up or down. The latter may, on occasion, be in the form of a cross-reference to another guideline. The guidelines also provide for upward or downward adjustments to the offense level based on several additional factors such as a defendant's aggravating or mitigating role in the offense, the ensuing harm to the victim, and the defendant's acceptance of responsibility. The final adjusted base offense level will yield a given guideline range where the maximum will not exceed the minimum by more than the greater of 25 percent or six months. This guideline will increase, depending on the defendant's criminal history.

A key feature of the guidelines is that specific offense characteristics and other types of adjustments are governed by "relevant conduct." The guidelines provide that adjustments to the offense level are to be determined on the basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." (U.S.S.G. §1B1.3(a)(1)(A).) The guidelines further provides that in the case of *jointly undertaken* criminal activity, whether or not charged as a conspiracy, a defendant is accountable for all reasonably foreseeable acts and omissions of others in furtherance of that jointly undertaken criminal activity. (U.S.S.G. §1B1.3(a)(1)(B).) In order to determine a defendant's accountability for the conduct of others under relevant conduct, the court must first determine the scope of the criminal activity that the defendant agreed to jointly undertake. (*See* Wilkins and Steer, *Relevant Conduct: the Cornerstone of the Federal Sentencing Guidelines*, 41 SO. CAROL. L. REV. 495 (1990); Goodwin, *Looking at the Law: Determining Mandatory Minimum Penalties in Drug Conspiracy Cases*, 59 Fed. Probation 74, 74–75 (March 1995).)

Because a count in an indictment may be worded broadly and include the conduct of many participants over a period of time, the scope of a defendant's jointly undertaken criminal activity is not necessarily the same as the scope of the entire conspiracy. A court, therefore, must make an individualized determination of relevant conduct as to each participant. (*See* U.S.S.G. §1B1.3, comment (n. 2).) Keep in mind, however, that relevant conduct findings, such as drug quantity or use of a firearm, are made by the court based on a preponderance of the evidence standard. Likewise, a

court may consider uncharged or acquitted conduct as relevant conduct. (*See* U.S.S.G. §1B1.3, comment. (backg'd).)

Just as with a criminal history, request from your client at the outset all the information that the court may factor as relevant conduct, such as his or her role in the offense and the conduct of all coconspirators. Ask the client to be as candid and expansive as possible in providing this information; otherwise at sentencing it may come back to haunt him or her. This information is also protected by the attorney-client privilege. Compare your client's version of the facts with the information contained in arrest and investigative reports, discovery provided by the government, as well as from interviews with witnesses.

A government deal

At the very beginning, ask the client if he or she has cooperated with the government about his or her own criminal conduct or the criminal conduct of others, or is willing to do so. You must inform the client about all possible risks of cooperation. You must also inform the client that in federal criminal practice, assisting the authorities in the investigation or prosecution of others--"substantial assistance"--is the only way, in most situations, to substantially shorten an otherwise lengthy sentence. Finally, you must advise the client that the decision on whether or not to cooperate belong to the client alone. It is at this juncture that the importance of calculating the applicable guideline range at the earliest time becomes most evident. If the client is unaware of the possible sentence, then he or she cannot make an informed decision on whether cooperation with the government is in his or her best interest.

If your client opts to cooperate, advise him or her not to make any statements to the government until you so instruct. Meet with the prosecutor and draft a cooperation agreement. At a minimum, the agreement should contain language to the effect that any information provided by your client cannot be used against the client in the determination of the applicable guideline range. (*See* U.S.S.G. §1B1.8(a).) This means that the client's self-incriminating statements made after the cooperation (§1B1.8) agreement is reached *can* be used by the court in selecting the sentence within the range, and in determining whether or not to depart pursuant to the government's motion under U.S.S.G. §5K1.1, and by how much. (*See* U.S.S.G. §1B1.8(b).) Counsel will want to attempt to structure a cooperation agreement that provides even more protection than envisioned by §1B1.8; more specifically, counsel will seek agreement by the government that the information described above will not be considered at all by the court in determining the client's sentence. Also, warn the client that, notwithstanding the protections envisioned by the cooperation agreement, the information provided by the client *may* be considered by the court if the client commits perjury, or for determining his or her criminal history under the guidelines.

The cooperation agreement should also contain language to the effect that the court, at the time of sentencing, has the authority to depart below the applicable guideline as well as below any statutorily mandated minimum sentence. Such a provision will make clear that the substantial assistance sought by the government and provided by the client will entitle the client to a departure below both the applicable guideline range and also below the mandatory minimum sentencing statute. (*Melendez v. United States*, ___ U.S. ___, 116 S. Ct. 2057 (1996); 18 U.S.C. § 3553(e).)

Limit uncertainty of outcome

Before entering into plea negotiations on behalf of the client, you should be well versed in the official plea bargaining and sentencing policy of the U.S. Department of Justice (DOJ), as well as the practice in the local U.S. attorney's office. With the exception of one recent modification since the guidelines went into effect in 1987, the DOJ has instructed prosecutors to proceed on the most serious "readily provable" charges, and not abandon charges to arrive at a plea agreement "that fails to reflect the seriousness of the defendant's conduct." In October 1993, the DOJ arguably expanded the discretion and flexibility available to federal prosecutors in charge bargaining, emphasizing the consideration of more broadly based factors, including the prosecutor's individualized assessment of the extent to which particular charges fit the specific circumstances of the case. (Attorney General Janet Reno, *Memorandum to Holders of the United States Attorneys' Manual*, Title 9 (Oct. 12, 1993), *reprinted at* 6 Fed. Sent. R. 352 (1994).)

You should also familiarize yourself with the individual judge's policies regarding particular types of plea agreements.

Charge bargaining as a practical matter has little effect on guideline computation for the great majority of cases involving offenses in which the court can consider certain dismissed or uncharged offenses as relevant conduct. (*See* U.S.S.G. §1B1.3(a)(2), referencing §3D1.2(d).) The most predictable--and often the best--type of plea agreement for your client is one in which the facts and applicable guideline calculations are stipulated, particularly if it is structured as a "binding" agreement, similar in effectiveness to an agreement under the Federal Rules of Criminal Procedure 11(e)(1)(C).

Sometimes the parties will agree on all disputed issues except one, such as whether or not the defendant is entitled to an adjustment for a mitigating role in the offense. (*See* U.S.S.G. §3B1.2.) If such is the case, consider entering into an agreement that reserves the right to argue just that one issue at the sentencing hearing. A word of caution: Include language in the plea agreement/stipulation making clear that it is not your client's intent to stipulate to a more serious offense than the offense of conviction, which, if found by the court, would mean that the court must use the guideline of that more serious offense in determining the applicable guideline range. (*See* U.S.S.G. §1B1.2(a).) The same caution applies to stipulating to conduct that the court may consider for applying an upward adjustment, even if the government does not actively seek an increase on that basis.

It will not be uncommon that even though the parties attempt to resolve issues by stipulations or other agreement some uncertainty will remain regarding what findings the probation officer will make and the court will find--an uncertainty particularly pronounced with respect to criminal history. In such instances, counsel should consider asking the court to ask the probation office to prepare a pre-plea presentence report. (Mark M. Lanier and Cloud H. Miller III, *Attitudes and Practices of Federal Probation Officers Toward Pre-Plea/Trial Investigative Report Policy*, 41 Crime & Delinquency 364, 368–376 (1995). *See*, e.g., *United States v. Salva*, 902 F.2d 483–488 (7th Cir. 1990)(suggesting appropriateness of this procedure).) Once this report is prepared, you will be in a much better position to advise your client of the likely guideline range and structure the final plea

agreement accordingly.

Finally, consider entering into an "binding" agreement using the explicit authority (or underlying contract principles) of the Federal Rules of Criminal Procedure 11(e)(1)(c). Under such an agreement the parties can agree to a specific outcome on one or more (or all) disputed issues of fact, guideline application, determination of offense level (as a cap on offense level or a specific offense level), selection of a sentencing alternative, and so forth, with the proviso that if the court refuses to follow that agreement, the defendant must be given the right to withdraw the plea. (*Santobello v. New York*, 404 U.S. 257, 262 (1971).) Selected use of such a technique may be greeted more favorably by prosecutors and judges because it can be much less intrusive on the judge's discretion than the traditional binding sentence under the Federal Rules of Criminal Procedures 11(e)(1)(C), but still carry the benefit of reducing uncertainty.

Resolving disputed issues

Judicial findings of disputed issues of fact and of guideline application are reviewed based on an abuse of discretion and due deference standard, respectively. This means that judges have more leeway in resolving these issues than they do issues that are clearly matters of law that are reviewed using a *de novo* standard. This opens the way for the use of more traditional advocacy skills, both in trying to foster a generally sympathetic picture of the client and in trying to make a persuasive case on individual issues.

Effective advocacy requires preparation: know your client's situation (preferably from the client's perspective as well as the government's); know the guidelines and how they might be brought into play; protect your client from the negative impact of his or her own admissions or dissembling; and conduct your legal research on guideline issues as much as possible before your client or you meet with the probation officer or present your perspective on the offense conduct and the defendant's situation. Finally, conduct yourself as a professional in your dealings with the probation officer, who will make critical recommendations, and the judge, who will make critical findings; convey an image of informed, prepared professionalism, and supply written documentation of your position on guideline application (and dispute resolution) with proposed findings of fact and conclusions of law. Your advocacy skills in a given case will increase your chances in that case and in later cases. Those who must respond to your advocacy are more likely to give you the benefit of the doubt on close cases if you create a reputation as a professional.

The Federal Rules of Criminal Procedure 32(b)(2) provides that counsel, upon request, must be given a reasonable opportunity to attend the presentence interview. Avoid possible problems by notifying the probation office in writing, immediately following the change of plea hearing or guilty verdict, that you intend to be present at the interview and that you must be notified in advance.

Counsel's presence at the presentence interview is highly recommended, and, in fact, is critical in cases where:

- there are disputed issues of fact regarding adjustments or offense characteristics;
- there is no plea agreement; or
- the client has been convicted following a trial.

It is your goal to have your client provide to the probation officer an accurate version of facts without admitting any relevant conduct or past criminal acts that may act to his detriment. (*See* U.S.S.G. §3E1.1.) If clients are inarticulate or have a tendency to contradict themselves or incriminate themselves beyond the offense(s) of conviction, you should consider providing theirs statements in writing to the probation officer. The client can then indicate to the probation officer that he or she admits to all the information contained in statement.

For those clients who you will permit to be personally interviewed by the probation officer, explain to your client the probation officer's role as a key player in the sentencing process, and that the probation officer's perceptions of the client during the presentence interview may ultimately result in a given recommendation to the court--favorable or unfavorable. Instruct your client to always be courteous towards the officer.

Once you receive a copy of the presentence report, you should review it sentence by sentence with your client. Make sure it contains no mistakes or confusing statements that may be interpreted against your client; even mistakes that do not affect guideline application must be corrected because of their possible impact in the security classification by the Bureau of Prisons. If your client has any objections to the presentence report, the Federal Rules of Criminal Procedures 32(b)(5)(B) provides that you must report these to the probation officer in writing within 14 days after receiving the report. Otherwise, the report's contents will be deemed admitted.

Treat the sentencing hearing as if it were a trial

Prior to sentencing, request in writing from the government all discovery relevant to sentencing matters in dispute. Also request *Brady* and *Giglio* material. If the government intends to present testimony, attempt to interview the witnesses.

The Federal Rules of Criminal Procedure 32(c)(1) grants the sentencing court ample leeway on whether to permit the parties to introduce testimony or evidence regarding objections to the presentence report. For each contested matter the court must make an on-the-record finding on the disputed issue, or state that a finding is not necessary because the evidence will not play a part in the court's determination. Counsel should be knowledgeable about the local rules of the district regarding sentencing procedure. Some districts require the parties to notify the court in advance of any evidence or witnesses to be presented at the sentencing hearing.

Although most practitioners know that the rules of evidence do not apply at a sentencing hearing, too many stop there. (*See* Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses be Applied?*, 22 Capital U. L. Rev. 1 (1993).) It is well known that the standard of proof is preponderance of the evidence; too often the test for admissibility--"sufficient indicia of reliability to support its probably accuracy" (U.S.S.G. §6A1.3(a))--is forgotten, or its significance underestimated. If you do not want certain evidence to be assessed against your client, you must challenge its reliability, and insist that the evidence be presented in a *form* that permits its reliability to be determined. In the most obvious example, if credibility of a witness is the issue, the form of the evidence should be a live witness subject to cross-examination. Some evidence in the form of multiple hearsay, while not barred by the

rules, may be so general that the reliability cannot be determined. Counsel should push for a different form of hearsay, such as a detailed affidavit. In some cases, the witness may be so hostile that counsel will want to ask that the witness be produced; in closer cases, counsel should consider asking the court to order an appearance for a deposition that will not be time consuming for the court, but which will give you more access and a greater opportunity to challenge the reliability of the evidence.

Good advocacy despite the strictures of the guidelines

While the sentencing guidelines have taken away considerable discretion from judges, defense advocacy and preparation still play an important role at the sentencing phase of a federal criminal prosecution. Research any potential issue regarding guideline application and prepare and file in advance of the hearing proposed findings of fact and conclusions of law (with supporting legal memorandum) to enable the court to familiarize itself with the issue at hand.

Requests for downward departures should be made in writing prior to the sentencing hearing. Similarly, once you view the client's case as a candidate for a departure, consider notifying the probation officer in writing. The officer can corroborate your client's factual circumstances and indicate this fact in the presentence report. It may impress the court that your client's request is not a last minute prayer for leniency, but a well-founded departure request.

Just as for a trial or any evidentiary hearing, prepare in advance your cross-examination questions for the government's witnesses. If you are presenting witnesses, meet with them prior to the hearing and go over their testimony with them. Remember, there is no substitute for thorough preparation of your case.

Guideline sentencing makes it all the more essential that you be a good advocate on behalf of your client and not underestimate the importance of your role. While the guidelines make your task more professionally demanding, they also make it easier to tell whether or not you have been effective as an advocate.

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