

## Practice Tips

## Pre-Sentencing Tips

## Little Things that Can Make a Big Difference

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### Accompany your client to the interview with the probation officer who will prepare your client's Pre-Sentence Report ("PSR").

Your client's interview with the probation officer who will prepare the PSR is an often underestimated component of the sentencing process. In fact, some defense counsel question whether they should even accompany their client to the interview. Defense counsel should not only accompany their clients to the interview, but should prepare their client in advance of the interview. Having a well-prepared client can have a substantial positive impact on the sentencing outcome. Here's why:

- Judges continue to rely heavily at sentencing on the recommendation of probation officers.
- The probation officer makes a number of critical decisions from whether to apply enhancements to recommendations on disputed issues of fact such as the amount of loss.
- Inaccurate information provided in the PSR can adversely affect the length and location of any period of incarceration.

What you should do before the interview:

- Obtain the documents and forms needed by the probation officer and have your client complete them in advance of the interview.
- Present your view of the case in a letter to the probation officer, including any cases supporting your position - remember, the government often lays out its version of the case and its guidelines calculation, along with victim impact statements, for the probation officer so you want to ensure the officer gets a balanced view.

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- Do your homework on your client - gather and provide the probation officer any background information on your client, such as social or family history.
- Provide your client's statement of the offense to the probation officer (your client can do this at the interview, but it is often preferable to set it forth in writing so as not to admit to more serious conduct than charged).
- Prepare your client for the questions and issues that will be addressed at the interview.

What you should do at the interview:

- Ensure your client provides accurate and truthful information.
- Ensure your client is respectful to the probation officer.
- Advance the positions set forth in your letter in person on the offense conduct, your client's role in the offense and any grounds for variance.
- Ask for the dictation date - make sure you get all the information to the probation officer well before that date.

### After the interview, follow-up with the probation officer *before* he/she completes the PSR.

Although the sentencing guidelines are now "advisory," the PSR remains a critical component of the sentencing process. Indeed, when crafting a sentence most judges give great weight to the PSR. In light of this, defense counsel should attempt to shape and mold the content of the PSR as much as possible *before* the probation officer begins preparing the PSR.

In one particular case, a prosecutor advised defense counsel that he intended to seek a sophisticated means and abuse of skill enhancement at sentencing. The potential impact on the ultimate sentence if *both* of these enhancements applied was significant because it would have resulted in an advisory guidelines range that included a potential term of imprisonment. By contrast, the possibility of a sentence of probation increased exponentially if only one, but not both, of the enhancements were found to apply.

Instead of waiting for the probation officer to circulate the PSR so that objections could be made, defense

counsel spoke with the probation officer before he started drafting the PSR to explain why neither enhancement applied. Although the probation officer expressed his belief that both enhancements applied, defense counsel nonetheless followed up with a detailed letter re-iterating his position and included legal authority to support that position.

When the probation officer circulated the PSR to the prosecutor and to defense counsel, the PSR made no reference to a sophisticated means enhancement. Once the prosecutor learned this, he decided not to press for the sophisticated means enhancement at sentencing, which he most certainly would have done had it been recommended in the PSR. And all defense counsel know that with some judges it can be exceptionally difficult to argue against application of an enhancement against your client when both the PSR and the prosecutor press for that enhancement. Thus, from a strategic standpoint, it makes more sense to try to keep unfavorable information from being included in the PSR in the first place instead of arguing to a judge why you are right, and both the prosecutor and the PSR are wrong.

### **Never underestimate the importance of letters of support.**

The *Booker* decision has reinvigorated judicial discretion and defense attorneys must utilize every measure to augment their client's prospects for a favorable sentence. In this climate, character letters of support now take on added significance and are an absolute must in providing the Court personal insights that are difficult to glean from the limited perspective afforded in a court appearance. Defense counsel must take the necessary steps to ensure that the letters are drafted properly in order to achieve the desired result.

Here are some ideas you might want to consider when pursuing this endeavor:

- Have your client identify a diverse mix of people, including family, friends, current and past co-workers and the broader community (e.g. neighbors).
- Send a letter to those individuals asking each to express their personal view of the client and to request lenient treatment at sentencing.
- Be sure to explain the current judicial process and the type of letter that would be most helpful to the client. A letter expressing resentment and anger might be improperly attributed to the client at sentencing.

- The letters of support should attempt to persuade a Court that substantial incarceration would serve no useful purpose and if the circumstances call for it, could imperil your client's ability to support and provide for the welfare of his or her family.
- Letter writers should reflect on events and exchanges that reveal the true nature of the client and attempt to concisely capture those thoughts in the letter. In doing so, the writer should briefly describe the nature and duration of the relationship with the client. There is no page limit, but the Court may receive multiple letters, so recommend a page limit of one to three pages.
- Have the letter writers send their drafts to you before sending to the Court so that you will be able to suggest any appropriate revisions.
- Once in final form, assemble all of the letters and provide them to the Court en masse with your other sentencing materials.

Do not underestimate the value of letters of support. It has been our experience that courts and probation officers do read and consider these letters, as they are a vital part of the sentencing process. If the letters are well-drafted and heartfelt, your client may derive a meaningful benefit.

### **Always confirm whether your client is potentially eligible for the BOP's Residential Drug Abuse Program ("RDAP").**

Another avenue to explore with a client is whether he or she would be eligible for the Federal Bureau of Prisons Residential Drug Abuse Treatment Program (RDAP). RDAP is a specialized program that can benefit offenders with substance abuse problems while also offering the added incentive of a potential reduction in their sentences beyond earning good time credit.

The treatment is an intense 500 hour, six to twelve month program and eligible graduates may qualify for an extended halfway house placement and a sentence reduction of up to one year.<sup>1</sup> The program is voluntary and candidates must have a documented substance abuse problem, usually verified by the PSR. Also, the candidate must have 36 months or less remaining on his or her sentence.

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always appoint counsel to represent the minor's interests under these circumstances.<sup>11</sup>

**8. Protective orders:** Just as the attorney for the child can file motions for protective orders before and during the trial, so too can the attorney ensure the child is protected after the defendant is sentenced. At the post-trial phase, child's counsel can continue to advocate for their client by seeking no-contact orders and appearances at modification and parole hearings to ensure the child is protected. In some cases such as when children have been victimized in pornographic material, the child may be re-victimized so Child's counsel may need to assist their client in future cases.

### Conclusion

The interests of child victims in criminal cases may be ignored unless those persons who have contact with the child victim take appropriate legal actions to protect the child's interests. Child victims will have rights as victims of crime like adult victims, but they may not have the capacity to understand and exercise those rights. Child victims may also have age specific provisions of law to accommodate their status as children. Those involved in child welfare cases, law enforcement personnel, social workers, prosecutors, judges, and others should take appropriate action to facilitate the appointment of GALs or counsel for child victims in criminal proceeding. With appropriate training, attorneys will be able assist child victims in the aftermath of crime.<sup>12</sup>

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### Endnotes

<sup>1</sup> "The legislatures who enact laws criminalizing child sex abuse, the police and prosecutors who enforce these laws and society at large have grown increasingly aware of the need to protect children throughout the criminal process. The growing emphasis on child victim rights in this process has led to debate within the legal community regarding how to balance the welfare and rights of the victim with those of the defendant." See generally, Gregory M. Bassi, *Invasive, Inconclusive, and Unnecessary: Precluding the use of Court-ordered Psychological Examination in Child Sexual Abuse Cases*, 102 NW. U. L. REV. 1441, 1442 (Summer 2008). See also Elaine Walton, *The Confrontation Clause and the Child Victim of Sexual Abuse*, Child and Adolescent Social Work Journal (June 1994).

<sup>2</sup> Information on the victims' rights statutes passed by various jurisdictions can be found at [www.ncvli.org](http://www.ncvli.org).

<sup>3</sup> See Mark Hardin, *Guardian ad Litem for Child Victims in Criminal Proceedings*, 251. FAM. L. 687 (1986-87).

<sup>4</sup> See Hardin, *supra*.

<sup>5</sup> ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.

<sup>6</sup> *US v. Rouse*, 410 F. 3d 1005 (8<sup>th</sup> Cir. S.D. 2005).

<sup>7</sup> N.C. Gen. Stat. §7B-601.

<sup>8</sup> Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. Louisville J. Fam. L. 239 (1997).

<sup>9</sup> 18 U.S.C. §3509

<sup>10</sup> *Id.* (See also Debra Whitcomb, *Guradians Ad Litem in the Criminal Courts*, Washington D.C., Nat'l Inst. Justice, 1988).

<sup>11</sup> *State v. Freeman*, 203 N.J. Super. 351 (1985).

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Verify that your client does not fall into one of the categories of inmates who are not eligible for the sentence reduction, such as INS detainees, having a prior conviction of certain violent offenses or having a current offense involving violence or the possession of a dangerous weapon.<sup>2</sup>

Obviously, defense counsel's primary objective will always be to avoid or reduce a prison sentence and the RDAP program can be a means to ease a client's passage through the prison system.

### Endnotes

<sup>1</sup> See 18 USC § 3621 (e)(2).

<sup>2</sup> The policies and procedures of the RDAP program are set forth in BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, available at [www.bop.gov/policy/progstat/5330\\_010.pdf](http://www.bop.gov/policy/progstat/5330_010.pdf).