Inside Baseball: Interview with Former Federal Probation Officer

The author interviewed Tess Lopez, a former U.S. probation officer for the Northern District of California in San Francisco. For 13 years, she specialized in presentence investigations. In 2005, she took her expertise in the area of sentencing to the private sector and is now a mitigation specialist with a national practice. Contact her at tesslo2@yahoo.com.

Ellis: *As a former probation officer, how do you think probation officers (POs) have responded to the* Booker *decision?*
Lopez: Well, unfortunately, I am not seeing that the presentence reports (PSR) have changed significantly even though the sentencing guidelines are only one of seven factors the court is now required to consider in imposing a sentence. In order for POs to determine which 18 U.S.C. § 3553(a) factors apply, they need to conduct four-hour interviews with offenders and another four to six hours of interviews with family members and close friends to gain this insight. Obviously, that is not going to happen in the current environment of insufficient staff and high caseloads.

Ellis: *How would the probation officers obtain this information?*
Lopez: The defense community, as a whole, needs to change its approach to sentencing. When probation officers receive a case, they are bombarded with information from the government, including graphic photos of child pornography, pictures of bank robbers, automatic weapons, drugs, and victim impact statements detailing how the offender has robbed good ol' granny of her life savings. The victim may add that your client should rot in jail in the worst of conditions. Such information is presented by the government to the PO in a nice little package complete with a letter outlining its version of the case, its guideline calculations, and an invitation to meet with the FBI agent or case agent to further "enlighten" the PO. Defense counsel usually just calls the PO to schedule the presentence interview and mails the probation form completed by your client providing basic background information.

Ellis: *What can the defense community do differently?*
Lopez: They cannot simply act like "business as usual." The court is not going to receive the information needed to consider sentences outside the guideline range or "variances" from the probation officer, and certainly not from the government. Defense counsel needs to either spend sufficient time with the client and his (or her) family or friends, getting to know him/her so that that the attorney can identify which 3553(a) factors may support a sentence outside the guideline range, or hire a sentencing mitigation specialist to obtain and analyze this information. The lawyer should obtain this information as early in the process as possible so that it is immediately available to present to the probation officer when he or she receives the case and prior to the probation interview. This would provide the probation officer with a more balanced view of the case and presents a preview of the 3553(a) factors that you have identified for consideration.

Ellis: *What else can defense lawyers do to assist the PO in understanding clients?*
Lopez: Provide verification of everything. If your client has an alcohol problem, if not documented by prior arrests, document it, get him or her evaluated, and have family members or friends comment about it. Could the client be abusing alcohol to "self-medicate" and relieve an underlying mental health prob-

Alan Ellis, past president of the NACDL, is a nationally recognized authority in the fields of plea negotiations, sentencing, appeals, parole and prison matters, habeas corpus 2241 and 2255 petitions, and international prisoner transfer treaties with offices in San Rafael, California, Ardmore, Pennsylvania, and Hong Kong, China. He is the coauthor with J. Michael Henderson, of *The 2005-06 Federal Prison Guidebook* and a contributing editor to *Criminal Justice* magazine. Contact him at aelaw1@alanellis.com or go to www.alanellis.com.

lem? If your client has significant medical issues, document it and provide a list of medications as well as your client's limitations. If there is a mental health issue, or even if you suspect it's possible, obtain a psychological evaluation. Gather as much information as possible to help the PO, and ultimately the judge, understand who your client is and what led him/her to commit the offense.

Ellis: *Can you provide an example of how such detailed information can support a sentence outside the guideline range?*
Lopez: I'll give you two. 1) Historically, lack of guidance as a youth and unfortunate childhood experiences were not relevant in determining whether a sentence outside the guideline range was appropriate. It was called a "prohibited factor." I could never understand this "logic." Repeated studies have shown that a disadvantaged youth is a root cause of crime in this country. At last, post-*Booker*, this information must be considered by the court as it relates to the personal history or characteristics of the defendant. 2) As you often say, Alan, "If you think your client is crazy, guess what? He may be crazy. Have him/her evaluated by a mental health professional." I second the motion. If your client has suffered significant abuse or trauma, these experiences may have contributed to his/her pattern of making poor decisions or engaging in risky, unacceptable behavior. Defense counsel may be able to show that the childhood experiences were extreme and contributed to the client's participation in the offense. Perhaps the client recently commenced counseling and can demonstrate new insight about wrongful conduct. These unfortunate childhood circumstances and the client's motivation to address his/her behavior may convince the court that a lower sentence is warranted.

Ellis: *In your experience, do many clients have mental health issues?*
Lopez: To illustrate an example: In a white collar case, the client is an exceptionally bright, high-functioning, and very successful individual. By all appearances, he is very skilled, highly motivated, and works 18-20-hour days, landing promotions and executive privileges. Where is the mental health issue here? A little digging and a psychological evaluation reveals that the client is an obsessive-compulsive perfectionist who suffers from depression and anxiety. The overwhelming desire to be successful personally and financially may cause an ordinarily law-abiding person to "cross the line" into inappropriate or illegal behavior. The exceptionally bright, successful client is later diagnosed with bipolar disorder. Studies have shown that many people silently and unknowingly suffer from mental illeness. The Justice Department estimates that half of America's prison and jail inmates have symptoms of mental health problems. However, the latest statistics by the U.S. Sentencing Commission (2002) reflect that only 2.6 percent of inmates received downward departures for diminished capacity (U.S.S.G. § 5K2.13). If half of the inmates have symptoms of mental health problems, yet only 2.6 percent are receiving departures, are the judges simply insensitive? Or, does the problem lie at the feet of defense counsel who are not taking the time to conduct a thorough investigation into the client's social and psychological history? Unfortunately, I believe it is the latter.

> On first contact, ask for the dictation deadline.

Ellis: *How can defense lawyers make sure the court gets the detailed information?*
Lopez: Unfortunately, it is often too late to wait and simply respond to the draft presentence report. When the lawyer first makes contact with the probation officer, ask for the "dictation deadline" or date that the draft PSR is due to the supervisor. Make sure all information regarding the client's background is provided by that date. As experienced federal practitioners well know, it is often difficult to convince a PO to make significant changes to the report once it is disclosed. However, if the information is simply not available until after the draft report is disclosed, the lawyer who responds to the draft PSR should request that the PO include the more detailed information into each section of the PSR. Defense counsel may even email a detailed report to the probation officer so he/she can cut and paste the information into the report. Finally, outline each factor that you want the PO to consider under parts E (factors that may warrant a departure) and F (factors that may warrant a sentence below the guideline range under 18 U.S.C. § 3553(a)) of the PSR and make strong arguments to support these requests.

Ellis: *Why not skip the process and just put everything in the sentencing memo to the court?*
Lopez: Two reasons: First, judges continue to rely on probation officers during sentencing and some judges are significantly influenced by the probation officer's opinion. If the PO is receptive to a variance it may be key to convincing the court to consider a sentence below the guideline range.

Second, in the event that your client receives a prison sentence, the only documentation received by the Bureau of Prisons (BOP) about your client is the PSR. This information (or lack of information) will dictate whether the client is sent to a dormitory-style camp or, at the very worst, a maximum security prison. For example, if your client has a pending state case and no disposition is noted, the BOP may treat the open case as a detainer. As a result, clients may be scored higher, be precluded from participation in programs that could benefit them and reduce their sentences, and affect whether or not they are sent to a more secure facility with fewer privileges.

Ellis: *How can lawyers address a pending state matter that may result in a detainer?*
Lopez: Defense counsel should schedule a court date to have the previous matter disposed and then alert the judge that the matter is pending disposition. Request that the sentencing go forward and notify the judge that you will provide a certified copy of disposition. Request that the judge order the probation officer to modify the PSR to include the disposition (before sending the PSR to the BOP) once the PO receives this documentation. Also request that the judge's clerk wait to release the judgment and commitment order (J&C) until this happens since the issuance of the judgment triggers the BOP designation process. Having the client sentenced on the prior offense *after* sentencing prevents the client from having another scorable conviction. Requesting that the PO be directed to change the previously pending matter to one that has been disposed of eliminates the issue of having a pending matter or "detainer" for BOP designation purposes.

Ellis: *Is there anything else defense counsel can do to get their point across to the probation officer?*
Lopez: Yes, in cases in which the client is convicted by a jury or enters a plea without a written plea agreement, the parties have not agreed on guideline calculations or departures. Often, the parties have opposing views on loss figures, guideline calculations, ex post facto issues, criminal history, and departures. I recommend that defense counsel present their entire view of the case in a straightforward letter to the PO as soon as possible. More importantly, I strongly recommend that defense counsel request to meet with the probation officer to discuss their position on these issues. This is particularly important in a complex case involving numerous counts, various ways to calculate the guidelines, which guideline is appropriate, which guideline book is appropriate, etc. Personal contact with the probation officer builds rapport and offers an opportunity to explain your position. Sometimes a case is so complex that the PO would welcome the opportunity for defense counsel to explain their version of the case. Remember, the PO wasn't present at trial. A personal meeting also assures the lawyer that the PO understands the case and his or her position. Generally speaking, when working with the probation officer, a little extra effort goes a long way.

Ellis: *Is it your impression that the judges are responding to the* Booker *decision and the* Booker *remedy by treating the guidelines as just one of seven factors and are sentencing outside the guideline range?*
Lopez: Unfortunately, the data indicate that federal sentences are not lower post-*Booker*. Once again, it is up to the defense bar to bring about change through creative advocacy. As noted by Karen L. Landau, whom I know is "of counsel" to your firm, in an article she coauthored with you and your senior associate, James H. Feldman, Jr., "Litigating in a Post-*Booker* World" (CRIM. JUST., Spring 2005, at 24.), "federal criminal defense lawyers may need to take a lesson from their comrades in the realm of capital litigation: these attorneys have repeatedly demonstrated how to save clients' lives through conducting a thorough investigation into the client's social and psychological history and producing evidence that mitigates the crimes committed."

I think it is easier for a judge who was on the bench in the preguideline days to welcome the wiggle room and lack of structure than it is for those judges whose only experience has been with guideline sentencing. It will take time for the defense community to appreciate the importance of operating differently and more thoroughly and it's going to take time for some judges who like the structure of the guidelines to adapt to the change, as it "goes against their grain." But you and your colleagues can help them do so. ■