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Presumptively Reasonable? Federal Sentencing Post-Booker and Post-Rita

How effective has the Supreme Court's decision in United States v. Booker been in influencing judges to order federal sentences outside the guideline range? The results vary widely among the circuits. The Supreme Court held that the federal sentencing guidelines are no longer mandatory and are now only one of seven factors that Court is required to consider at sentencing. How much weight should be given to the guidelines? They still have to be calculated for the Court to consider along with the other factors. Should they be given equal consideration along with the other factors? In United States v. Rita, the Supreme Court finds that appellate courts are permitted to apply a "presumption of reasonableness" when reviewing within-guideline sentences. The decision repeatedly emphasizes that this is an appellate presumption of reasonableness, a district court may not presume that a guideline sentence is the correct sentence, the court must start from the beginning and consider all of the 3553(a) factors. This is the latest decision in a wave of new and important cases which attempt to address the obvious ambiguity left by the Booker remedy.

How can federal practitioners develop and present an effective argument for a sentence below the guideline range? Pre Booker, defense counsel focused on detailed plea agreements establishing a specific guideline range and proposed sentence. Consequently, minimal emphasis was devoted to the sentencing process. Post-Booker, it is imperative that federal practitioners be prepared to address all relevant sentencing factors now available under 18 U.S.C. § 3553(a). As a former federal probation officer who specialized in the preparation of presentence reports, I offer the following suggestions:

Prior to entering a plea, spend some time with your client. Do not agree to waive your right to argue for a sentence below the guideline range - a practice which is gaining momentum in the Ninth Circuit. How can you give up that which you do not know? In order to develop these sentencing factors, considerable time needs to be spent with the client and his/her family to gather detailed background information. There needs to be an analysis of the information to determine if a mental health evaluation, substance abuse evaluation, medical evaluation or other testing would be beneficial. Consider the assistance of a sentencing specialist.

Prepare a detailed social history report for use by the mental health/substance abuse/medical practitioner, probation officer (P.O.) and the Court. Make contact with the probation officer as soon as possible and notify him/her that you will be sending a letter. The letter should incorporate the social history as well as outline your position on guideline issues, departures and identify 3553(a) factors for the probation officer's consideration. Send the letter in advance of the presentence interview. This is important because once a probation officer receives a case, they are bombarded with information

from the government which often includes graphic photos and victim impact statements. The information is presented in a letter from the AUSA outlining his/her position on the case, his/her interpretation of the guidelines, and an invitation to meet with the FBI or case agent to obtain additional details. Because this is generally all of the information a probation officer receives on a case, it is easy for the AUSA to convince the P.O. that their position is the correct position. Prior to Booker, defense counsel usually simply called the P.O. to schedule the interview and submitted a completed probation form. Let's level the playing field and give the probation officer a more balanced view of your client.

One of the most important and often overlooked areas of focus is responding to the draft presentence report. As you know, this is the only document that follows your client through the Bureau of Prisons process and the information will affect the client's classification level, eligibility for programs, and designation. The report also influences the probation officer as to how to supervise your client upon his/her release. It is imperative that your client is presented in the most positive light and that all potential problem areas are addressed prior to the release of the final presentence report. Make sure your proposed 3553(a) factors are identified under Part F of the presentence report. This is your last chance to get all of your points across to the P.O. and ultimately into the presentence report.

Because the federal sentencing guidelines are now only one of seven factors the Court is required to consider, they ought not to be given more weight than the others. Therefore, when preparing the sentencing memorandum, present the issues in the order outlined in 18 U.S.C. § 3553 (a). The guidelines are the fourth factor. Your sentencing memorandum should begin with your request for a sentence below the guideline range and follow the analysis consistent with the statute.

As part of the defense community, we must utilize every opportunity to provide a more balanced view of the client and meet the obligation to alert the Court of all relevant mitigating issues. We need to be proactive in gathering and identifying post-Booker issues, bringing them to the attention of the probation officer in an effort to convince the probation officer, and ultimately the Court, that there are factors which warrant a sentence, other than that proposed by the federal sentencing guidelines.

In this uncertain era of federal sentencing, we remain hopeful that we can bring about change through diligent and creative advocacy.

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