

## Make the Sentencing Process Work for You

BY TESS LOPEZ

*"You can't always get what you want, but if you try sometimes . . . you just might find . . . you get what you need."*

—Rolling Stones

In December 2006, a young East Indian immigrant was arrested, along with several other young men, and charged in the Western District of Texas with possession of marijuana with intent to distribute. An investigation revealed that the illegal activity involved growing in excess of 1,000 marijuana plants. The defendant subsequently pled guilty to one count of the superseding indictment—but not before he was again arrested, while on bond, for selling marijuana. As a result of this last arrest, his bond was revoked and he was incarcerated pending sentencing. Weighing against him, the defendant also had prior convictions for possession of marijuana and driving while intoxicated.

Initially, he faced a mandatory minimum term of 10 years in federal prison, but after pleading guilty to the lesser charge, he faced a maximum of five years' imprisonment with a sentencing guideline range of 78 to 97 months. In the end, the defendant was sentenced to a five-year term of probation with a period of electronic monitoring. Finding that mitigating factors under 18 U.S.C. § 3553(a) were appropriate and relevant in the final determination of the sentence, the court imposed no prison time.

Prior to sentencing, the services of a qualified sentencing specialist were obtained and a comprehensive background investigation was initiated. It was determined that the defendant was highly intelligent. He had been an honor student and the recipient of a National Merit Scholarship award.



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He was a business partner of a successful medical research clinic and had been accepted to several medical schools. How could this seemingly successful young man become involved in this type of criminal behavior?

Only after an evaluation by a psychologist was it determined that this individual had serious emotional issues brought on by excessive family and cultural expectations. The psychologist submitted an extensive psychological report to the probation officer explaining the issues clearly. Additionally, reports to the probation officer included verified treatment for chronic marijuana dependency, his weekly psychotherapy sessions for treatment of a major depressive disorder, and his ability to attain and maintain successful employment. The submissions to the probation officer clearly explained how such interventions greatly minimized his risk of reoffending. A letter was also submitted from his girlfriend outlining that he was the sole financial and emotional support for her six-year-old autistic son. A letter was provided from the son's therapist regarding the client's critical role in the boy's life and the detrimental impact felt by the son as well as the son's behavioral deterioration when the client was initially incarcerated. Numerous letters from business partners and other professionals were also submitted attesting to the positive character of the defendant.

As a result, the final presentence report submitted to the court by the probation officer contained all of the relevant factors necessary to achieve the desired results, namely, an appropriate and just sentence by the court.

### Beyond the Plea Agreement

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. In *United States v. Booker*, 543 U.S. 220 (2005), the U.S. Supreme Court held that the federal sentencing guidelines are no longer mandatory and are now only one of seven factors that a court is required to consider at sentencing. Therefore, it is imperative that federal practitioners be prepared to address all relevant sentencing factors now available under 18 U.S.C. § 3553(a). Post-*Booker*, notwithstanding myriad factors in play under 18 U.S.C. § 3553(a), the U.S. Probation Office continues to do business as usual and does not spend additional time interview-

ing a client and his/her family members, friends, and business associates to understand the client's personal history and characteristics. Upon receiving a case, the probation officer is presented with information from the government, including graphic photos of evidence such as child pornography, automatic weapons, and drugs, as well as victim impact statements explaining why the client should get the maximum sentence. This information is presented by the government in a package complete with a letter outlining its version of the case, its guideline calculations, and an invitation to meet with the case agent who is more than ready to provide additional details (relating to charged or uncharged conduct and, in many cases, notwithstanding a lack of evidence supporting these allegations).

It is incumbent upon the defense community to level the playing field. Historically, defense counsel simply called the probation officer to schedule the presentence interview and submitted the completed probation form to the probation officer. To take advantage of the changing law, defense counsel cannot continue doing business as usual. Getting the presentence report and, ultimately, the desired recommendation requires a proactive approach. Achieving the desired goal of a sentence that is "sufficient but not greater than necessary" requires ensuring that all sentencing factors are available to the probation officer. It is important that defense counsel be mindful that the information contained in the presentence report will affect program eligibility, classification level, and institutional placement.

Should defense counsel find it time-consuming to conduct thorough interviews with the client and others to develop and identify mitigating factors, arrange for appropriate evaluations, collect and review character reference letters, and prepare a detailed letter to the probation officer, counsel should consider the assistance of a sentencing specialist to perform these functions.

### Five Suggestions

To ensure that the presentence process works to the client's advantage the following suggestions are offered to defense counsel:

1. As early in the process as possible, preferably prior to a plea, spend considerable time with the client and his/her family members to gather detailed background information. Information collected needs to extend far

beyond what is required on the probation form. Gather information with a goal toward identifying and substantiating issues that will have a favorable influence on sentencing as well as eligibility for programs and designation to a camp or a lower security facility. Explain or mitigate issues that may have a negative impact on sentencing or placement.

2. Determine whether a psychiatric evaluation, substance abuse evaluation, medical evaluation, or other testing would be beneficial in verifying the client's condition and arrange these evaluations at the onset of the case. These evaluations are often time-intensive and should be arranged as soon as possible.

3. Prepare a detailed letter to the probation officer outlining the client's social history, and identify and enumerate all appropriate 3553(a) factors for his/her consideration. Send this letter to the probation officer prior to the presentence interview. Provide verification of everything. Both counsel and client want to make a positive impression on the probation officer early in the process.

4. Have the client obtain character reference letters from family members and, more importantly, from credible people who can attest to the client's excellent employment history, community service, role as a mother/father. The client should also seek written corroboration from those who can verify incidents of childhood abuse, substance abuse, or a history of mental health problems. Counsel should contact the probation officer immediately and advise that the letters will be sent as soon as possible—ideally, prior to the presentence interview.

5. Finally, counsel should offer to e-mail the letter to the probation officer so he/she can "cut and paste" the information directly into the presentence report. This makes the probation officer's job easier and ensures that most, if not all, of the information is incorporated into the presentence report. In an era of greater caseloads and tighter time constraints, the probation officer will appreciate the assistance. Additionally, it will make the presentence interview go more quickly and smoothly as the probation officer already has the information needed.

The letter detailing your client's social history can also be utilized by the mental health or substance abuse evaluator and/or medical practitioner, and acts as an outline for the ultimate sentencing memorandum.

One of the most important and often overlooked areas of focus is responding to the draft presentence report. This is counsel's last chance to get all of the points across to the probation officer. The presentence report is the only document that follows the client through the Bureau of Prisons process, and the information it contains will affect the client's classification level, eligibility for programs, and designation; it also influences the risk level and level of supervision provided by the probation officer upon the client's release from custody. Proposed 3553(a) factors should be identified under Part F of the presentence report. It is imperative that the 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.

Judges continue to rely heavily upon probation officers during sentencing and many judges are significantly influenced by the probation officer's opinion. By providing relevant mitigating evidence both regarding the offense and the offender to the probation officer early in the process, counsel may be able to make the case that a downward variance is appropriate. The probation officer's opinion may be key to persuading the court to consider a sentence below the guideline range.

The defense community must utilize every opportunity to provide a more balanced view of the client and meet the obligation to alert the court to all relevant mitigating issues. Defense counsel must 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 warranting a sentence below the federal sentencing guideline range. Counsel who takes advantage of the new, post-*Booker* opportunities just might find at sentencing that "you get what you need." ■