

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2012

PHILADELPHIA, FRIDAY, MARCH 2, 2012

VOL 244 • NO. 42

An **ALM** Publication

CRIMINAL LAW

Section 3553: The Center of Federal Sentencing Provisions

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Special to the Legal

My last two federal sentencing articles addressed downward departure and variance motions in a sentencing hearing. This article focuses on the heartland of sentencing provisions: the 18 U.S.C. § 3553(a) factors. Advocating the pre-sentencing compliance with these provisions, how they should be applied to your client and other sentencing court's decisions will ensure a sentence sufficient but not greater than necessary.

The Section 3553(a) discussion is considered after the court has ruled on departure and variance motions to establish a revised guideline sentencing range. The Section 3553(a)(1) factors require the court to equally consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentences available; (3) the kinds of sentence and the sentencing range; (4) any pertinent policy statement issued by the Sentencing Commission; (5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (6) the need to provide restitution to any victims of the offense.

Concurrently, Section 3553(a)(2) requires the sentence imposed to: (1)



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reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense; (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further crimes of the defendant; and (4) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.

Emphasize upbringing, education and familial background with specific reference to remarkable life events beyond those discussed in the pre-sentence report. Explicitly address how, why, when and with whom your client became involved in the crime. If a proffer occurred, regardless of a §5K1 motion, set forth the completeness of cooperation, extent of assistance to the government and nature of such risk. Case law establishes that lack of motive, degree of intent and individual culpability are all relevant in assessing and allocating blame at sentencing. Appellate courts have reversed sentences when district courts did not consider neighborhood,

prior victimization or threats, and work needs as reasons for, not excuses of, criminal conduct.

Aberrant behavior is established through evidence of work and family history, charitable activities, business struggles or successes, and character. Letters from friends and extended family place into context for the court your client's life and the isolated nature of the criminal events of the sentencing. Spouse and business partners' testimony supportive of the guilty highlight a defendant's continued community, family and peer endorsement; all of which is the foundation for proving the one-time nature of the criminal act.

Thereafter, establish your client's low risk of recidivism. This is necessary to show your client's amenability to rehabilitation and ability to comply with the terms of supervised release. The U.S. Sentencing Commission has authored two statistical studies on recidivism. These two articles, "Recidivism and the 'First Offender'" and "Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines," allow for citation to age and gender-specific statistical probabilities of recidivism for each offense level and prior record history. How unlikely it is that your client will reoffend based upon his or her age is a significant argument. Empower the court to choose your sentencing recommendation through the Sentencing

Commission's own empirical evidence. It is now an abuse of sentencing discretion if the court ignores age recidivism policy considerations not included in the guideline calculations.

Even if the final guideline sentencing zone is prison, sentencing courts must still consider all kinds of sentences available. It is always appropriate to highlight your client's nonviolent, nonserious offender status in conjunction with limited prison resources. More importantly, post-offense enrollment in mental health treatment and/or a college/vocation training program identifies a responsible, hard-working defendant who is striving to better himself or herself, afford supervision and pay required restitution. Remind the court that Section 3553(a)(2)(D) allows for maintaining offender-coordinated rehabilitative paradigm as a more effective, efficient and less costly sentence than judicially coerced corrective measures with unknown treatment providers at government expense.

Alternative kinds of sentencing also satisfy deterrence and respect for the law that are not necessarily achieved by lengthy incarceration. Certain defendants possess the ability to transfer their business acumen into valuable and suitable community service projects in their respective business field. After all, providing highly competent, free service to those individuals injured by the criminal conduct (i.e., helping the homeless if HUD was a government victim) provides a win-win alternative sentence that does not include incarceration, addresses reparations, secures deterrence and allows for community benefit. Jail is not always the answer.

Just punishment is also evaluated in the context and extent of self-inflicted ruination that your client has already suffered because of his or her conduct and prosecution. Stress the pre-sentence collateral consequences of losing a professional license, divorce, depletion of personal and business assets, and

preclusion from participation in federal and state government programs. While these costs are not a complete substitute for judicial punishment, they are critically important to assessing what further punishment is necessary. Courts widely recognize that because such consequences satisfy some of the purposes of punishment, they are grounds for a below-guideline sentence.

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Having removed your client from the standard, unscientifically based guideline calculus, now focus on offense-specific commission sentencing policy to identify a limited congressional intent to punish your client. The commission's annual sentencing policy statements, which address guideline amendments and implementation of Supreme Court decisions, contain valuable arguments for every sentencing memorandum. Referencing recent Supreme Court cases discussing sentencing authority, *United States v. Booker*, *United States v. Pepper* and *United States v. Kimbrough*, in conjunction with updated commission policy provides judicial authority for further reduction in offense level determination.

Identifying similarly situated defendants by criminal offense in the Section 3553(a)(6) context provides for factual comparisons to avoid

unwarranted sentencing disparities. The Sentencing Commission's online quarterly publication of sentencing statistics for every circuit and district for each major criminal offense is an important tool. Every sentencing memorandum should include reference to your client's crime and your district and circuit's sentencing figures.

As well, search national and local U.S. Attorney and Federal Defender media releases for similar prosecutions across the country. After securing a defendant's name, search PACER in that jurisdiction to create a defendant-based sentencing grid with similar cases from around the country. Identifying what specific below-guideline sentence was handed down on an identical prosecution anywhere in the country, not limited to your district or circuit, is valuable to any sentencing court.

The Section 3553 factors are the last calculus from which every sentence is derived. It is here that counsel must present their client's character, history and future in the context of the underlying case, punishments already suffered, and similarly situated cases. From the tools referenced, the court will have legal and factual basis, not disturbable upon appeal, to issue a below guideline, non-incarceration, sentence. •