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CRIMINAL PRACTICE

# Securing a Downward Variance in a Federal Sentencing

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*Special to the Legal*

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In reviewing the Federal Sentencing Commission Statistical Information Report for Fiscal Year 2010, it is clear that once a client is formally charged or indicted in the 3rd Circuit, whether disposition is through a guilty plea or trial, there is more than a 95 percent chance that a sentencing hearing will occur. It is in the sentencing hearing, not trial, that counsel will have the greatest opportunity to affect the sentence imposed.

Post *U.S. v. Booker*, a 2005 U.S. Supreme Court decision, presenting a reasoned basis for a downward variance through application of the 18 U.S.C. § 3553(a) factors and *any other evidence* will lead to a below guideline sentence close to 15 percent of the time nationally and 23 percent of the time in the 3rd Circuit.

Procedurally, the sentencing court first must clearly articulate the applicable base-level advisory guideline range. Thereafter, government and defense motions for departure under specific guideline provisions are addressed, establishing a revised offense level and guideline range. Finally, the court considers the 18 U.S.C. § 3553(a) factors and *any other evidence* before deciding to grant or deny an upward or downward variance and annunciate the final offense level and respective sentence. (See the 2011 3rd U.S. Circuit Court of Appeals opinion in *U.S. v. Fumo*.) It is at this last step that defense counsel presents evidence and argument establishing the basis for the downward variance to persuade the sentencing court to "impose a sentence sufficient, but not greater than necessary."

The court's ability to vary downward after all calculations is based upon *Booker,* which held that the Sentencing Guidelines are just one of a number of sentencing factors. Instead of being bound by the guidelines, the Sentencing Reform Act, which *Booker* revised, requires a sentencing court to consider guideline ranges, 18 U.S.C. § 3553(a)(4), and tailor the sentence in light of other statutory concerns. The 3rd Circuit instructs the district courts to apply the § 3553(a) factors in addition to other defense mitigation or government proffered aggravating factors in rendering a sentence. (See the 2006 3rd Circuit opinion in *U.S. v. Severino*.)

Judicial discretion is at its greatest in calculating the variance, if any, and therefore advocacy at this stage will impact a defendant's sentence the most. This is because the primary sentencing mandate of § 3553(a) is that courts must impose the minimally sufficient sentence to achieve the statutory purposes of punishment — justice, deterrence, incapacitation and rehabilitation. As well, in determining the type and length of sentence that should be imposed, sentencing courts know that "imprisonment is not an appropriate means of promoting correction and rehabilitation." (See 18 U.S.C. § 3582(a).)

Accordingly, it is imperative for counsel to provide the court with all factual and legal rationales upon which the court can reasonably rely to vary downwards from a guideline calculation.

In determining the minimally sufficient sentence, § 3553(a) directs sentencing courts to consider the following factors: (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 sentences and the sentencing range established [by the Sentencing Commission]; (4) any pertinent policy statement issued by the Sentencing Commission; and (5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

These benchmark considerations, however, still establish the high water mark from which the guideline advisory range is calculated if a downward variance is granted. Once consideration of the § 3553 (a) factors is complete, absent a government upward variance, the offense level and corresponding sentence should only go down as downward variance grounds are presented.

The 3rd Circuit has explained that the record should demonstrate that the court considered the § 3553(a) factors and any other sentencing grounds the parties properly raise that have recognized legal merit and factual support in the record. The "district court has a duty to evaluate the quality of mitigating evidence presented to it," the 3rd Circuit said in its 2009 opinion in *U.S. v. Olhovsky*. This duty is concomitant with the court's wide latitude to vary a sentence from the guideline range.

One successful variance argument is the lack of deference due to certain non-mandatory guideline provisions based upon the arbitrariness of offense level enhancements. Economic loss calculations under § 2B1.1 are one such example. Here, the argument is the absence of empirical or scientific basis to support the guideline calculation or offense level increases between claimed loss amounts.

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In so establishing the pure randomness of certain guideline calculation enhancements, the disparate impact and, therefore, the substantial overstatement of the seriousness of the offense becomes clear. This position is central to the contention that the proposed sentence is "greater than necessary [or artificially inflated] to provide just punishment" after consideration of the § 3553(a) factors. (See the 2009 3rd Circuit opinion in *U.S. v Arrelucea-Zamudio*.) This argument provides the court with a "reasoned, coherent, and sufficiently compelling" basis to decline to apply a guideline sentence after consideration of the § 3553(a) factors. (See the 2010 3rd Circuit opinion in *U.S. v. Grober*.)

The district court's discretion in sentencing is further reinforced under a variety of statutory provisions focused on limiting the term of imprisonment imposed and effecting the parsimony provision of § 3553. Again, under 18 U.S.C. § 3582(a), imposition of a term of imprisonment is subject to both the understanding and restriction that incarceration "is not an appropriate means of promoting correction and rehabilitation." In fact, some courts have held that where the guidelines conflict with other sentencing factors set forth in § 3553(a), these statutory sentencing factors could trump the guidelines. Additionally, 18 U.S.C. § 3661 states that "no limitation shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

In sum, in every sentencing the court has substantial discretion, and must consider all of the § 3553(a) factors, not just the guidelines, and all other appropriate evidence, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing. It is up to counsel to provide the sentencing court with all relevant, reasoned, and compelling evidence at the variance stage to minimize the potential jail sentence issued. •