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CRIMINAL PRACTICE

Securing a Downward Departure in a Federal Sentencing

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Special to the Legal

My last article started with the conclusion that in more than 95 percent of federal criminal cases a sentencing takes place. (See "Securing a Downward Variance in a Federal Sentencing," published Nov. 22.) The topic of choice was the downward variance in light of former state Sen. Vincent Fumo's resentencing. Now, let's turn to several available and specifically enumerated downward departure guideline provisions that if warranted and not raised could constitute ineffective assistance of counsel.

Keep in mind when assessing these motions' viability that many years may pass between commission of an offense and a sentencing or resentencing. Over time, our clients' character and physical and mental well-being change.

In the 2011 *Pepper v. U.S.* case, the U.S. Supreme Court demonstrates that it is now aware of this fact and permits all relevant information to be considered at a sentencing hearing regardless of whether the facts were able to be presented at the initial sentencing or only at a subsequent resentencing after an appeal and remand.

In a federal sentencing, the court first determines the base-level advisory guideline range after reviewing the presentence report and ruling on any party's offense-level calculation objection. As this article is about downward departures, government motions pursuant to U.S.S.G § 5K1.1, and defense departure motions are then presented and ruled upon.

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The importance of a government sponsored § 5K1.1 motion cannot be overstated. In 2010, nationally, only 11 percent of defendants received such a motion. In the 3rd Circuit, 25 percent of defendants did. As well, in the 3rd Circuit, defense-based departure motions, exclusive of any § 3553(a) mitigating factors, were granted in 47 cases where the evidence warranted a departure.

Section 5K1.1 authorizes a downward departure only upon the government's motion stating that the assistance was significant, useful, truthful, complete, reliable, extensive, timely and possibly involved risk. Commentary makes clear the following three principles regarding a reduction for assistance to authorities: It is in addition to any reduction for acceptance of responsibility allowed in § 3E1.1; the court may sentence below a statutorily prescribed mandatory minimum; and substantial weight is ascribed to the government's assessment of the defendant's assistance.

The lesson here is that defendants who plead guilty should divulge "the whole truth, nothing but the truth, and everything else they possibly know." The potential benefit is clear and unambiguous. The government will help those who timely and credibly help it solve more crime.

If factually relevant, defense motions for downward departure could start with § 5H1.4, Physical Condition, Including Drug or Alcohol Dependence or Abuse. The provision reads, "Physical condition or appearance, including physique, may be relevant in determining whether a departure may be warranted." On Nov. 1, 2010, the Sentencing Commission amended "not ordinarily relevant" with "may be relevant" to reflect the commission's policy reversal of now encouraging courts to consider medical conditions existing at sentencing that may or may not have been previously present. (See *Pepper*.) Importantly, this new principle invites, rather than discourages, consideration of defense departure motions under this section. (See *U.S. v. Larkin*, a 2010 3rd U.S. Circuit Court of Appeals case.)

Recent case law suggests that "Alcohol and Drug Use" departure motions are now discouraged rather than prohibited. The unique factual claim under §5H1.4 is a truly medically infirm client. Before a medical departure is permitted, the court must find unusual or exceptional conditions that make the medical conditions relevant for a judge's consideration.

Within the 3rd Circuit, a district court is permitted to medically depart downward if the "court finds a mitigating circumstance is present to an exceptional degree." (See *U.S. v. Watson,* an Eastern District of Pennsylvania 2005 case.)

Examples of my clients' exceptional medical conditions that have warranted departure include tuberculosis-, HIV- and diabetes-related severe health complications (emergent

and unplanned need for amputations or drug cocktail modification), chronic pulmonary obstructive disease, hypothyroidism, diabetic retinopathy and hypertension. Providing medical documentation to pretrial services to secure an independent recommendation of departure in the presentence report is helpful.

Significantly, the Bureau of Prisons' ability and quality of care are mere factors, and not determinative, of whether a medical departure motion should be granted. It should be argued that the typical Bureau of Prisons letter confirming treatment capability in a Federal Medical Center (low security hospital for seriously ill) or while housed in general population with infirmary care is not equal to the quality, character and length of treatment a defendant has received from his or her own long-standing physician and hospital. The courts will not lightly remove the chronically ill from their own nurturing treatment environment. When the issue becomes extensive care while on house arrest or in jail, assert that §5H1.4 encourages in-home detention with care continuity because such a sentence would be "as efficient as, and less costly than, imprisonment."

A § 5H1.3 mental health departure motion should also be raised, if applicable, in conjunction with a § 5K2.13 diminished capacity motion.

As of 2010, the guidelines state: "Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions … are present to an unusual degree and distinguish the case from the typical case." The Sentencing Commission 2010 policy amendment to "may be relevant" now requires the court to consider, if raised, extraordinary mental health issues. This mandate is reinforced when viewed in conjunction with the court's deliberations of the §3553 (a) factors and § 3661's "no limitation" on the information the court may view concerning the background, character and conduct of the defendant. Head trauma or documented proof of a diagnosed chronic mental health condition that may not justify a departure under § 5K2.13 may be grounds, nonetheless, for a departure under § 5H1.3.

Another great post-*U.S. v. Booker* defense-initiated departure motion is a *Sally* petition. First raised in 1977 in *U.S. v Sally* by the 3rd Circuit, the case addressed the sentencing court's consideration of *Sally's* extraordinary post-offense rehabilitation achievements. Although the 2000 version of U.S.S.G § 5K2.19 precluded post-offense rehabilitation evidence except in the most unusual cases, in 2011 this rule has been deemed merely advisory and, in fact, inconsistent with congressional intent. (See *Pepper.*)

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The 2011 3rd Circuit cases of *U.S. v. Diaz* and *U.S. v. Salinas-Cortez* are directly on point. *Pepper* also stands for the position that factually, many of the highlights raised in a *Sally* motion are also relevant while addressing the §3553 (a) factors.

To qualify for a *Sally* departure motion, the defendant's efforts at rehabilitation must be so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply; conduct must be remarkable, "indicate real, positive behavioral change"; and demonstrate a "commitment to repair and rebuild" his or her life. (See the 1999 Eastern District of Pennsylvania case *U.S. v. Motto*.) If proof exists of a defendant's post-offense, consistent and comprehensive turning of one's life around to an exceptional degree, the truly repentant defendant may earn the §3E1.1 Note 1(g) downward departure.

As several years may pass between proffer and sentencing, clients have plenty of time to, and sometimes do, change their lives. An example of such for a *Sally* motion is a low-level bank fraud co-conspirator who, post-information, switched careers to a non-profit organization engaging in health care insurance coverage counseling to indigent families caring for children with long-term medical needs. Fortunately for me, I represented just this defendant.

These are but a few examples of defense initiated downward departure motions. The confluence of four new, judicially sanctioned arguments raises the specter of success in departure motions: There is now Supreme Court authority to "respectfully disagree" with the guidelines; district court judges routinely express dissatisfaction with harsh guideline recommendations in both opinions and op-ed contributions; Sentencing Commission policy now encourages all departure motions; and there is no empirical or scientific support for congressionally mandated offense-level escalations in most criminal categories.

Post-*Booker*, the balance of power at a federal sentencing has swung back to the judge from the prosecutor. With careful presentation of appropriate facts, departure motions can secure significant reductions in the offense level calculation and, therefore, the prison sentence, if any, handed down. •