Federal Probation

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This Issue in Brief

Community Service: A Review of the Basic Issues.—Triggered by the Federal Comprehensive Crime Control Act of 1984, the evolution of community service as a formal condition of probation has caused judges and probation officers to pay increased attention to the requirements of community service programs. Authors Robert M. Carter, Jack Cocks, and Daniel Glaser state that as various options are considered, basic issues must be identified, related to a system of judicial and correctional philosophy, and implemented in an atmosphere in which citizens have ambiguous feelings about community service as a sentencing option. In this article, the authors attempt to identify the basic issues and to place them in a frame of reference for practitioners.

The Alcoholic, the Probation Officer, and AA: A Viable Team Approach to Supervision.—Probation officers are encountering increasing numbers of problem drinkers and alcoholics on their caseloads. Most officers are not specifically trained to work with the alcoholic, and author Edward M. Read advances a practical treatment model for use in the probation supervision setting. The author stresses the necessity for an important re-education process which includes full acceptance of the disease model of alcoholism and an accompanying renunciation of several damaging myths still all too prevalent. Several techniques of countering the alcoholic denial system are discussed, and the author highlights the appropriate use of Alcoholics Anonymous in the supervision process.

The Perceptions and Attitudes of Judges and Attorneys Toward Intensive Probation Supervision.—In recent years the spectrum of criminal justice sanctions has widened to accommodate an intermediate sentencing alternative known as intensive probation supervision (IPS). In his study of the perceptions and attitudes of court personnel toward IPS in Cook County, Illinois, author Arthur J. Lurigio found that, overall, judges and public defenders viewed IPS favorably, whereas state's attorneys were essentially unwilling to accept IPS as a viable option to prison. According to the author, the success of IPS programs often hinges on developing effective strategies to promote the program so that it appeals to the various elements in the criminal justice system.

The Role of Defense Counsel at Sentencing.—This article establishes the duties and obligations of defense

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The Role of Defense Counsel at Sentencing

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I. Introduction

DEFENSE ATTORNEYS must recognize that the sentencing stage is the time at which, for many defendants, the most important service of the entire criminal proceeding can be performed. Sentencing is a critical stage of the criminal process. *Gardner v. Florida*, 430 U.S. 349 (1977). Thus, "to the convicted defendant, the sentencing phase is certainly as critical as the guilt/innocence phase." *United States v. DeFrancesco*, 449 U.S. 117, 150 (1980) (Brennan, J., with White, Marshall, and Stevens, JJ., dissenting).

The American Bar Association has adopted standards with respect to the duties of defense counsel at sentencing. The core duties of defense counsel at sentencing include the investigation of dispositional alternatives, assistance during the presentence investigation, and factual verification. These duties are in addition to the lawyer's traditional role as advocate and indeed are an extension of that role.

> The duties of the prosecution and defense attorneys do not cease upon conviction of the defendant. While it should be recognized that sentencing is the function of the court, the attorneys nevertheless have a duty of assisting the court in as helpful a manner as possible.[1]

The courts have been noting with increasing frequency the need for defense counsel to fully appreciate the importance of the sentencing proceeding. In *United States v. Pinkney*, 551 F.2d 1241, 1249 (D.C. Cir. 1976), the court stated that "we note at the outset that the first step toward assuring proper protection for the rights to which defendants are entitled at sentencing is the recognition by defense counsel that this may well be the most important part of the entire proceeding." *Ibid. See also United States v. Green*, 680 F.2d 183 (D.C. Cir. 1982).

The National Advisory Commission on Criminal Justice Standards and Goals stated in its 1972 report that it is encumbent upon counsel to:

> familiarize himself with sentencing alternatives and community services available to his client, and to the extent consistent with his position as an officer of the court and a servant of society, recommend that sentence which most accurately meets the needs of his client and enhances his liberty.

Against this background, this article will focus on the "do's and don't's" of representation at sentencing.

II. The Presentence Investigation Report (PSI)

Following the adjudication of guilt, defense counsel should personally accompany the defendant to the United States Probation Office to set up an initial interview with the U.S. probation officer assigned to the case. Some probation officers prefer to speak with the client directly. However, there are many reasons which favor counsel's presence. For example, counsel may assist in clarifying the legal status of the case, its facts, offense behavior, and overall circumstances. Moreover, counsel is often in the best position to provide factual verification on a number of matters relevant to the presentence investigation.

Many of the problems experienced by probation officers and attorneys alike are simply a matter of perception. The issue of "perception" is addressed at §IX, *infra*. It should be noted, however, that the probation officer and attorney should not view this encounter as an adversarial proceeding. The American Bar Association's standards are instructive in this regard.

> . . . The attorney should also satisfy himself or herself that the defendant understands the nature of the presentence investigation process, and in particular the significance of statements made by the defendant to probation officers and related personnel. In some circumstances, *it may be appropriate for the attorney to attend the probation officer's interview with the defendant*, and on such occasions, the attorney should seek to accommodate his or her schedule to that of the probation department.[2]

The commentary to that section holds that while counsel should not turn the presentence interview

> between the probation officer and the defendant into an adversarial exchange, there are a number of useful functions counsel can perform at this juncture: information can be marshalled, extenuating circumstances detailed, and the defendant's views better articulated. In cases where counsel and the probation officer share "a similar social milieu," it has been observed that the presence of counsel can establish a better rapport and thus increase the flow of information.[3]

Indeed, the more seasoned criminal defense attorneys routinely accompany their clients to the initial pro-

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[1] *ABA Project on Standards for Criminal Justice: Sentencing Alternatives & Procedures*, §18-6.3

[2] *ABA Standards for Criminal Justice: Sentencing Alternatives & Procedures*, §18-6.3(f) (c) (emphasis supplied).

[3] *Ibid.* at p. 443.

bation interview and have followup contact with the U.S. probation officer. *See, e.g.*, Kuh, *Trial Techniques: Defense Counsel's Role in Sentencing*, 14 Crim. L.B. 433, 434–435 (1978)("counsel *must* arrange to be present with his client at the time of the presentence investigation interview... The role of counsel at the presentence interview can be critical.") (original emphasis).

III. Defendant's Version of the Offense

Under the "core concept" of the PSI, as set forth by the Administrative Office of the United States Courts (Probation Division), *see, e.g.*, Publication 105, the PSI shall include a section for the "defendant's version of the offense." It is encumbent upon counsel to prepare a written statement for attribution to the client detailing, from the defense perspective, the defendant's version of the offense. This information is particularly important in the case of adjudication by guilty plea. This written statement should be to the exclusion of an oral statement solicited by the U.S. probation officer from the client.

There are countervailing reasons why counsel often advises against submitting a "defendant's version of the offense" following a conviction after trial. For example, if the defendant prevails on appeal, such statements may be used to impeach the defendant should he exercise the right to testify at any subsequent proceeding. Probation officers should be sensitive to that fact and appreciate why, in some cases, a "defendant's version of the offense" is sometimes not submitted.

The fifth amendment privilege against self incrimination is not self-executing. *See Minnesota v. Murphy*, 465, U.S. 420, 104 S.Ct. 1136 (1984). In that case, the defendant's probation was violated on the basis of admissions that he made to the probation officer. The Minnesota Supreme Court held that the probationer's admission of criminal responsibility to the probation officer, in the absence of *Miranda* warnings, violated the fifth and fourteenth amendments. The U.S. Supreme Court reversed, concluding that because the probationer revealed incriminating information instead of timely asserting his privilege against self incrimination, the disclosures could not be considered compelled incriminations. The statement was then used in a subsequent prosecution.

IV. The Importance of a Meaningful Rapport Between Counsel and the Probation Office

Although the PSI is intended to be an objective document for review by the court, as mere mortals, probation officers necessarily inject their subjective impressions about the defendant and the offense into the report. It is important for defense counsel, similarly, to attempt to create as favorable an impression of the defendant and the circumstances of the offense to the probation officer. In order to foster confidence, on the part of the probation officer in the accuracy of information imparted by counsel, it is critical that counsel highlight mitigating circumstances *only* to the extent that such facts accord with reason and probability. It is counterproductive for defense counsel to submit information and conclusions to the probation officer which are without *objective* factual support. The credibility of defense counsel, like the credibility of the probation officer, is crucial in determining how much weight any proffered fact is entitled to. Therefore, if counsel knowingly misrepresents facts and circumstances to the probation officer, the input of that attorney will be completely discounted, and rightfully so, in the future. Similarly, if defense counsel conducts himself in a manner consistent with his ethical obligations —as an officer of the court—the probation officer will be more likely to accord greater weight to such assertions. By the same token, probation officers who consistently slant and distort facts—and reach conclusions unsupported by objective facts—should be called to task by defense attorneys, prosecutors, and the court.

V. Defendant's Sentencing Memorandum

Defense-conducted presentence reports have now received wide acceptance in many jurisdictions. The attorney should always assume professional responsibility for a sentencing memorandum or private sector PSI prepared by someone outside his or her office. Ideally, counsel should personally prepare the sentencing memorandum.

> Presentence investigation reports prepared in the private sector, under the direction of counsel, sometimes contain more information than similar reports prepared by the probation officer, both because the fuller cooperation of the defendant may be obtained and because preparation can be commenced at an earlier point in the process, frequently even before trial or plea.[4]

A parallel presentence study in the same manner as the official PSI highlights the essential subjectivity of the process and the issues are made clearer where a formal hearing is otherwise needed to resolve facts that may be in dispute.

The defendant's sentencing memorandum should contain a statement of the case (summarizing the legal proceedings), a statement of facts (defendant's version of the offense), and the personal background and social history of the defendant. Additionally, defense counsel should highlight mitigating offense characteristics and

[4] *ABA Standards for Criminal Justice: Sentencing Alternatives & Procedures*, §18-6.3 (Commentary at pp. 441-42).

other circumstances for consideration by the court. These mitigating factors should have already been brought to the probation officer's attention, in the hope that they would be incorporated into the official PSI as well.

The proliferation of private sector PSI's has spawned a new industry within the criminal justice profession. A number of former probation officers and/or criminal justice professionals are employed in the private sector to prepare such reports. In many cases, private sector consultants can make a positive contribution to the defendant's sentencing memorandum and the sentencing process itself. (For a detailed discussion of the role of private sector professionals under the Comprehensive Crime Control Act of 1984, see §VIII, *infra*).

Finally, through the defendant's sentencing memorandum, counsel should propose a sentencing recommendation to the court.

VI. Defense Attorney's Role in Community Corrections

The functions of counsel at the sentencing stage of the case are not traditionally associated with the role of the defense attorney in other legal proceedings. For example, counsel is put in the position of being a social worker, investigator, resource center, diagnostician, and advisor. The duties of defense counsel require the attorney to investigate dispositional alternatives and sentencing options for the court to consider.

For example, during the course of representation, the attorney may become aware of a client's problem with drugs or alcohol. The attorney is duty-bound to address these aspects of his client's life. *See, e.g.*, American Bar Association Model Rules of Professional Conduct:

> In representing a client . . . a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[5]

Further,

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work. . . *Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make a recommendation.*[6]

The investigation of dispositional alternatives should commence well before the actual adjudication of guilt. If the client is acquitted, or if charges are subsequently dropped, nothing is lost. However, the process of rehabilitation can commence at any point—the earlier, the better.

In many cases, referral to a drug and alcohol treatment facility is the most obvious dispositional alternative. The attorney should consult with other professionals if there is any reason to suspect an acute or chronic problem with chemical dependency. If the client, at an early stage in the case, was referred to a program of drug treatment, the offender who successfully completes such program and participates in aftercare will be in much better standing when sentence is imposed.

The increased proliferation of drugs, particularly cocaine, often plays a role in the defendant's commission of an offense. If defense counsel can assist in identifying some of the "causal factors" leading to commission of the offense, and the offender can take remedial steps to address that problem, the process of rehabilitation will have been served.

> The interests of rehabilitation of the criminal is served when the sentence causes the criminal to realize the wrongfulness of his conduct, instills the criminal with a sense of social responsibility, *and integrates the criminal into a productive social role.*[7]

It is encumbent upon counsel to seek other forms of dispositional alternatives as well. Under the Federal Probation Statute, 18 U.S.C. §3651, the court has broad discretion in conditioning the grant of probation upon any reasonable condition related to the offense, the defendant's rehabilitation, deterrence, punishment, or protection of the public. *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979).

In appropriate cases, counsel should investigate the possibility of having the defendant perform "volunteer community service" as a condition of probation. However, counsel should not leave investigation of such alternatives exclusively to the court or the Probation Office. Counsel should unilaterally go into the community to explore the possibility of the defendant performing volunteer community service with a charitable organization that would accept such volunteer service. Defense counsel should then present a letter, or testimony from an official of the agency, advising the court that if granted probation, the charitable organization would accept the volunteer services of the defendant. The courts have generally approved "volunteer community service" as a sentencing alternative in appropriate cases.

> We do not suggest that compelling charitable service is an appropriate condition of probation in every case, but we think it is an acceptable one here. Certainly, the rehabilitative potential of such service is greater than the rehabilitative program of most prisons. The donation of charitable services to the community is both a deterrent to other potential offenders and a symbolic form of restitution to the public for having breached the criminal laws.[8]

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[5] ABA model rules of professional conduct at §2.1.

[6] *Ibid.* (comment) (emphasis supplied).

[7] *United States v. Carlston*, 562 F.Supp. 181, 185 (N.D. Ca. 1983) (emphasis supplied).

[8] *United States v. Arthur*, 602 F.2d 660, 664 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979). *See also United States v. Higdon*, 627 F.2d 893 (9th Cir. 1980); *United States v. Restor*, 679 F.2d 338 (3d Cir. 1982).

If the defendant has a history of problems in getting or maintaining legitimate employment, counsel should assume the role of employment counselor and refer the defendant to appropriate agencies and resource centers in order to obtain employment. Legitimate, verified employment is crucial to the process of rehabilitation.

There is virtually no limitation upon the creativity of proposed sentences. Counsel should endeavor to provide the court with dispositional alternatives to further the correctional objectives sought to be achieved by the court through sentencing.

Deterrence and accountability are primary sentencing factors and in structuring proposed alternatives to incarceration, counsel should bear such factors in mind. Counsel should advise the court and Probation Office why the grant of probation, conditioned upon a structured program, would neither depreciate the seriousness of the offense nor promote disrespect for the law in appropriate cases. Counsel should point out that "criminalogical literature has shown that symbolic restitution reaffirms the community's standards [as] an important element of general deterrence." *United States v. Danilow Pastry Co. Inc.*, 563 F.Supp. 1159, 1167 (S.D.N.Y. 1983).

In summary as to this point, it is necessary for counsel to make specific proposals to the court with respect to dispositional alternatives. Counsel should become aware of resources in the community which provide the type of support services necessary to carry out such dispositional alternatives, including residential and outpatient drug/alcohol treatment centers, charitable organizations accepting volunteer community service, employment referral services, consumer credit counseling services, and the virtual myriad of other counseling and support groups in the community.

VII. House Arrest

Sentencing judges have been experimenting with the use of house arrest as an alternative to incarceration in appropriate cases. *See, e.g., United States v. Murphy*, 618 F.Supp. 350 (E.D.N.Y. 1985). Sentencing judges are becoming more aware than ever before, based upon limited correctional resources, of the need to resort to alternatives to incarceration without compromising the objectives ordinarily sought to be furthered through the sentencing process. The Probation Office should promulgate specific guidelines, policies, and procedures governing the use of house arrest as an alternative to incarceration. The Probation Office should present, in its sentencing recommendation to the court, the use of house arrest (and its conditions and limitations) to sentencing judges for consideration in appropriate cases. See generally, Petersilia, "Exploring the Option of House Arrest," *Federal Probation* (June 1986); *see also*, Corbett and Fersch, "Home As Prison: The Use of House Arrest," *Federal Probation* (March 1985).

VIII. Comprehensive Crime Control Act of 1984

The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, radically alters the Federal system of sentencing. The promulgation of sentencing guidelines will undoubtedly cause great confusion for judges, prosecutors, defense attorneys, and probation officers. The guidelines will not be effective until at least November 1, 1987.

The Sentencing Reform Act established the United States Sentencing Commission to promulgate sentencing guidelines for every Federal offense. The Act broadly directs the Commission to assure that the guidelines provide certainty and fairness in achieving the four goals of sentencing that the Act recognizes: just punishment, deterrence, incapacitation, and rehabilitation. Rehabilitation remains an important consideration under the law in determining sentences other than incarceration, such as probation or fines. 1984 *U.S. Code Cong. & Ad. News*, S.Rep. No. 225 at p. 76. The Act further directs the Commission to issue policy statements about the application of the guidelines and other aspects of sentencing. *See, e.g.*, 28 U.S.C. §994(a).

Before imposing a sentence, under the Act a court must consider a list of factors, 18 U.S.C. §3553(a) (West. 1985), including the characteristics of the offense and defendant, the recognized purposes of sentencing, the kinds of sentences available, and the sentence that the applicable guideline categories establish at the time of sentencing. The judge must impose a sentence of the kind and within the range that the guidelines specify, unless the judge finds that the particular case includes particularly aggravating or mitigating circumstances. Finally, the judge must state in open court the reasons for imposing a sentence outside the applicable sentencing range.

Defense attorneys will, in appropriate cases, urge the court to impose a sentence below the indicated guideline range. Defense counsel, therefore, must provide the court with legally articulated reasons which justify, in fact and in law, a decision below the guidelines. In executing those duties, counsel must have a working knowledge of the sentencing guideline system and present specific proposals for the court's consideration. Similarly, probation officers, acting as an extension of the court, must bear the initial burden of properly classifying the offense in the first instance. During the presentence stage, defense counsel should work in conjunction with the United States Probation Office in determining what guideline range applies in given cases.

The Sentencing Reform Act of 1984 will also substantially expand the contents of the Presentence Investigation Report (PSI) to assure accurate application of sentencing guidelines.

If the sentencing court desires more information than the PSI initially contains, the court may direct "qualified consultants" in the "local community" to perform a study which shall take no more than 60 days. This study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the private sector professional consultant believe are pertinent to the factors set forth in 18 U.S.C. §3553(a). The consultant shall then provide the court with a written report including recommendations concerning the guidelines and policy statements promulgated by the Sentencing Commission. *See generally* 18 U.S.C. §3552(b) (West. 1985). This provision of law essentially validates, for the first time, the employment of non-attorney criminal justice professionals to assist the court in preparing private sector PSI's.

In summary, the transitional period from a system of essentially indeterminate sentencing (due to parole) to a system of determinate sentencing guidelines will require more work than ever before on the part of both attorneys and probation officers. It is critical for these professionals to assist the courts during this difficult period of transition.

IX. Perceptions: Defense Counsel/Probation Officer

The most obvious impediment to a successful and productive relationship between probation officers and defense attorneys relates to how each professional perceives the other. In many instances, attorneys perceive probation officers as surrogates of the government bent on maximizing the sentence to be imposed. Conversely, some probation officers view attorneys as "hired guns" whose sole function is to minimize the sentence to be imposed without any regard for the interests of the community or victim. Obviously, both perceptions are wrong.

The interests of the probation officer and defense attorney can be co-extensive. Each is interested in providing the court with an overview of the defendant and the offense. While the attorney's traditional role as an advocate is important, the "new role" of defense attorneys in formulating dispositional alternatives should not be discounted. Attorneys, by definition, are not necessarily skilled in utilizing community resources like probation officers. On the other hand, probation officers are not fully trained to appreciate the nuances of the law. By complimenting each other, the probation officer and defense attorney can work, in the interests of justice, toward achieving a just and fair disposition at sentencing. Ultimately, it is the court that serves as the final arbiter of the sentence. The court must necessarily rely upon the reports by the probation officer and the attorney before imposing the sentence.

It is critical, for the benefit of the criminal justice system, for defense attorneys and probation officers to share a common ground. That common ground is best seen through their submission of *reasonable* sentencing recommendations to the court.

The scarcity of correctional resources—the limits upon space in prison and funding—necessarily requires today's judges to consider less restrictive alternatives than incarceration. It is encumbent upon both the probation officer and attorney to bring these proposals to the court's attention. The interests of the probation officer and attorney, therefore, are not at odds so long as the presentence process is not construed as an adversarial proceeding.

When probation officers and defense attorneys recognize themselves as fellow criminal justice professionals, and accord each other the respect they deserve, a more equitable sentencing system will have been achieved.

X. Conclusion

In discharging the sixth amendment right to the *effective assistance* of counsel, it is important for defense attorneys to explore dispositional alternatives on behalf of their clients. It is equally important for the court to be advised—from the defense perspective—as to all relevant facts and circumstances with respect to the offense and the offender. Sentencing is that stage of the criminal process when an attorney's advocacy and comprehensive representation can best serve the client. Given the importance of the sentencing stage of the criminal process, defense counsel should work closely with the United States Probation Office in developing the PSI. Finally, defense attorneys should present the sentencing judge with a sentencing recommendation and, in appropriate cases, dispositional alternatives with an emphasis on the concept of community corrections.