

Probation Supervision: Where Do We Go from Here?

[	The Failure of Correctional Management—The Potential for Reversal	111953	Alvin W. Cohn
[	Probation: A System in Change	111954	Vincent O'Leary
[	Observations of a "Friend of the Court" on the Future of Probation and Parole	111955	M. Kay Harris
[	Return to John Augustus	111956	John P. Conrad
[	Something Works in Community Supervision	111957	Michael Eisenberg Gregory Markley
[	Sentencing Theory and Intensive Supervision Probation		Alan T. Harland Cathryn J. Rosen
[The Investigative Role of the United States Probation Officers under Sentencing Guidelines	111958	Susan Krup Grunin Jud Watkins

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The Investigative Role of the United States Probation Officer under Sentencing Guidelines

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Introduction

GUIDELINE SENTENCING will bring about a revolution in the work of United States probation officers. It will profoundly affect the way presentence reports are prepared by probation officers and used by the courts in imposing sentences. Most of the investigative procedures, report format, and sentencing rules familiar to probation officers are changed as a result of guideline sentencing. This essay will provide a brief background and an example of guideline sentencing, along with a discussion of the new skills required of probation officers in preparing the presentence investigation report under guideline sentencing.

Background

Origins of guideline sentencing can be traced to the early 1960's. Model penal codes, commissions on sentencing reform, and the American Bar Association's standards¹ relating to sentencing alternatives held a common objective: To clarify the purposes of sentencing and reduce sentencing disparity. Through the mid-1970's many state legislatures adopted various forms of determinate sentencing. Typically, these variations featured prescribed prison terms for certain felony offenses and set standard "good-time" deductions. Parole boards in these states were either abolished or lost the authority to set the release terms for prisoners.

By the end of the 1970's several states, including Minnesota, California, Florida, Maryland, Washington, and Pennsylvania, had taken yet another step toward sentencing by rule; they established standing agencies to promulgate rules, assess their impact, and develop sentencing policies for the future. Within the Federal criminal justice system, the decade of the 1970's saw congressional review of the Brown Commission's² recommended legislation for reforming Federal sentencing practices. Thereafter, a series

of legislative proposals between 1973 and 1975 sought to regulate the Federal sentencing process, primarily through recodification.

The elements of sentencing guidelines and a sentencing commission were first introduced in the 95th Congress by Senators McClellan and Kennedy. Their bill, S. 1437, contained sentencing reform provisions and authorization of a sentencing commission to promulgate guidelines. S. 1437 passed the Senate on January 30, 1978 but was never passed by the House of Representatives.

This omnibus concept of sentencing reform, however, became the basis for subsequent legislation that would mark a new era in Federal criminal justice. The Comprehensive Crime Control Act of 1984, with sentencing reform provisions, was signed into law October 12, 1984. The Act established the United States Sentencing Commission as an independent agency in the judicial branch. Its purpose is to develop sentencing policies and practices for the Federal criminal justice system by promulgating guidelines which prescribe appropriate sentences for convicted Federal offenders. These guidelines, in turn, have the statutory purpose of furthering the objectives of sentencing: deterring criminals, incapacitating and/or rehabilitating the offender, and providing "just deserts" in punishing criminals.

Sentencing under Guideline Provisions

Guideline provisions change the sentencing process in two ways. First, the provisions themselves are, in fact, rules for courts to follow in imposing sentences. Prior to guidelines the sentencing decision was limited only by the maximum statutory penalty, leaving the sentencing judge with broad discretion in imposing a sentence. Second, and perhaps more important, under guidelines the decision-making process will be more explicit. Specific factors that the sentencing judge has weighed and considered accord-

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¹American Bar Association, *Standards on Sentencing*.

²Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, U.S. Sentencing Commission, Washington, DC, June 18, 1987, p. 1.

ing to guideline rules are to be stated on the record for review by the courts of appeals and research by the Sentencing Commission. Objections and appeals will presumably be directed toward either the relevant facts the judge has considered or the rules selected and applied to the sentence. In most cases, every critical fact considered by the judge and the extent to which it influenced the sentence will be known by all parties at the imposition of the sentence.

A guideline sentence will most often be expressed as a range of months to be served. The U.S. Sentencing Commission has specified these ranges with a two-axis matrix or grid of sentencing options, the sentencing table (See table I).³ The vertical axis is comprised of 43 offense levels, increasing in severity. The horizontal axis is comprised of six criminal history categories. If the sentencing court finds that a defendant with an offense level of 15, for example, has no prior record (Criminal History Category I) then a guideline sentence would likely be imposed within the range of 18 to 24 months. If a defendant with that same offense level, 15, were found by the court to have sufficient criminal history points to merit a Criminal History Category III, the appropriate range of the sentence—barring aggravating or mitigating factors—would be 24 to 30 months. Courts may depart from the guidelines if factors exist that were in the judgment of the court not adequately taken into account by the guidelines.

The presentence report has been changed to convey facts in support of guideline applications. Revised Rule 32 of the *Federal Criminal Rules of Procedure* establishes the required contents of the new presentence report. The presentence report is to contain the following information:

(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of Title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the guidelines would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(2);

(D) verified information stated in a non-argumentative style

containing an assessment of the financial, social, psychological, and medical impact upon and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

The most important facts in the report, those which have the greatest impact upon the number of months to be served, consist of facts in three sections of the report: the Offense Conduct, the Criminal History, and Offender Characteristics. The report must set out these verified facts in a concise manner and in such a way that judges may rely upon them as findings at the sentencing hearing. Factual or rule-related issues that are not resolved prior to the submission of the report will be conveyed to the court in an addendum. The addendum's purpose is to certify that the report, with revisions, has been disclosed to the defendant, his attorney, and the counsel for the Government, and that the content of the addendum has been communicated to counsel. Equally important, the addendum states the objections any party has made. This will alert the judge to the potential issues likely to be raised at the sentencing hearing.

Information gathering and verification are traditional tasks performed by probation officers. Under guidelines, however, the probation officer must present the sentencing facts and rules to the court as he or she views them. This will entail weighing the evidence and resolving disputes to the extent that facts are not distorted. It is here that the investigative role of the probation officer takes on important new dimensions.

An Array of New Skills

The guideline sentencing process requires the probation officer to learn and apply several new skills. The nature of the revised presentence report as a technical and largely legal document means the investigating officer must use extra care in verifying and specifying certain information. Beyond fact-gathering skills, however, guidelines require the probation officer to evaluate the evidence in support of facts, resolve disputes between the prosecutor and defense attorney, and testify, if necessary to present evidence in support of selected guideline applications. Officers must develop systematic procedures for keeping both their guideline manuals and their application skills up-to-date to ensure consistency in guideline applications. Each of these skills adds an important dimension to the work of the probation officer. What follows is a brief discussion of how they might affect the officer's role and function.

³ U.S. Sentencing Commission Guidelines, Sentencing Table, Chapter Five, Part A, page 5.2 U.S. Sentencing Commission, Washington, DC (October 1987).

SENTENCING GUIDELINES

TABLE 1. SENTENCING TABLE

Offense Level	Criminal History Category					
	I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 or more
1	0 - 1	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6
2	0 - 2	0 - 3	0 - 4	0 - 5	0 - 6	1 - 7
3	0 - 3	0 - 4	0 - 5	0 - 6	2 - 8	3 - 9
4	0 - 4	0 - 5	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 5	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

Evaluating Factual Material

The probation officer has traditionally served the court as an independent investigator. In presentence investigation, prior to guidelines, the tasks of interviewing the defendant, the U.S. attorney, victims, and other parties demanded objectivity and accuracy. Reporting that information to the court, however, under "old law" presentence procedures did not require the officer to make independent judgments in the body of the report regarding which sets of facts by various observers the court should rely upon in imposing sentence. In such cases if the probation officer was aware of conflicting information, heretofore, the officer presented opposing views so the court could consider them. The offense section of the "old law" report provides the best example of this. Here the probation officer was expected to impartially depict the defendant's and the Government's versions of the offense and include both versions in sequential sections of the report without much evaluative comment.

As is now widely known, guidelines sentencing requires the probation officer to gather similar information, weigh the evidence in support of divergent accounts, if they exist, and arrive at a single version of the offense. The same weighing of evidence and exercise of judgment is also required in other sections of the guideline-based report. Particularly in calculating guidelines for the offender and offense classifications, the probation officer must decide and recommend to the court the facts which are best supported by the available evidence.

Resolving Disputes

Because critical judgments will be made regarding which facts the court should rely upon in sentencing, it is foreseeable that there will be disputes between the opposing parties. Resolving such disputes in a way so as to produce a balanced, fair, and yet timely report is another important skill probation officers will develop over time. In essence, what the investigating officer must attempt to do at this stage is narrow or eliminate the disputed issues, thereby simplifying the fact-finding process for the court. This phase of investigative work by the officer may have two stages. The first stage might be characterized by communication from the attorneys, both verbal and written, regarding any factual or guideline issues in question. In this communication phase the officer's impartiality and openness to opposing points of view become key to the dispute resolving process.

On points about which there is no disagreement, discussions about facts and applications may be brief. On those issues in dispute, however, the officer will request all documentation, argumentation, or other supportive evidence the attorneys may wish to submit. Asking questions, explaining guidelines implications, and encouraging the attorneys to consider all the available facts will typify the officer's role in these discussions. Simply stated, the goal of this process is to surface the maximum amount of evidence in support of opposing views, so that the officer's subsequent evaluative judgments can be made.

If what has been disclosed thus far by the attorneys does not require reinvestigation, the second stage of dispute resolution should ensue. This might be envisioned as the officer's opportunity to present his or her tentative guideline application, with a tentative statement of unresolved issues as they will appear in the addendum to the presentence report. The officer will make clear the evidence on which these recommended findings are based, detailing those matters that remain to be decided by the court. This may prompt another round of argumentation, or it may be the conclusion of the dispute resolving process. In either case it is imperative that the officer not be intimidated by the prospect of a challenge to the presentence report.

Predictably the defense attorney and the prosecutor will first vigorously argue, then seek to negotiate, disputed issues. The probation officer's function, however, is not one of negotiation. Rather, the officer's primary task is to assure that all reliable, relevant information is given to the court. Throughout the dispute resolution phase, the skills or qualities required of the officer are objectivity and willingness to listen. As noted in the publication, *Presentence Investigation Reports Under the Sentencing Reform Act of 1984*, ". . . it is crucial that probation officers continue to exercise their traditional independence as agents to the court." With regard to the probation officer's role in disputes, the publication states, "While the probation officer may discuss the case with the lawyers, it is not intended that the officer withhold from the court reliable information disclosed by his or her investigation. In particular, it is not contemplated that the lawyers will, by agreement, be permitted to eliminate relevant information."

Testifying in Court

Probation officers are long accustomed to providing testimony in probation violation hearings and

parole revocation proceedings. Guideline sentencing procedures are expected to add testifying and witness skills to the probation officer's function in the presentence investigation. How frequently such testimony will be required, however, is difficult to estimate. Courts have discretion even under guidelines to make findings without an evidentiary hearing if the appropriate standard has been met, and the court is satisfied that a correct application of the guidelines can be made. Other important factors not yet known include how many disputed factual and guideline issues are likely to arise in the average investigation and how many may be settled prior to the submission of the presentence report.

Whether testimony regarding the presentence report emerges as a major aspect of the investigative job or not, the officer will be expected to have the necessary basic skills. To be an effective witness, an officer must be thoroughly prepared to answer questions about both the factual and rule-related findings recommended in the report. An evidentiary hearing of this kind could require the officer to produce statements of victims, collateral investigations performed by another probation officer, court judgments and related documents from other jurisdictions, or laboratory reports showing amounts and purity of drugs.

Bringing the appropriate documents to court is not, on the other hand, likely to completely allay the newer officer's anxiety about testifying; there is a need to be mentally prepared as well. Officers should seek the assistance of supervisors or experienced colleagues in studying the key issues in a given investigation. Perhaps even staging some "rehearsals" would be of value in training the officer to effectively present evidence under cross-examination. Along with these preparatory measures, officers will find direction by recalling their single most important objective: To remain independent and unbiased in the adversarial process and to provide the court with thoroughly verified information.

Applying the Guidelines Consistently

This skill area is in many ways the foundation upon which all the other investigative skills rest. Without guideline application skills that are consistent, current, and complete, even the most industrious probation officer is going to find evaluating facts, resolving disputes, and testifying in court to be extremely burdensome and time-consuming. Obtaining this kind of consistency in guideline application,

system-wide, is one of the major responsibilities facing the probation system.

The first step an individual officer can take in obtaining and maintaining consistency centers upon the basic "tool" of the job itself, the U.S. Sentencing Commission Guideline Manual. This manual, in order to be fully functional, needs to be properly posted in its binder with all commentary and appendices included. Should "emergency" amendments be promulgated, they should be clipped into the appropriate place to supplement the existing pages. The "emergency" amendments must then be followed pending congressional action which could review and affirm or repeal them. It may eventually be necessary for probation officers to maintain a steadily growing library of guidelines spanning developments over time.

Even though equipped with an up-to-date manual, the probation officer must be alert to other possible sources of inconsistency. Short-cuts and memorizing frequently used portions of the guidelines can cause errors. Adopting the habit of merely asking colleagues and relying upon "word of mouth" interpretations instead of directly consulting the appropriate guidelines will lead to inconsistency over time.

Of course, probation officers need not wage this campaign for consistency alone. Management initiatives on consistency of guideline application for quality control will complement the line officer's efforts. For example, chief probation officers and supervisors in certain districts have already developed screening committees to review guideline reports. Specialized investigation units, where practicable, tend to bring consistency and reduce errors in procedures. Local training in guidelines application will no doubt continue to be a valuable experience for all participants.

The point cannot be overstated, even in light of the previous discussion, that accuracy in the use of the guidelines will set the level of credibility associated with the revised presentence report and reflect upon the officers who prepare them. As was true before guidelines, sentencing judges and magistrates will rely upon the probation officer's services to the extent that such service is viewed as genuinely valuable in selecting the most appropriate sentence in each case. Thus, the new role of the probation officer, although somewhat determined by guideline requirements, will ultimately be defined by the judges and probation officers most directly involved in the sentencing process.