Federal Probation

The Sentencing Reform Act of 1984 and Sentencing Guidelines

DECEMBER 1991

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LV DECEMBER 1991 NUMBER 4

This Issue in Brief

YEARS FROM now, 1987—the year sentencing guidelines went into effect—will be remembered as a milestone in Federal criminal justice. The Sentencing Reform Act of 1984 which brought about the sentencing guidelines sent ripples in the pool of the Federal court system that affected all who participate in the sentencing process. Certainly the day-to-day work of judges, both district and appellate, prosecutors, attorneys, probation officers, and correctional personnel has been altered significantly, and the course of careers has changed. This special issue of *Federal Probation* gives a voice to those who have been working in the midst of such historic change.

Federal Probation invited eminent jurists and prominent sentencing experts to prepare articles reflecting their thoughts and perspectives regarding the Sentencing Reform Act and the sentencing guidelines. The first three articles comprise thoughtful, varied perspectives from the bench. The articles that follow are by authors representing other critical roles in sentencing. The articles are organized by profession in the order that each author would typically become involved in the sentencing process.

Ever since the Federal sentencing guidelines went into effect, judges and commentators have criticized the guidelines for placing excessive restrictions on judicial discretion. The Honorable Gerald Bard Tjoflat, chief judge of the U.S. Court of Appeals for the Eleventh Circuit, asserts that critics fail to appreciate the significant discretion that the judge retains. In **"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"** Judge Tjoflat addresses the failure of attorneys to appropriately exploit judicial discretion within the guidelines structure. Advice for attorneys is offered regarding how to develop proper arguments to guide the sentencing judge's discretion in a particular case. Providing substantial background information, the article describes the congressional purposes of the sentencing guidelines, the elements of guideline sentencing, and the scope of judicial discretion embedded in the guidelines.

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The Federal Probation Officer: Life Before and After Guideline Sentencing

BY JERRY D. DENZLINGER AND DAVID E. MILLER*

There have been few events in the history of the Federal Probation System that have had as revolutionary an effect as the Sentencing Reform Act. By its nature the new process establishes an adversary model of sentencing. Both prosecution and defense counsel play a more active role in sentencing than under previous law. Additionally, the presentence report will be subject to greater scrutiny.

THE QUOTATION above, appearing in the preface to Publication 107, *Presentence Investigation Reports Under the Sentencing Reform Act of 1984*, published by the Administrative Office of the United States Courts in 1987, accurately predicted the new sentencing model would be adversarial. By implication, the duty and tasks of the presentence investigator would change dramatically. At the time, it was not possible to predict with certainty that the probation service could adjust to such radical change and produce reports that served the courts in meeting the intent of the Sentencing Reform Act of 1984. Detractors of the new model predicted it could not be done, while avid supporters took a "Pollyanna" view of the impact on the officer. Most believed that although the task would be difficult, the United States probation officer, a proven and adaptable member of the Federal criminal justice system, would overcome any obstacles.

This article is an attempt to capture the challenges faced by the probation officer through an examination of the duty and tasks of a presentence investigator prior to and after implementation of "guideline sentencing," concluding with an assessment of the degree of success and related observations. At the risk of "preaching to the choir," it is hoped the article will serve policymakers and administrators in their ongoing evaluation of the impact of the new sentencing model on the Federal Probation System's most valuable resource, the probation officer. Further, the authors hope that the discussion will allow other participants in the sentencing process to more fully appreciate the difficulty facing probation officers in meeting their duty.

No effort is made to examine the efficacy of preguideline or guideline sentencing approaches, although many issues discussed may suggest the relative worth of the two sentencing models. From these authors' perspectives, probation officers have abandoned that debate in favor of their commitment to duty. Those who formulated procedures for guideline sentencing understood the probation officer's commitment to duty and, based on that knowledge, placed a heavy burden for the success of guideline implementation on the probation officer.

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Life Before Guidelines

Prior to passage of the Sentencing Reform Act of 1984 and the effective date of guideline sentencing, presentence reports prepared by United States probation officers had long been the major source of information on which courts based their sentences. Investigative efforts focused on traditional factors considered important in imposing sentences, such as the nature and severity of offense, harm to victim(s), offender motivation, and prior criminal conduct, as well as the social and personal history of the offender. The data collected were ultimately fashioned into a recommendation after they were considered in the context of a variety of sentencing philosophies and concerns including rehabilitation, reformation, retribution, incapacitation, deterrence, and community standards.

The United States probation officer, typically educated in the behavioral sciences, was selected for service in the probation system after demonstrating skills in working for the "welfare of others," most commonly, offenders. The probation officer came to employment with a variety of skills, not the least of which were assessing factors contributing to behavior maladjustment, investigating, writing, and counseling. The officer's required knowledge base was primarily concerned with social/human behavior; however, knowledge of statutes and Federal rules associated with sentencing and sentencing alternatives was also critical. Further, review of amendments to Federal rules, statutes, and occasional case law that impacted process and/or decision-making in the sentencing arena was required. Generally, the volume and complexity of changes in the system were manageable and effectively assimilated. The probation officer could perform as either supervisor of a caseload or as presentence investigator. In fact most probation departments chose to use the probation officer as a "generalist," allowing the officer to supervise a caseload in addition to conducting presentence investigations.

The presentence format at the time was designed for

the accurate presentation of information concerning a defendant and his conduct to assist the court in decision-making. The approach allowed the probation officer to present separate and sometimes differing accounts of the offense conduct based upon representations of the Government and the defendant, allowing the judge to assess the veracity of the differing positions. More importantly, the format and presentation of information was consistent with the application of the so-called medical model that sought to rehabilitate offenders and the panoply of discretionary sentencing options available to the court. Thus the report took on the flavor of a diagnostic tool. Probation officers portrayed the offender not only in terms of conduct but with equal emphasis on causative factors and potential for change to law-abiding behavior. The abilities to communicate in writing the "essence" of the defendant and to make recommendations that took advantage of the court's wide sentencing discretion/sentencing options were the hallmarks of the presentence report.

Considered an independent agent of the court, the officer was encouraged to be the judge's "eyes and ears" for purposes of developing information for sentencing. Upon the court's order of a presentence investigation and under the court's cloak of authority, the probation officer initiated the sentencing process. Generally, the officer completed his or her task without causing rancor or conflict among other participants in the sentencing process. Defense attorneys rarely requested to be present during presentence interviews. In fact most placed a premium on cooperation with the officer, directing their clients to truthfully answer all questions posed by the probation officer. Many attorneys helped the officer by assisting their clients in gathering and presenting information needed for the presentence report. Other attorneys seemingly abandoned their clients and were not seen or heard from until the day of sentencing. Prosecutors were cooperative in providing file materials for the officer's use in preparing the investigative report, but unless the case involved an offender or an offense of significant notoriety, prosecutors generally did not participate in the sentencing process. Only occasionally did they exercise their right of allocution at sentencing hearings.

With the advent of disclosure of presentence reports in 1983 pursuant to an amendment to Rule 32 F.R.Crim.P. (many courts were practicing disclosure prior to the amendment), it was anticipated the officer would spend a significant amount of time defending information contained in the presentence report. However, experience demonstrated that with the exception of astute attorneys who recognized the importance of the presentence report upon parole prognosis as determined by the United States Parole Commission's guidelines, counsel only occasionally objected to information contained in the presentence report. Because sentencing was wholly discretionary, the importance of particular facts about the offense or the offender was often unclear. For example, objections to the precise amount of money taken by an embezzler or drugs distributed by a drug trafficker were of little use, especially if the court might have made it clear the precise amounts were unimportant. Counsel for the defense and the Government typically resorted to preparation of sentencing memoranda for the court's consideration. Defense lawyers most always gave passionate pleas for mercy. When objections to facts were raised, the court had the discretion of determining that a finding as to the disputed issue was unnecessary, as it would not be taken into account in sentencing. With these factors in operation, officers were rarely embroiled in sentencing disputes.

In summary, the environment in which the presentence investigator functioned fostered the preparation of reports compatible with the medical model of dealing with offenders and consistent with the broad discretionary authority and sentencing options enjoyed by the court. However, the system also allowed for wide variances in sentences among similar defendants committing similar harms. In the simple view, judges occupied the focus of the disparity debate. However, probation officers were contributors to the degree their reports influenced sentencing decisions. In addition, prosecutors and defense lawyers had a part in creating disparate sentences as a result of plea bargaining.

Life After Guidelines

As a result of the implementation of guideline sentencing, wholly discretionary sentencing was abandoned for a determinate model, featuring fixed sentences without possibility of parole. To accommodate the model and sentencing process, the presentence format changed dramatically, primarily serving to record how facts are treated by the guidelines and to aid the court in making preliminiary findings of fact. The author of the presentence report became not only a preliminary fact-finder but also was required to apply law—the guidelines—to those facts. Thus, the officer's required knowledge base increased significantly and became considerably different from that required in the prior system. It was critical that the officer learn this new approach well, as the burden of the massive training effort (both formal and informal) to implement guideline sentencing fell largely on the probation officer. As a result the probation officer was and remains in the sometimes unpopular role of guideline "expert," if such a role is possible. Because the officer's role of preparing the presentence report initi-

ates the critical step of determining the defendant's sentencing range, both the officer and the presentence report have become the focus of what is now a very adversarial sentencing system. The officer's relationship to and with other participants in the sentencing process has changed dramatically. He or she is often seen as the "third adversary" in the courtroom, the enemy of the plea agreement, a view often simultaneously held by the judge, the Government, and the defendant.

The presentence report has become more a legal document than a diagnostic tool, citing facts, statutes, and guidelines, justifying and supporting positions the guidelines treat as relevant in arriving at a sentencing range. The format and presentation of information is dominated by facts related to the offender's offense behavior and criminal history, the two primary factors establishing a defendant's sentence range. Social and personal history information is reported, however, primarily to aid the court in choosing a point within the range, imposing conditions of release, and/or departures. The approach no longer promotes a writing style that communicates a "feel" for the defendant. Rather, the report communicates facts and decisions in a way that promotes sentencing by rule rather than discretion. As a result, the report has become the most critical portion of the record for purposes of appellate review of sentencing issues. (The fact that title 18, U.S.C. 3742 authorizes appellate review of the district court's sentence under prescribed circumstances further underscores the adversarial nature of guideline sentencing.)

To effectively perform under the guideline system, it was necessary for the officer to assimilate a great deal of new information. More importantly, the new knowledge required included understanding abstract concepts and legal principles such as "relevant conduct," "reasonably foreseeable," and "level of proof," in order to conduct pertinent investigations, make decisions in applying the guidelines to specific facts, and come to correct conclusions. Compounding this challenge was and is the necessity that the officer review and understand amendments to the guidelines as well as decisions relating to guideline application and sentencing procedure revealed through case law. Further, in order to provide accurate and relevant information to the court, officers must be continually vigilant as new legislation passes and statutes and rules are amended. To meet these challenges, many departments have divided officers between two functional specialties, supervision of offenders or presentence investigations.

Considering the duty as a preliminary fact-finder and the deference given the presentence report by the courts, today's probation officer operates in a more difficult and frequently hostile sentencing environment. Lawyers no longer view the officer apathetically and have become energetic participants early in the presentence investigative process. Defense attorneys now regularly request to be present during interviews, recognizing the probation officer's interview often produces information that expands a defendant's "relevant conduct" or produces information not readily discoverable by the officer from other sources. This necessary participation of the defense attorney in the interview process often hinders the officer in gathering information, in assessing the reliability of information, as well as in evaluating the degree of remorse demonstrated by the defendant. Further, accommodating counsel's request to be present is difficult, considering the officer's schedule and need to meet court-imposed deadlines.

While the prosecutor is generally not seen as more active in the process than previously, prosecutors do occasionally advocate positions that cause grief to the probation officer. For example, the prosecutor may be especially prominent when attempting to preserve a plea agreement and/or stipulations that the officer may determine are contrary to the operation or intent of the guidelines. In other situations, the prosecutor will neither argue for nor against a position taken in opposition to the presentence report by the defense. In the former situation, the officer stands alone, as neither party is an advocate of the officer's position, and, in fact, both may be allied in their arguments against the officer's position. In the latter situation, without some position from the Government, the officer is cast in the role of a surrogate prosecutor, at least in the eyes of the defendant and defense counsel.

The environment is more overtly hostile after the presentence report is disclosed. Objections to the report are increasingly becoming the rule rather than the exception. In response, the officer is obligated to review the objections, reinvestigate if necessary, reevaluate decisions made, and discuss the findings with counsel. Any unresolved objections must be summarized for the court in an addendum to the report. On occasion this process consumes more time than the preparation of the presentence report. Further, many times attorneys (defense and prosecution) are not familiar with guideline application, making it difficult for the officer to respond without spending considerable time in demonstrating how the guidelines operate. On rare occasions an attorney may resort to intimidation, attacking the officer's credibility, skill level, or professionalism, rather than focusing on factual or guideline issues.

Unlike the officer's relatively passive role in the sentencing hearing in the pre-guideline era, the officer is now a very visible and active participant. The officer is often required to testify as to disputed facts and

guideline application reported in the presentence investigation. The officer may be required to provide the court with alternative calculations, sentencing ranges, and sentencing options if the court makes findings that will result in different calculations from those given in the report. Further, some courts require the officer to be vigilant as to procedural error in the sentencing hearing, bringing such error to the attention of the court if not raised by counsel.

Finally, the probation officer has had to meet the challenges posed by this new sentencing model in the face of a resistant judiciary and defense bar and an increasing workload of presentence reports. The prosecution, although voicing support, resented the scrutiny of plea bargains required by the new model. Thus the probation officer was a messenger, bearing a message which frequently no one wanted to hear.

Meeting the Challenge

Considering the magnitude and complexities of change posed by the Sentencing Reform Act, it is these writers' opinion that the probation officer's accomplishments have been remarkable. Generally, probation officers found they could assimilate the new knowledge requirements and effectively teach others. Officers learned that their formal education and experiences under the prior system serve them well under the guideline approach. Not only is that knowledge and experience critical in "individualizing" sentence recommendations within parameters of the guidelines, but also in identifying those "atypical" offenders and conduct that warrant departures. In this perspective, creativity flourishes. Further, officers not only continue to conduct sound investigations, reporting information that is reliable for consideration in sentencing, but also have adjusted well to procedural reforms subjecting their reports to intense scrutiny.

This assessment is certainly generalized, recognizing there are varying degrees of accomplishments in a system as large and diverse as the Federal Probation System. However in the main, regardless of potential conflict, officers have remained faithful to their duty set forth in Rule 32(c)(2)(B):

> The report of the presentence investigation shall contain . . . the classification of the offense and of the defendant under the categories established by the Sentencing Commission . . . that the probation officer believes to be applicable . . . 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 applicable guideline would be more appropriate under all the circumstances.

Successfully implementing this new sentencing approach and dealing with its attendant problems did not occur without serious ramifications to the Federal Probation System and the individual probation officer. To meet the intent of the Sentencing Reform Act, resources and energies were dedicated to implement guideline sentencing at the expense of the remaining primary duty of the probation service, supervision of the offender. Individual officers worked and continue to work many hours of uncompensated overtime studying, investigating, writing presentence reports, and supervising offenders, attempting to meet these duties. Casualties of stress and burnout have been common, most especially in districts with large caseloads and heavy criminal dockets. Despite these problems the adaptable, "duty-oriented" Federal probation service, as anticipated, met and continues to meet the challenge.

Related Observations

Without question, the probation officer has made an enormous contribution toward the implementation of the new sentencing approach. Some rewards have come to the probation officer and the probation system as a result of the hard work and sacrifice. Virtually all participants in the sentencing process rely upon the officer, especially the sentencing judge. Consequently, the officer's role is not only more visible but much more elevated, especially in the eyes of the judiciary. The United States Sentencing Commission, appreciating the value of the probation officer's experience and role, continues to solicit and rely upon the probation service for input regarding the guidelines and procedure, as well as for assistance in fulfilling the Commission's education mission. Further, recognizing the burden and importance of the task of the probation officer, the Judicial Conference Committee on Criminal Law and Probation Administration has recently championed the officer's cause, influencing increases in staff and resources, especially automation. The United States probation officer and the Federal Probation System's standing among national policymakers, especially those who influence the distribution of limited resources, has increased.

The Sentencing Reform Act has also precipitated change in the approach toward supervising offenders. The Act's effect upon resources made it necessary to reconsider how officers could meet the responsibility of supervising offenders in the community. As a result, an offender-supervision approach was developed that is consistent with the intent of sentencing reform. That model, "enhanced supervision," is currently being implemented system-wide. As with the implementation of sentencing guidelines, the probation officer is the critical component that will ultimately prove the model's effectiveness in meeting the goals of enforcing conditions of release, protection of the community, and correctional treatment.

A related impact upon the supervision function of the probation officer introduced by the Sentencing

Reform Act is the abolishment of parole and replacement of supervised release. The postcustody violator, traditionally handled by an administrative agency, is now under the jurisdiction of the court. In disposing of these cases, the probation officer is called upon to play a crucial role in advising the court of the sentence range for the violator, based upon chapter 7 of the *Guideline Manual* (currently in the form of policy statements). The judicial and probation resources necessary to deal with this docket are not yet completely known but certainly will increase over time.

The Sentencing Reform Act and its attendant consequences for the mission(s) of the probation service, delivery of services, and agency growth, have contributed to an examination of the effectiveness of the traditional organizational structure and management approaches utilized by probation departments. The volume and complexity of knowledge and skills required of a United States probation officer today are very different, in many respects, from those required prior to the passage of the Sentencing Reform Act. Many departments have opted to arrange officers into specialty units focusing on presentence investigations or supervision tasks. Such an approach promotes greater expertise and efficiency to complete the task—however, at the expense of the flexibility the "generalist" approach offers. Experimentation with these approaches and others are considered in conjunction with related concerns such as recruitment/selection criteria, unit staffing levels, duty rotation, cross-training, compensation (formal and informal), and staff retention. Although present in the pre-guideline era, these issues have warranted even more attention by probation managers, resulting in innovative approaches.

In conclusion, the moderator of one of the early vieotapes dealing with the Sentencing Reform Act noted, "Federal law is complex. The guidelines are complex." Such understatements are not wasted on probation officers. Yet probation officers have learned the complex system and continue to grow in expertise. However, although officers have mastered basic application principles, they must not fail to contribute to the evolution of the guidelines through thoughtful, reasoned, and rational sentencing recommendations, including departures. Further, probation officers are becoming increasingly more comfortable in their new and important role but must be wary of becoming over-confident about the label "expert." As one prominent defense attorney has commented, "There are no guideline experts, only lawyers and judges." No doubt the future holds many more challenges for the probation system, but as demonstrated over the past 4 years, probation officers are willing and able.