

## *Easing Your Client's Experience of Federal Prison; Outside Counsel*

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### **Body**

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The lengthy sentence imposed on former Enron CEO Jeffrey Skilling recently is a stark reminder that the U.S. Sentencing Guidelines have made federal prison a reality for many first-time offenders.

In fact, one third of all federal inmates are first-time, nonviolent offenders. Moreover, because of the length of their sentences, many of these individuals, like Skilling and WorldCom founder Bernie Ebbers, are denied placement in camp facilities.

But whether an inmate is assigned to a camp without wires and fences or a locked two-person cell, few would disagree that prison life is a profoundly dehumanizing experience.

How then can a prospective inmate obtain the most favorable placement in federal prison? Some hire sentencing consultants, the best of whom - if hired early enough in the case - can position and prepare their client for the least onerous experience the Bureau of Prisons (BOP) offers. But defense lawyers can readily develop expertise in this area and exert a positive impact on the quality of prison time their clients serve.

This article will focus on the various ways before, during and after sentencing, in which attorneys can ease their client's passage through federal prison. While a defense lawyer's primary objective will always be to avoid or reduce a prison sentence, surprisingly minimal effort can substantially improve the client's experience of prison life - from securing a coveted lower-bunk pass, to entry into a program that makes participants eligible for early release.

#### **Before the Sentencing**

The groundwork for ameliorating a federal prison sentence is laid between the plea (or trial) and the sentence. During this time the Probation Department conducts the presentence investigation and prepares the critical presentence investigation report (PSR), a detailed portrait of the client's personal and criminal history. Akin to an academic transcript, the PSR accompanies a federal inmate throughout her prison experience and is used by the BOP to make several critical determinations about the inmate, including:

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*Designation:* Generally, an inmate will be designated to a facility matching her security level, within 500 miles of the inmate's home. BOP facilities are classified into one of five security levels, ranging from minimum (dormitory-style accommodations, limited or no perimeter fence and the lowest staff to inmate ratio) to high (locked single and two-person cells, tightly controlled movement and the highest staff to inmate ratio). An inmate's security level is calculated using an elaborate scoring system based on the inmate's current offense behavior and prior criminal conduct, age, education, substance abuse history and whether she was permitted to surrender to prison voluntarily.<sup>1</sup> In this process, the BOP primarily utilizes information from the PSR, unless superseded by the sentencing court's "Judgment in a Criminal Case" and accompanying "Statement of Reasons" (collectively, the Judgment). Critically, in scoring the inmate's current and prior criminal conduct, the BOP will look beyond the actual finding of guilt and consider the often more serious underlying description of the offense, as set forth in the PSR. Certain factors, known as Public Safety Factors - such as a client's alien status, sex offender status or the length of the sentence - can preclude minimum security (camp) placement. In addition, the BOP may in its discretion apply "Management variables" to increase or lower an inmate's security level, based on such factors as the inmate's program needs or a finding that the inmate's scored security level is inconsistent with her security requirements.

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*Program Eligibility:* The BOP will use the PSR to determine an inmate's eligibility for a variety of educational and vocational programs. Of particular note is the Residential Drug Abuse Treatment Program (RDAP), a 500-hour, six- to 12-month intensive substance abuse treatment program, which qualifies eligible graduates for a six-month halfway house placement and a sentence reduction of up to one year.<sup>2</sup> Candidates for the program must volunteer for it, have a documented substance abuse disorder (i.e., usually corroborated in the PSR), and 36 months or less remaining on their sentences. The sentence reduction is not available to deportable aliens, inmates previously convicted of certain violent offenses, or those whose current offense involved violence or the possession of a dangerous weapon.<sup>3</sup>

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*Medical Treatment:* The BOP will use the PSR, as supplemented by the Judgment, to determine any medical or mental health treatment appropriate for the inmate. The BOP will generally continue to provide the inmate's medical prescriptions (or their equivalent) listed in the PSR. Documented medical issues may entitle the inmate to certain exemptions. For example, back problems may secure the client a lower-bunk pass - a not insignificant privilege when the sleeping arrangements are dormitory-style.

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*Other:* The PSR is used to establish, among other items, visitation lists, religious affiliations, dietary restrictions and appropriate work assignments, as well as to assist in pre-release planning.

Given the preeminence of the PSR, it is critical that the defense lawyer play an active role during the presentence investigation stage to influence this process to the client's advantage. The investigation is an opportunity for the lawyer to frame the PSR, not merely serve witness to it.

As part of the investigation, the assigned probation officer will schedule an interview with the client. In advance of that interview, the lawyer should fully debrief the client and family members on all matters pertinent to the PSR, from allergies to prescription medications to substance abuse history, in order to select the issues that need to be emphasized (or conversely downplayed) with the probation officer. A failure to mention alcohol or drug abuse problems could ruin the client's chances of getting into RDAP; an over-emphasis on medical issues could cause the client to be designated unnecessarily to a facility with specialized medical care.

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A cooperative relationship with the probation officer at this stage will usually be more productive than an adversarial one. At the interview, the lawyer should not hesitate to prompt the client to give more expansive answers or interject to provide additional relevant information. It is also helpful to provide the officer with all available corroborating documents. Detailed notes should be taken, in the event there is a dispute later about what was said.

After the PSR is issued, the lawyer should review it carefully with the client for any inaccuracies or omissions and communicate any objections to the probation officer in a timely manner. See FedRCrimP 32(f)(1) (requiring objections to be made within 14 days of receipt). While no inaccuracy is too small or immaterial to correct, particular attention should be paid to the descriptions of the client's role in the current offense and any alleged past criminal conduct. An improper application of a firearm enhancement in the sentencing calculation for the current case could render the client ineligible for the RDAP sentence reduction; an erroneous description of a prior domestic violence incident could negatively impact the client's security classification.

### **At the Sentencing**

There are several applications that can be made to the sentencing judge, either orally or in writing, with the aim of enhancing the client's prison experience.

Most importantly, the lawyer should move for any amendments to the PSR that have not already been made by the Probation Department in response to the lawyer's previous objections.<sup>4</sup> The lawyer may also request judicial recommendations for designation to a particular facility or class of facilities, and admittance to a particular BOP program, such as the RDAP. While not binding on the BOP, such recommendations have persuasive power, assuming the client meets the requisite eligibility criteria. In fact, the BOP must explain in writing to the court why it rejected the court's recommendation.<sup>5</sup>

Specific medical or mental health treatment may be requested for the client, mindful, of course, of the potential impact this application can have on the client's ultimate designation. If the judge imposed a fine or restitution, the lawyer can move for payment to commence after the completion of the prison sentence.<sup>6</sup> Finally, the lawyer should always request permission for the client to self-surrender (not just to spare the client the hospitality on "Con Air," but to improve the client's security score) and sufficient time for the client to get his or her affairs in order.<sup>7</sup>

### **After the Sentencing**

By the time the sentencing is over, most of the foundations of the client's federal prison experience are already set in stone. There are, nonetheless, several constructive steps the lawyer can take at this stage.

It is important to follow up with the probation officer to make sure the PSR is corrected according to the sentencing judge's instructions and that the corrected version is forwarded to the BOP. In addition, the Judgment should be reviewed to confirm it accurately reflects the rulings made at sentencing, and the court immediately petitioned for amendments if it does not. In certain situations, it might be helpful for the defense lawyer to write directly to the BOP on the issue of the client's designation, for example, where the lawyer believes the client's likely security level will overstate her security needs. If so, this letter should be written as soon as possible after the sentencing, as it is much harder to change a designation decision once it has been made. The lawyer should make sure the client is designated before the surrender date, or move for an adjournment of the surrender date to permit completion of the designation process.

Finally, the lawyer can help the client prepare practically and psychologically for the transition to prison life. The client can be introduced to the wealth of Internet resources<sup>8</sup> and literature<sup>9</sup> on the subject. A meeting with a former inmate, if it can be arranged, can also be a valuable way of dispelling unnecessary fears. The client should also be encouraged to schedule full medical and dental check-ups prior to surrender.

## Conclusion

For many prison inmates, the quality of the time they serve is as important as the length of the sentence. Time will certainly pass faster for most, for example, if one is in the relatively freer and less volatile environment of a camp facility. Thus, in federal criminal cases, once the client has pleaded guilty or has been convicted after trial, it is in the client's interest for the defense lawyer to adopt the dual strategy of mitigating the sentencing exposure and simultaneously positioning the client for a favorable prison placement. This is true even if the likelihood of incarceration appears to be remote. Once a prison sentence has been pronounced, it is often too late to take the measures that can make that sentence more palatable.

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## Endnotes:

1. See BOP Program Statement 5100.08, Security Designation and Custody Classification Manual, Chapters. 3, 4 (available at [www.bop.gov/policy/progstat/5100\\_008.pdf](http://www.bop.gov/policy/progstat/5100_008.pdf)).

2. The sentence reduction is authorized by statute. See 18 USC ?3621(e)(2).

3. The policies and procedures of RDAP are set forth in BOP Program Statement 5330.10, Drug Abuse Programs Manual, Inmate, available at [www.bop.gov/policy/progstat/5330\\_010.pdf](http://www.bop.gov/policy/progstat/5330_010.pdf). Further information on early release eligibility can be found in BOP Program Statement 5331.01, Early Release Procedures Under 18 USC ?3621(e), available at [www.bop.gov/policy/progstat/5331\\_001.pdf](http://www.bop.gov/policy/progstat/5331_001.pdf); see also Ellis & Henderson, "Getting Out Early: BOP Drug Program," Criminal Justice 20, No. 2 (A.B.A. 2005). The other sentence-reducing program at the BOP (the boot-camp program for nonviolent, first-time offenders) was phased out last year.

4. Such amendments cannot be made after the sentencing. See, e.g.,

[\*United States v. Giaimo\*, 880 F.2d 1561, 1563 \(2d Cir.1989\)](#) (no jurisdiction under FedRCrimP 32 to correct inaccuracies in PSR after a defendant has been sentenced).

5. See BOP Program Statement 5070.10, Responses to Judicial Recommendations and U.S. Attorney Reports, available at [www.bop.gov/policy/progstat/5070\\_010.pdf](http://www.bop.gov/policy/progstat/5070_010.pdf). In the U.S. Court of Appeals for the Second Circuit, the BOP might, but not necessarily will, honor recommendations that an inmate with a sentence of 12 months or less be designated to a community confinement center (halfway house), as a result of the Court's decision in

[\*Levine v. Apker\*, 455 F.3d 71 \(2d Cir. 2006\)](#) (holding that the BOP's rule limiting inmate's placement in a halfway house to the lesser of the last 10 percent or six months of the sentence was an improper exercise of the BOP's rulemaking authority). Such a designation would be guaranteed, however, through a sentence of probation with a condition of community confinement. In addition, the BOP might not necessarily honor recommendations of camp placement for eligible offenders with sentences of 15 months or less, since such inmates may be required to man the work cadres of pretrial detention centers.

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6. If the court grants this application, the inmate will usually not be required to participate in the Inmate Financial Responsibility Program (the program by which the BOP assists in the collection of court-ordered financial obligations), which can result in substantial deductions from the inmate's commissary account every month.

7. A discussion of the interplay between state and federal sentences is outside the scope of this article. If the client is primarily subject to state jurisdiction, the lawyer should review "Interaction of State and Federal Sentences," available at [www.bop.gov/news/publications.jsp](http://www.bop.gov/news/publications.jsp).

8. See, e.g., [www.bop.gov](http://www.bop.gov) (downloadable copies of all BOP program statements as well as other information on BOP facilities, rules and procedures); [www.prisontalk.com](http://www.prisontalk.com) (message board on federal prisons with up to date information provided by former inmates and the families of current inmates); [www.michaelsantos.net](http://www.michaelsantos.net) (Web site of long-term federal prisoner, with articles on prison life and advice to the newly sentenced); [www.fedcure.org](http://www.fedcure.org) (advocacy group for federal inmate population, with news, publications and links).

9. See, e.g., Alan Ellis, "Federal Prison Guidebook" (2005); David Novak, "Down Time: A Guide to Federal Incarceration" (2005); Michael Santos, "What if I Go to Prison?" (2003); Clare Hanrahan, "Jailed for Justice: A Woman's Guide to Federal Prison Camp" (2002).

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