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Picking the Client's Prison A Most Difficult Conversation

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PRACTICING CRIMINAL DEFENSE is fundamentally different from civil litigation. In the latter, things usually boil down to the universal constant of money. Not so for those of us in the criminal defense bar. In discussing the disposition of a case with the client, criminal defense lawyers address topics that often are more abstract but of arguably greater importance, items like freedom and civil rights. One particular subject that proves daunting to address in a comfortable manner is in which prison the client would like to serve a period of incarceration that might be imposed.

In federal sentencing practice, clients normally are best served by counsel employing a proactive approach to the substantial likelihood of the client ending up incarcerated. While the client may be in denial about the specter of having to “do time,” it is counsel’s job to make sure that any such period is as short and tolerable as possible. Fortunately, there are a number of ways to attack the problem.

Let’s start with some basics. The stated policy of the Bureau of Prisons (BOP) is to assign an incoming inmate to the closest facility within 500 miles of his or her release residence that is consistent with the offender’s security status and programmatic needs. (See Bureau of Prisons Program Statement 5100.008, “Security and Classification Manual,” available at <http://www.bop.gov>.) Furthermore, under federal sentencing law, the BOP must give due consideration to any recommendation made by the sentencing judge. (See 18 U.S.C. § 3621(a)(4)(B).) Keep in mind that the recommendation is just that – a recommendation by the judge to the BOP. The BOP remains free to assign an incoming inmate as it sees fit.

The first key, then, is the client’s “release residence.” That is pretty simple to manage. The BOP consid-

ers the address listed on the defendant’s Presentence Investigation Report (PSR) to be the release residence. Therefore, the BOP will attempt to assign the incoming inmate to a facility as close as possible to that address. As a result, if the client wishes to be incarcerated closer to family or friends who reside in a different part of the country than where the client was living when the PSR was prepared, counsel will need to dialogue with the Probation Officer preparing the PSR and see if a different permanent address can be provided.

Next, counsel needs to address the question of the client’s security status. Note that this is different from, but ultimately related to, the security level of the facility to which the incoming inmate will be assigned. Incoming offenders are classified as minimum, low, medium, high, and administrative based on a point system and other qualitative factors. (The administrative classification is a catch-all for classifications based on factors other than security, such as medical or psychological needs, etc., and is a subject for another day.) Although the nature of the offense of conviction largely dictates what the point score will be, there are a number of ways that counsel can have an impact on the score.

For example, counsel will want to make sure that the PSR accurately calculates the client’s criminal history category, and accurately treats any history of violence, escape, or attempts to escape. Additionally, the BOP will subtract three points if the incoming inmate is allowed to self-surrender; thus, counsel should make every effort to persuade the sentencing court to allow the client to report voluntarily. The point total is also affected by the client’s education level, with two points being added for those with no verified high school education or GED. If, however, the client is enrolled in and making satisfactory progress toward a GED,

only one point will be added. It may thus behoove a client who did not graduate from high school but who is facing incarceration to begin work immediately on a GED.

The security status is also implicated by public safety factors, which encompass facts like whether the client is a sex offender or deportable alien, has threatened government officials, has participated in a prison disturbance, and the like. Once again, because much of this information is drawn directly from the PSR, counsel must carefully scrutinize all parts of the report and ensure that the information therein is accurate and described in the least pejorative terms possible.

Finally, the BOP will consider the incoming inmate’s program needs. If the client has documented medical conditions, these need to be fully developed in the PSR. This is true even if counsel does not plan to argue for a Sentencing Guideline departure based on medical condition, because if the conditions are serious enough, the BOP may conclude that the incoming inmate should be assigned to a Federal Medical Center. Be careful, though, as this could be a double-edged sword – the closest FMC may be much further away from the BOP facility to which the client might otherwise have been assigned and, worse yet, the FMC could be more restrictive in its treatment of inmates.

Likewise, a documented history of drug or alcohol abuse may also aid the incoming inmate, even though counsel’s instinctive reaction may be to downplay such facts in the PSR for fear that it will result in a more severe sentence. Under the BOP’s Residential Drug and Alcohol Program, an inmate may qualify for as much as a twelve-month reduction in sentence and a six-month placement in a

halfway house or community confinement facility. (See 18 U.S.C. §3621(e).)

In addition to managing the classification process, there are some other actions counsel can do to help lessen the client's likely period of incarceration and thus the facility in which that time will be served. One well known tactic for those facing relatively short sentences is to request a year-and-a-day sentence, even if the advisory guideline sentence is somewhat shorter. For those not already in the know, federal offenders earn good time credit only if their sentence *exceeds* one year. (See 18 U.S.C. § 3624(b).) Specifically, if the offender's sentence is more than one year (but less than life), he or she may earn a reduction of up to 54 days of incarceration for "exemplary compliance with institutional disciplinary regulations." (*Id.*) (One caveat that deserves mention: The BOP will only award 46 of the 54 days to an inmate serving a year-and-a-day sentence under its interpretation of § 3624(b).) So, a sentence of 365 days results in serving 365 days, while a sentence of 366 days of incarceration results in only serving about 320.

Once the application of these factors to the client is understood, it is time to return to the question of picking a prison. The BOP has several different types of facilities. These include:

- Minimum security Federal Prison Camps (FPC), which are dormitory in nature and often have limited or no limited perimeter fencing. Per the BOP website, FPC's "are work-and program-oriented," have low staff-to-inmate ratios, and often "are located adjacent to larger institutions

or on military bases, where inmates help serve the labor needs of the larger institution or base."

- Low security Federal Correctional Institutions (FCI), which use dormitory or cubicle housing and have double perimeter fences. Like FPC's, FCI's have strong work and program components, although the staff-to-inmate ratio in these institutions is higher than in FPC's.
- Medium security FCI's, which use cell-type housing and have strengthened perimeters. Although work and treatment programs are available, medium security FCI's have staff-to-inmate ratios even higher than low security FCI's, and even greater internal security controls.
- High security United States Penitentiaries, which have cell-type housing and highly-secured perimeters. They have the highest staff-to-inmate ratios and close control is exercised over inmate movement.

Some BOP facilities may also have satellite camps, which furnish labor to the larger, adjoining institution. Locally, FCI Elkton has a satellite low security facility. Some individuals find confinement at camps to be most palatable, as they offer the least amount of formal confinement and afford inmates the greatest amount of day-to-day freedoms. Finally, it bears noting that there are far fewer institutions that house female inmates and so the female client's choices may be much more restricted.

It can be difficult to obtain reliable information that a client may want to know about actual conditions inside BOP facilities. One excellent resource to

consult is the *Federal Prison Guidebook*, authored by Alan Ellis and J. Michael Henderson. (More information at <http://www.alanellis.com>.) It contains a wealth of information about each facility run by BOP, some of it not found on the BOP website. Additional information can be gleaned from a number of prison-related websites, such as <http://www.prisontalk.com>, <http://www.inside-prison.com>, <http://www.federalprison.com>, and others. One obvious caveat about such websites is that the information provided may not be completely reliable. A recent client uncovered a somewhat more reliable source: A Forbes.com article by Lacey Rose entitled "The Best Places To Go To Prison." (The website address is lengthy, so use this shortcut to find it: <http://tinyurl.com/g7jtj>.) The general idea, however, is to do as much research as possible to help the client find an appropriate facility that is close to home and is at the right security level so as to maximize the chances that the BOP will honor the Judge's recommendation.

Discussing incarceration with a client can be challenging. It is certainly a delicate topic, but one that needs to be discussed almost from the outset of the engagement given that in excess of 80% of federal offenders are sentenced to incarceration. Use all available resources to educate yourself and your client, and manage the likelihood of incarceration throughout your representation of the client. ■

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