Negotiating Federal Plea Agreements Post-*Booker*

SAME AS IT EVER WAS?

By Barry Boss and Nicole L. Angarella

"*And you may ask yourself, how do I work this?"*
—Talking Heads, "Once in a Lifetime"

Immediately after the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), cries arose from all corners of the federal criminal justice system that the sky had fallen and chaos undoubtedly would reign until Congress saved the day with a legislative fix. John Gibeaut echoed popular sentiment when he wrote in the *ABA Journal eReport*, on January 15, 2005, "Prosecutors likely won't be the only ones on shaky ground after this week's U.S. Supreme Court decision. . . . The earth also could be moving beneath defendants and judges, sentencing experts predict." This Chicken Little perspective has proven somewhat histrionic, as the sky does not seem to be falling. The balance in the federal system—which is weighted heavily toward government prosecutors—has changed little, if at all, post-*Booker*, notwithstanding U.S. Department of Justice (DOJ) claims that the current system presents a "clear danger" to the gains we have made in "reducing crime and achieving fair and consistent sentencing." (*Federal Sentencing after* United States v. Booker*, Hearing Before the House Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 6 (Mar. 16, 2006) (statement of William Mercer, principal associate deputy attorney general).)

For those of us in the trenches, the new system comes with the same old challenges. Although *Booker* requires that the sentencing court consider myriad sentencing factors in addition to the U.S. Sentencing Guidelines, the fact remains that the overwhelming majority (62 percent) of sentences are within the applicable guideline range. Less than 10 percent of cases involve what we call "*Booker* variances," which involve sentences below the guideline range based on consideration of the statutory factors set forth in 18 U.S.C. § 3553(a). (UNITED STATES SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 62 (2006),

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http://www.ussc.gov/booker_report/Booker_Report.pdf.) Thus, the sentencing guidelines, which have been ratcheted upward over the years, continue to play an important role at sentencing and, as a result, remain a core issue during plea negotiations.

Several factors help explain why such a heavy focus remains on the sentencing guidelines post-*Booker*. Shortly after that decision, the U.S. deputy attorney general issued a memorandum directing prosecutors to seek sentences within the guideline range. (*See* Memorandum from Deputy Attorney General James Comey to All Federal Prosecutors Re: Department Policies and Procedures Concerning Sentencing (Jan. 28, 2005) *at* 2, http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf [hereinafter Comey Memorandum].) Moreover, there is tremendous pressure on judges to sentence defendants to a guideline sentence due to DOJ reporting rules that are set forth in the Comey Memorandum and legislative oversight. (*See* 28 U.S.C. § 994(w); 8 U.S.C. § 3553(c)(2).) In addition to prosecutors seeking guideline sentences and an implicit threat that hangs over the head of any judge who varies from the guidelines, the sentencing guideline range itself is entitled to a rebuttable presumption of reasonableness in a growing number of circuits. (*See, e.g.*, *United States v. Ellis*, 440 F.3d 434 (7th Cir. 2006); *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *but see United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006).) In this article, we discuss general plea bargaining principles with an emphasis on those practices that *have* changed in our post-*Booker* world. We further discuss several strategies defense lawyers may want to consider before negotiating with prosecutors.

Charge bargaining

Two basic types of plea negotiation exist: charge bargaining and sentencing bargaining. The former, as the name suggests, is negotiating about the specific charges to which a defendant will plead guilty. In most instances, the specific charge to which the defendant will plead will have little impact on the ultimate sentence because in calculating the advisory guideline level, all relevant conduct is considered, regardless of the specific count of conviction. (U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.3 [hereinafter U.S.S.G.]). However, there are some notable exceptions. Before considering them, understanding DOJ policies regarding charge bargaining is important. Charge agreements are governed by DOJ policy and the sentencing guidelines. Generally, a prosecutor must pursue the most serious, readily provable charge consistent with the nature and extent of the defendant's criminal conduct. (U.S. ATTORNEYS' MANUAL § 9-27.430.) Limited exceptions to this policy include:

- cases involving a "fast track" program, usually cases in border districts involving immigration offenses;
- cases where there is a postindictment reassessment due to factors like suppression of the evidence or unavailability of a witness;
- cases where the defendant has provided substantial assistance;
- cases where there are potential statutory enhancements and there is supervisory approval to waive the filing of enhancement papers; and
- cases where there are other exceptional circumstances.

(*See* Memorandum from Attorney General John Ashcroft to All Federal Prosecutors Re: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), http://files.findlaw.com/news.findlaw.com/nytimes/docs/doj/aschcroft92203chrgmem.pdf [hereinafter Ashcroft Memorandum].)

According to the Ashcroft Memorandum, the exceptional circumstances exception recognizes that the "aims of the Sentencing Reform Act must be sought without ignoring the practical limitations of the federal criminal justice system." The memorandum further provides that, with the approval of the designated supervisory attorney, the prosecutor can abandon the most serious charge because, for example, the particular U.S. attorney's office is overburdened, the duration of the trial would be exceptionally long, or proceeding to trial would significantly reduce the total number of cases disposed of by the office. However, the memorandum cautions that "such case by case exceptions should be rare."

Charge agreements may be useful in certain cases. For example, where you represent a noncitizen, the statute of conviction may have a dispositive impact on whether the defendant will be deported. In addition, where the advisory guideline range would result in a significant prison sentence or fine, the count of conviction can serve as a cap that limits the client's exposure. Also, the applicability of statutory mandatory minimum sentences is controlled by the count of conviction rather than relevant conduct. Finally, there may be collateral consequences like debarment or professional disciplinary sanctions that are impacted by the specific count of conviction rather than relevant conduct.

With regard to charge agreements that serve to cap a sentence below the otherwise applicable guideline range, this may be more tempting to prosecutors than they would choose to admit. Particularly in cases involving multiple defendants, prosecutors do not want to fact bargain or guideline bargain in a manner that might come back to haunt them when it comes time for your client to testify

against others, assuming a cooperation deal, or to seek a substantial sentence for the codefendant or coconspirator who chose to go to trial. Obviously, where other defendants or potential defendants are involved, a prosecutor will want your client to commit to a version of the offense that is consistent with what the prosecutor hopes to prove against the remaining targets or defendants. In addition, the prosecutor will not want to agree to a guideline calculation other defendants could point to later as justifying a more lenient sentence. Where, for example, your client definitely is facing more than five years at the time of sentencing under the advisory guidelines and where you expect a judge would impose the guideline sentence, you should push for a plea to a statute with a five-year maximum, perhaps 18 U.S.C. § 371. This achieves your goal of limiting your client's sentencing exposure, but permits the prosecutor to set forth all of the incriminating facts he or she hopes to prove against the codefendants and establish the "appropriate" advisory guideline range.

Sentencing agreements

The second type of plea bargaining involves sentencing agreements where you seek concessions from the government regarding its sentencing position. A sentencing agreement may provide:

- no agreement regarding sentencing, and the parties are free to make any recommendation or argument to the court;
- the government will make no recommendation to the court regarding sentencing, but keep in mind that under the new broad victims' rights statute, 18 U.S.C. § 3772, the government's silence does not restrict *victims* from making a recommendation;
- the government will recommend a particular sentence (*see* FED. R. CRIM. P. 11(c)(1)(B));
- the government will not oppose the defendant's requested sentence (*see* FED. R. CRIM. P. 11(c)(1)(B));
- the government agrees to a specific sentence, sentencing range, or guideline factor, and that agreement is binding on the judge (*see* FED. R. CRIM. P. 11(c)(1)(C)).

With regard to any sentencing recommendation or agreed upon sentence, the advisory guidelines instruct that the court should not follow the recommendation or accept the plea agreement unless the sentence falls within the applicable sentencing guideline range or departs from that range for justifiable reasons. (U.S.S.G. § 6B1.2(b).) Post-*Booker*, this provision can no longer be considered binding on sentencing courts because not only are the guidelines no longer mandatory but also the provision itself reflects the old sentencing regime, where justifiable departures were the only ones permitted by the guidelines. Now, of course, the court must consider a broader array of factors under section 3553(a) in determining the "justified" sentence. Indeed, even in our pre-*Booker* world, some courts refused to consider this guideline provision as binding on a sentencing court. (*See United States v. Goodall*, 236 F.3d 700, 704–05 (D.C. Cir. 2001) (holding that, unlike other policy statements, section 6B1.2 was promulgated "to guide, not to constrain" courts in deciding whether or not to accept a plea agreement).)

In the preindictment context, before a matter is assigned to a particular judge, both sides have greater incentive to negotiate a resolution pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which provides for a binding agreement with regard to a particular sentence or sentencing factor. If the judge refuses to accept the agreement, the defendant may withdraw the plea pursuant to Federal Rule of Criminal Procedure 11(c)(5)(B). Post-*Booker*, the government, in many instances, is more willing to discuss a binding plea agreement in order to achieve greater certainty regarding the ultimate sentence. From a defense perspective, such certainty can be an appealing feature. It is important to remember that the rule permits a binding agreement with regard to sentencing factors like the advisory guideline range. Even where the parties cannot agree on an ultimate sentence, it is often worth exploring whether you can agree on the guideline score, or even a guideline factor (like the absence of a role adjustment for an organizer or leader).

Given the directive in the post-*Booker* Comey Memorandum that prosecutors must continue to attempt to obtain a guideline sentence, the real challenge is trying to get the government to agree to a sentence that is below the otherwise applicable guideline range. The best approach is to try and convince the government that a reasonable alternative guideline calculation can be made so that the agreed upon sentence is within the guideline range and thus consistent with the Comey mandate. There also may be guideline departures—as opposed to *Booker* variances—that permit the government to accept your desired sentencing range as consistent with the guidelines. Although the government rarely agrees to guideline departures, its agreeing to a *Booker* variance is even more unusual.

Where the government is unwilling to consider a binding agreement with regard to sentencing factors or an ultimate sentence, one must then discuss what the government is willing to recommend, or at least not oppose. In such instances, the government often will request either (1) a stipulation that a sentence within the guideline range is *a*, but not necessarily *the* only, "reasonable" sentence, or (2) that the defendant waive his or her right to appeal any sentence. The former language (without an appellate

waiver) dramatically reduces, if not eliminates, any hope to obtain a sentence outside of the guideline range because the stipulation means that any guideline sentence is essentially immune from challenge on appeal. Post-*Booker*, however, an appellate waiver by both the government and the defense may prove advantageous to defendants. Where the defense has a strong argument for a downward departure under the guidelines or a *Booker* variance, an appellate waiver by the government may cause a sentencing judge to consider the request more favorably given that there is no risk of being embarrassed in the court of appeals. This is a somewhat risky strategy given the possibility that you will not be able to challenge a sentence above the advisory guideline range. However, in the appropriate case, where the mitigating factors truly predominate and where you know the history and practices of your sentencing judge, it may be a risk worth taking.

For defendants facing statutory mandatory minimum sentences, *Booker* does not directly provide the district court with any greater discretion to sentence a defendant below the statutory minimum sentence. However, two mechanisms exist for such defendants to obtain below-minimum sentences. The first is cooperating to receive a downward departure for substantial assistance, pursuant to U.S.S.G. § 5K1.1, or a postsentence reduction under Federal Rule of Criminal Procedure 35(b). The incentive to cooperate remains largely unchanged for those defendants facing statutory mandatory minimum sentences who are not eligible for the "safety valve," 18 U.S.C. § 3553(f), because substantial assistance motions provide the only realistic mechanism to obtain a sentence significantly below the minimum statutory sentence. (*See* 18 U.S.C. § 3553(e).)

The safety valve provides the second mechanism that might provide a defendant with the opportunity for a below-minimum sentence. The safety valve provides first-time offenders who meet the criteria set forth in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 with the opportunity to be sentenced below the statutory mandatory minimum sentence. Post-*Booker*, the safety valve may provide more substantial relief to qualifying persons. When the guidelines were mandatory, safety valve defendants were sentenced within the guideline range because of the application of the guideline provision irrespective of the mandatory minimum sentence. (18 U.S.C. § 3553(f).) However, post-*Booker*, the guidelines must be treated as advisory. Thus, a sentencing court is free to sentence a safety valve defendant to whatever sentence is appropriate after consideration of the 18 U.S.C. § 3553(a) factors without regard to the statutory minimum sentence. (*See United States v. Duran*, 383 F. Supp. 2d 1345, 1347 (D. Utah 2005) (Cassell, J.).)

For defendants not facing mandatory minimum sentences, cooperation plea agreements need to be evaluated carefully by defense counsel. In the pre-*Booker* world, where the guideline sentence was mandatory, many defendants depended on cooperation as the only potential avenue for a below-guideline sentence. Now, of course, the advisory guidelines are only one part of the sentencing calculation and a section 5K1 motion is not required for a below-guideline sentence. In addition, some courts have held that the defendant may receive credit for cooperation even where the government does not file a motion for substantial assistance. (*See United States v. Fernandez*, 443 F.3d 19, 33 (2d Cir. 2006) (sweeping nature of section 3553(a)(1) "presumably includes the history of the defendant's cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation").) Thus, to advise the defendant intelligently on whether he or she should enter a cooperation plea agreement, defense counsel must discuss the potential for a *Booker* variance in the absence of cooperation or based on cooperation deemed insufficient by the government to justify a motion for substantial assistance. As a practical matter, it appears that section 5K1.1 motions still provide most defendants with the greatest opportunity for a below-guideline sentence. However, it is no longer the *only* opportunity.

Pleading without any express agreement

In the post-*Booker* world, it also is important to consider pleading without any plea agreement. Postindictment, a defendant always can plead to the entire indictment. Preindictment, it is possible to plead to an information without any plea agreement between the parties, although the government's consent is essential and the government rarely will do so. Given the greater sentencing discretion enjoyed by judges, at least on a theoretical basis, there is less of a need to enter a plea agreement with the government, which usually gives up many of your client's rights with only modest concessions from the government. As a practical matter, given that judges generally continue to follow the guidelines, plea agreements continue to be prudent in most cases.

Although it is important to understand this new sentencing landscape and consider it in negotiating a plea deal with the government, the reality is that the new system has not brought any radical change to plea or sentencing practices. Because judges by and large continue to sentence defendants within the applicable guideline range, it tends to be business as usual when it comes time to negotiate plea agreements. Although the guidelines are advisory, the guideline range likely will be applied to your client. Thus, as in pre-*Booker* days, obtaining guideline concessions from the government remains a critical part of plea bargaining.