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Drastic Changes To Sentencing Guidelines On Horizon

Law360, New York (October 07, 2013, 9:53 AM ET) -- A special task force of the American Bar Association has very recently proposed to the United States Sentencing Commission substantial amendments to the U.S. Sentencing Guidelines for economic crimes. While there is work to be done to make the proposals more concrete and there are significant details to be worked out, the proposals would represent the most significant philosophical shift in sentencing in white collar cases since the inception of the Sentencing Guidelines, even if they are adopted only in part.

The task force, comprised of an all star panel of practitioners, judges and law professors, together with a U.S. Department of Justice observer, would dramatically reduce the impact of loss on a defendant's applicable guidelines level. On the flip side, the proposals would require a sentencing court to make explicit findings, based on its consideration of a non-exclusive list of factors, regarding a defendant's level of culpability and the impact of a defendant's criminal conduct on victims.

These findings would be significantly different than the largely quantitative findings now required in Section 2B1.1, the section of the Sentencing Guidelines governing economic crimes. The proposals would also cap the guidelines sentence for a first time offender who pleads guilty and did not commit an "otherwise serious" offense at zero to six months. The proposals are expected to be considered by the Sentencing Commission as part of its multiyear review of Section 2B1.1.

Given the Sentencing Commission's mandate to reduce overcapacity in federal prisons,[1] the proposals are likely to receive very serious consideration by the Sentencing Commission, such that white collar practitioners should be aware of the substantial changes to federal sentencing practice that may be on the horizon.

Basic Structure of the Proposals

The present version of Section 2B1.1 begins with a base offense level (either six or seven), next requires a sentencing court to determine loss, and then requires the application of more than a dozen separate (and largely upward) adjustments to the offense level. Section 2B1.1 has grown to more than 20 pages in the Sentencing Guidelines Manual and now includes the text of the guideline itself and an extraordinarily complicated series of rules, subrules and exceptions, together with extensive commentary. Litigation over loss and the many other adjustments in Section 2B1.1 can be extraordinarily time-consuming and, in a post-Booker world, i.e., where the Sentencing Guidelines are no longer mandatory, somewhat distracting.

In contrast, the proposals begin with a base offense level and require a sentencing court to make specific calculations relating to: (1) loss; (2) the defendant's culpability; and (3) the impact of the offense on victims. The proposals then require a sentencing court to "consider" the majority of the specific offense characteristics presently contained in U.S.S.G. § 2B1.1(b). The proposals are not explicit as to whether the sentencing court should specifically apply many of these adjustments, thereby increasing a defendant's guideline range based on them, or whether the court should merely "consider" these offense characteristics.[2] If the latter, the proposals would dramatically simplify sentencing litigation to focus on loss, culpability and victim impact.

Before describing each of these key determinations, it should be noted that the proposals have bracketed the suggested increases in range based on each factor, suggesting that the task force is still considering, or did not otherwise agree upon, how to calibrate guideline sentences in white collar cases.

Loss

The proposals of the task force would drastically reduce the importance of loss in determining a defendant's sentencing range. At the lower end, a loss of anywhere up to $20,000 would result in no upward adjustment in offense level under the proposals, whereas presently a loss must be $5,000 or less to avoid any upward adjustment for loss. At the higher end, a loss of more than $400,000 and less than $1 million under the current version of U.S.S.G. § 2B1.1 results in a 14-level increase in the applicable guideline level. Under the proposal, any fraud loss of more than $50 million would result in a 14-level increase. And the proposals make no further distinction beyond a $50 million loss. Thus, practically all mega-loss cases would be treated equally for loss purposes.

Perhaps as significant as the reduction in the importance of the amount of the loss, the task force proposes to entirely eliminate the notion of intended loss, presently defined as the "pecuniary harm that was intended to result from the offense," including "pecuniary harm that would have been impossible or unlikely to occur."[3] The proposals would focus exclusively on actual loss and, thereby, eliminate the possibility that a serious fraud that did not occur for reasons typically beyond a defendant's control would result in a substantial sentencing range.

As an example of the impact of the proposals, take the case of a fraud defendant who seeks to defraud a bank of $150,000, but succeeds to the tune of $75,000. Under present practice, before any other adjustments, including for acceptance of responsibility, this defendant would be subject to a guidelines range of 24 to 30 months. Under the proposals, this defendant would be subject to a range of eight to 14 months.

Culpability

Under current practice, a defendant's role in the offense conduct is typically dealt with by applying the adjustments in Chapter 3 of the Sentencing Guidelines for aggravating and mitigating role, specifically, U.S.S.G. §§ 3B1.1 and 3B1.2. Current practice makes it relatively easier to be tagged as an organizer, leader, manager and supervisor, but relatively more difficult to obtain a downward adjustment for a minor or minimal role in an offense.

The task force would require sentencing judges to make explicit findings for the new offense characteristic of "culpability." The proposals would characterize defendants on a five-level scale of culpability, from "lowest culpability" to "highest culpability," with corresponding decreases or increases in offense level. The proposed decrease in offense level would be anywhere from six to 10 levels for a defendant with the lowest culpability, and a proposed increase of six to 10 levels for a defendant with the highest culpability. The proposals also caution against "double counting" — typically described as using the same conduct more than once to increase a defendant's guideline range — when considering culpability and role under Section 3B1.1 and 3B1.2.

In assigning the appropriate culpability level, the task force proposes that sentencing courts consider factors such as: the defendant's motive or nature of the offense; the gain to the defendant or to others; the degree to which the offense and the defendant's contribution was sophisticated or organized; the duration of the offense; extenuating circumstances in connection with the offense, such as coercion or duress; whether the defendant initiated the offense or merely joined in criminal conduct initiated by others; and whether the defendant took any steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm of the offense.

As an example of the impact of the proposals, take the example of our bank fraud defendant who has low culpability, but not low enough to have a minor or minimal role under current practice. Such a defendant would have a sentencing range of zero to six months under the proposals and 24 to 30 months under the current regime.

Victim Impact

In present practice, victim impact is typically factored into an applicable guidelines level by considering the number of victims of criminal conduct, pursuant to U.S.S.G. § 2B1.1(b)(2), which results in an increase of anywhere between two and six levels.

The task force proposed four levels of "victim impact": (1) minimal or none; (2) low; (3) moderate; and (4) high, with increases of zero, two, four or six levels corresponding to the increasingly serious impact. Similar to its multifactor analysis of the culpability levels, the task force directs a sentencing court to consider a variety of factors when arriving at the appropriate level of victim impact, such as the particular vulnerability suffered by victims, the significance of loss to the victims, non-economic harm that the victims may have suffered, and, interestingly, whether the victims contributed to the offense in some manner. Thus, the proposals have the effect of requiring a much more nuanced and ultimately more qualitative consideration of the impact of criminal conduct on victims.

As an example of the impact of the proposals, take the case of a bank fraud defendant with "moderate" culpability whose criminal conduct had "low" victim impact, as most sub-$150,000 bank frauds probably would. Such a defendant would have a sentencing range of 12 to 18 months under the proposals, but 24 to 30 months under present practice.

The Cap for Non-Serious Offenses by First-Time Offenders

In a substantial shift in practice, the task force proposes that first-time offenders who have committed offenses that are not "otherwise serious" have a cap of level 10 in their offense level. A level 10 results in a guideline range of six to 12 months for those defendants who are not credited with acceptance of responsibility under U.S.S.G. § 3E.1.1 for pleading guilty, and zero to six months for those who do plead guilty. The task force sets forth a long list of factors in determining whether an offense is "otherwise serious."

This is a substantial deviation from the original philosophy of the Sentencing Guidelines, which viewed probationary sentences as too frequent and, as a practical matter, treated theft, tax evasion, antitrust offenses, insider trading, fraud and embezzlement as presumptively "serious." Indeed, the proposals explicitly advance the view that "[m]any of the offenses falling within [Section 2B1.1] are not 'otherwise serious'"[4]

Given the discretion that sentencing judges will retain regarding the determination of which offenses are "otherwise serious," this provision may serve to give a meaningful chance to many white collar defendants to avoid substantial incarceration. Indeed, it may give white collar defendants substantial additional incentives to go to trial. At the very least, this proposal would have the likely effect of substantially increasing the number of defendants receiving probationary sentences from the 5.8 percent of all federal defendants who did so in 2011.[5]

Conclusion

In the post-Booker world, it is a fact of life in federal criminal practice that the guidelines remain the starting point for sentencing determinations. Since Booker was decided in January 2005, judges' comfort in imposing below-guidelines sentences has grown and, in 2011, judges imposed sentences in fraud cases that averaged about 26 months, or about 18.8 percent below the bottom of the applicable guidelines range. Of course, that trend is tempered by the substantial increase in the average bottom of the guideline range for fraud offenses, from about 20 months when Booker was decided to slightly more than 30 months in 2011.

The task force's proposals would have the effect of reversing the trend of increasing guideline ranges by, among other things, drastically reducing the importance of loss to the determination of an applicable guidelines range. At the same time, the proposals would largely reduce the technocratic application of numerous guideline adjustments. Instead, the proposals would create several multifactor, and more qualitative, tests for sentencing courts to apply in determining sentencing ranges and shifting litigation to more crucial questions about a defendant's culpability, the impact of offense conduct on victims, and whether a defendant's conduct is "otherwise serious."

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[1] https://www.federalregister.gov/articles/2013/08/21/2013-20356/sentencing-guidelines-for-united-states-courts#h-5;
http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20130815_Press_Release.pdf.

[2] As the proposals note, some of these adjustments are mandated by Congress, which in some statutes has directed the Sentencing Commission to increase sentencing ranges in various limited instances.

[3] U.S.S.G. § 2B1.1, n.3(A)(ii).

[4] U.S.S.G. ch. 1, pt. A, § 4(d).

[5] U.S. Sentencing Comm'n, Report on the Continuing Impact of United States v. Booker on Federal Sentencing 5 (Dec. 2012).

[6] Id. at 61, 67. These trends are more pronounced in the Second Circuit, where judges have given below-Guideline sentences in more than 30% of fraud cases since Booker was decided in 2005. Id. at 78.

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