VAIRA & RILEY, P.C.

THE RELIABLE SOURCE

A NEWSLETTER OF FEDERAL CRIMINAL PRACTICE IN THE EASTERN DISTRICT

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SENTENCING CONSULTING SERVICE:

As part of its criminal practice, Vaira & Riley now offers to practitioners a consulting service on federal sentencing questions and procedure.

Ms. Aeryn Fenton, an eight-year lawyer, experienced in sentencing matters, will assist practitioners in applying the sentencing guidelines and determining applicable bases for departures and potential upward adjustments. She can provide alternative calculations regarding financial loss, deal with the probation officer, and draft plea agreements, objections and revisions to the PSI, versions of offense and sentencing memoranda, including Motions for Downward Departure.

Notwithstanding Ms. Fenton's experience in this area, and the supervision by the firm's partners, Vaira & Riley will bill Ms. Fenton at an associate rate.

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Sentencing Reports

The following sentencing reports are offered as precedent for your own practice. Although most are not formally published, practitioners may use them as a guide for formulating arguments in similar situations.

Departure Based on Combination of Factors

Contact: Carmen Nasuti (215) 829-1101

The combination of factors departure, suggested in the Commentary to U.S.S.G. §5K2.0, is growing in popularity. In a recent case involving filing a false tax return, an ailing elderly defendant presented documentary evidence of his extraordinary military record during World War II. Judge Robreno declined to grant a departure based on an individual factor but departed on the basis of a combination of factors. The departure was supported by the Probation Office and unopposed by the Government. Judge Robreno departed from an offense level of 12 and sentenced the defendant to probation and a period of house arrest.

Significantly, military service is a discouraged factor under U.S.S.G. §5H1.11. Age is also a discouraged factor under the guidelines, however, where the defendant is elderly and infirm and where it can be demonstrated that home confinement would be equally efficient as incarceration, the age factor can support imposition of a sentence below the applicable guideline range. *See* U.S.S.G. §5H1.1. ❖

10 Level Departure Following Grant of 5K1.1

Contact: Marc Durant (215) 592-1818

The defendant was implicated in a bank fraud conspiracy involving bankruptcy and securities tax

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fraud. The defendant cooperated at substantial danger to himself. The Government's 5K1.1 motion was granted at sentencing. Defendant's offense level was 18. Judge Waldman granted a 10 level departure and sentenced the defendant to 1 month imprisonment and 5 years probation. ❖

Level 14 Offender Sentenced to 6 Months Jail, 8 Months House Arrest, and 3 Years Probation

Contact: Jay Gottlieb (215) 735-3210

Defendant was convicted of conspiracy to steal union funds, theft of union funds, and filing false reports with the Department of Labor. After a hung jury at the first trial, defendant was found guilty on 17 counts at the second trial. His offense level was 14. Judge DuBois found that defendant was merely a minor player in the conspiracy and departed down to level 10 citing *Koon*. ❖

Level 13 Defendant Sentenced to 6 Months Incarceration and 6 Months Home Confinement

Contact: James Schwartzman (215) 563-2233

In conspiracy case where defendant's offense level was 13, Judge Weiner sentenced defendant to 6 months incarceration followed by 6 months home confinement. For the complicated details of this departure, contact James Schwartzman. This situation will most likely only be cited as a precedent in another case before Judge Weiner. ❖

Outside the Heartland Departure in Kidnapping Case for "Stooge" Defendant

Contact: Mark E. Gottlieb (215) 575-7030

Judge Van Antwerpen granted a departure under *Koon* where defendant, an adult woman, was convinced by her mother to kidnap mother's husband and commit him to a mental hospital. Once husband was committed, mother cleaned out husband's bank accounts. Other co-conspirators were separately indicted. The Government stipulated that the facts were outside the heartland for a departure pursuant to *Koon*. Judge Van Antwerpen departed as to the incarceration. Guideline range for kidnapping offense was 60 months incarceration; defendant was sentenced to 30 months imprisonment. Probation Office cited factors supporting an upward adjustment which the Court declined to follow. The Government did not take a position on any potential upward adjustment. ❖

Departure for Minor Participant Where Defendant Was Drug Mule

Contact: Gregory J. Pagano (215) 467-6700

Defendant was drug mule in conspiracy to import and distribute cocaine. She was a young woman with a history of mental problems which were not of a severity to constitute grounds for departure under U.S.S.G. §5H1.3. Judge Padova granted a 2 level departure for minor participant under U.S.S.G. 3B1.2(b). The Government contested the departure at sentencing but agreed to waive appeal. ❖

Bureau of Prisons Policy

From time to time, *The Reliable Source* will include information on key BOP Programs to aid practitioners in advising clients about to enter a federal corrections facility or clients presently incarcerated in a federal facility. The following is a summary of the required procedure should a client require an escorted trip to attend the funeral of or make a bedside visit to an immediate family member.

BOP Security Designation and Custody Classification

BOP Program Statement 5538.04 covers escorted trips. The BOP permits approved inmates to attend the funeral of or make a bedside visit to the following family members: mother, father, brother, sister, spouse, son, daughter, parents, and foster parents. The government pays the salary of the escort staff for the first eight hours of each day. The inmate assumes all other expenses including transportation costs. If the inmate or the inmate's family cannot cover the expense, the program statement suggests there may be another appropriate source if it is approved by the warden. The unit staff determines the cost of the escorted trip. The

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necessary funds must then be deposited in the inmate's trust account prior to the trip and the inmate must complete a BP-199 form payable to the U.S. Treasury in the amount of the expense. Unexpended funds are returned to the inmate's trust fund account following completion of the trip. Due to the requirement that the inmate finance the trip in advance, it may be appropriate to advise a client's family to deposit sufficient funds in the inmate's trust fund in advance so that the inmate may travel quickly if an emergency may arise.

The warden approves requests for inmates in minimum security facilities (OUT classification). The request is prepared by the unit staff, forwarded for screening and clearance and then submitted to the warden. Request by inmates confined in facilities with greater than minimum level security (IN and Maximum classification) must be approved by the Regional Director. The Regional Director will most likely approve requests accompanied by a favorable warden's recommendation and demonstration that the escorted trip is warranted. The Regional Director will consider the inmate's sentence, time in custody, adjustment, and the nature of the request in making his determination.

Inmates will be guarded continuously throughout the trip. The use of restraints for inmates regularly held in minimum security facilities is within the discretion of the escorting officer. Inmates regularly held in higher security facilities will be required to at least wear handcuffs with Martin chains for the pendency of the trip. Should the trip require an overnight stay, inmates will be housed in pre-arranged holdover points, such as federal facilities or federally approved jails where possible.

Basically, the lawyer's job lies in advising the client to arrange for funding to be deposited into his inmate trust account, directing the client that he is to notify his case manager of the emergency so that the approval process can be set in motion, and notifying client's unit team regarding the urgency of the situation. ❖

Practice Points

Record of Prior Good Works Under §5H1.11, Proceed With Caution

At a recent sentencing, Vaira & Riley successfully argued for a departure pursuant to U.S.S.G. §5H1.11 based on the defendant's civic services, employment-related contributions, and prior good works. Departure on these bases is a discouraged factor under the Guidelines. The Guidelines state that a Court should depart pursuant to this factor only where the conduct constitutes an exceptional case. U.S.S.G. Ch. 5, Pt. H, Introductory Commentary.

The government initially filed an appeal of the sentence, but later withdrew the appeal after counsel argued to the U.S. Attorney that the facts of the case presented no precedential value and an appeal would not substantially increase the sentence. This factor has not been successfully used for departures in many jurisdictions. Vaira & Riley is of the opinion that this is a difficult departure to prove and if counsel is successful in obtaining a departure an appeal is very likely to follow. Contact: Peter Vaira (215) 751-2700. For relevant case law on U.S.S.G. §5H1.11, *see United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990); *United States v. DeMasi*, 40 F.3d 1306 (1st Cir. 1994); *United States v. Haversat,* 22 F.3d 790 (8th Cir. 1994). ❖

Gelbard Motions

In representing an individual called as a witness before a grand jury, do not overlook the value of a motion for disclosure of any electronic surveillance pursuant to *Gelbard v. United States*, 408 U.S. 41 (1972). Title 18 U.S.C. § 2515 provides that no electronic evidence can be received in evidence before a grand jury if the evidence was obtained in violation of the wiretap statute. In *Gelbard*, the Supreme Court held that a witness may challenge the legality of the electronic surveillance which provides the basis for questioning in the grand jury. Following such a motion, the government is required to respond by informing the witness whether he or she has been the subject of any electronic surveillance before the witness testifies. This may cause some delay and may permit counsel to enter into further negotiations or a withdrawal of the subpoena. This is not a motion to make in every case. This motion may be valuable in a case in which the federal government is relying on investigations conducted by foreign countries, which conduct electronic surveillance under varying or questionable circumstances. For an example of current usage of a *Gelbard* motion call Katie Recker – (215) 972-6430. ❖

The Reliable Source is a service of the firm of Vaira & Riley for the federal criminal practitioners in the Eastern District of Pennsylvania. The newsletter provides a bi-monthly review of current developments and trends in the courts, the United States Attorney's Office, and the federal agencies with a substantial effort devoted to the sentencing process.

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This newsletter is meant as a practical aid to practitioners and is not intended to take the place of legal research.

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