

Spring Cleaning Issue

Client Relations

One way to endanger your status as a member of the CJA Panel is to ignore calls or letters from your appointed clients. (Other ways are to decline appointments or anger judges). Unresponsiveness to clients has recently been a problem for some lawyers.

My advice is that you set the tone for client relations at your first meeting with a defendant. Give your client as much information about the process of their case as you can. Tell them what will happen next and when they can expect to hear from you. Give them reasonable expectations about your availability.

If you set their expectations too high then you will not be trusted when you are unable to live up to your

promises. If you set their expectations too low then they think you just do not care. Use the initial interview to gauge the personality of your client.

If you see that a client will be "high maintenance," then budget extra time to see them in person during their case. Always send those clients letters.

Clients who constantly request to see you are the same clients that later complain you did not give them complete and accurate information. A plainly worded letter can put an end to that complaint.

This office uses a pamphlet that gives clients a general overview of the federal criminal justice process in this district. A pamphlet suitable for both panel lawyers and defenders will soon be completed and available in the courtrooms of the Magistrate Judges for distribution to defendants.

Please take your relationships with your clients seriously. Many of our cases are hopeless causes. The least you can do for your clients in those cases is to be caring and attentive.

Expedited Presentence Reports

Clients who are detained in this district, typically spend five or six months in local custody between their arrest and transfer to a federal facility to serve a sentence. This is true even in cases where there is an early determination that the client will plead guilty.

One of the biggest complaints from our clients is about the amount of time they have to spend in the Mobile Metro Jail. A reason for the delay is the time it takes for U.S. Probation to complete background checks for presentence reports.

This office and Probation have agreed upon the use of a form "Defendant's Approval to Institute a Presentence Investigation Before Conviction or Plea of Guilty" (PROB13A). If you and your client agree to sign this form, Probation will immediately conduct a presentence interview with your client, absent questions about offense conduct.

Probation will then begin its work and the presentence report can be completed in weeks rather than months after conviction.

The decision to sign this form must be assessed on a case by case basis. Some clients will feel that participation is a recognition of guilt before they have committed to enter a

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guilty plea.

In many cases, pleas occur late in the process because negotiations are drawn out or certain contingencies have not been met. These are the cases in which this form will have the greatest benefit.

Copies of the form will be available at Probation.

Restitution

By Lyn Hillman Campbell, AFD

Restitution is probably one of the least glamorous parts of sentencing. Most attorneys think that there is nothing they can do for an indigent client who has stolen many thousands of dollars. The client will just have to pay the money back. However, the law doesn't require indigent defendants to suffer an unreasonable restitution amount, even if it accurately reflects what they took. Restitution can greatly affect your client in a few years when their SRT is about to expire and they have a large restitution amount remaining. The result can be revocation, and additional time in prison.

The United States Constitution prohibits debtors' prisons. While no one can be imprisoned because of the inability to pay a debt, and while this protection extends to restitution orders, the Supreme Court requires that an indigent person on supervision make every reasonable effort to pay their restitution, including borrowing the money from her family, to escape imprisonment. The burden is on the defendant

to prove a good faith effort to pay and the inability to do any better. Bearden v. Georgia, 103 S. Ct. 2064 (1983). Even then, the court is only prohibited from "automatically" imposing imprisonment upon revocation of supervision. If after reviewing the individual client's case, the court still feels imprisonment is proper to preserve the government's interest in punishment and deterrence, the client is going to jail. Bearden, 103 S. Ct. at 2071.

If your client saved for Christmas, bought a car, or had an expensive gift given to them (like a computer for their children), your client may have to sell these assets to meet the Supreme Court's test. Further, if your client is having voluntary deductions taken out of his paycheck for union dues, health insurance, or a pension plan, the Government will argue that the money should have been used for restitution. Basically, if your client (or her spouse) is using money for anything other than what the Government sees as "necessary expenses," she is going to jail.

The Mandatory Victim Restitution Act of 1996 requires that the court order restitution in the full amount of the victim's loss at the time of sentencing. 18 U.S.C. §3664. Unlike the restitution law before 1996, the ability of the defendant to pay the restitution is no longer an issue in deciding the amount of restitution to order. However, the ability of the defendant to pay is still very important, as the court may order nominal payments if it appears that the defendant 1) cannot pay restitution, or 2) may not repay

the full amount of restitution during supervision. 18 U.S.C. §3664(3)(B). The burden rests with the government to prove the amount of loss. However, the burden rests with the defendant to establish the defendant's economic circumstances, which include past employment history, past earnings, assets (if any), and obligations to dependants. 18 U.S.C. §3664(3)(B), United States v. Fuentes, 107 F.3d 1515, 1532 (11th Cir. 1997) (applying former version of 18 U.S.C. §3663(A)). The defendant must support any assertion of inability to repay restitution fully by a preponderance of the evidence. Fuentes, 107 F.3d at 1532, 18 U.S.C. §3664(e).

If you prove your client cannot repay the full amount of restitution during her term of supervision, the court may order instead that your client pay \$50 per month toward the restitution obligation. If this proves too difficult (or too easy), the restitution order, and the payment schedule may be revisited at any time. 18 U.S.C. §3664(o).

The down side of the restitution statute is that an order of restitution, if filed according to the statute, functions as an automatic judgment recognized under state law and can be used to put a lien on any property owned by the defendant. 18 U.S.C. §3664(m)(1)(B). Further, once convicted a defendant may not claim in a civil proceeding that she did not commit the crime. 18 U.S.C. §3664(l).

The restitution statute also has an interesting provision

which allows the defendant, with the consent of the victim, to perform community service in lieu of restitution. 18 U.S.C. §3664(f)(4)(C). Such community service will be supervised by the probation office. 18 U.S.C. §3664(m)(2). Additionally, any inheritance, judgment or settlement received by a defendant during a period of incarceration must be used, in its entirety, to satisfy a restitution order. 18 U.S.C. §3664(n).

While the Eleventh Circuit has not rendered an opinion regarding the Mandatory Restitution Act of 1996, the Court has cautioned practitioners to object at sentencing if the court's findings regarding restitution are not what you had hoped. If objections are made, the factual findings are reviewed for clear error, and the overall restitution order is reviewed for abuse of discretion. Fuentes, 107 F.3d at 1534. If no objections are made, plain error applies, and the court will not consider contested factual issues without an objection. *Id.* In other words, if no objections are made, the restitution order will hold up on appeal.

Make sure your clients know that they have to pay something toward their restitution every month. If, for some reason, your client cannot pay a month, provide a written reason to the probation office with a partial payment of whatever the defendant can afford (the reason shows good faith on the part of the probationer). Also, advise your clients to keep copies of all correspondence with the

probation officer, including their monthly reports. Further, it's important to let your clients know what their probation officers can and can't order them to do. For example, without a court order allowing the probation office to set the amount of the restitution payment, the probation officer cannot mandate an additional sum of restitution (such as 50% of the defendant's income tax return).

CJA Salon

Some may feel that I have been remiss in my duties by not offering seminars to the Panel. However, I do not believe that I could improve upon the excellent opportunities already available.

For instance, on July 9, 10 and 11th, ACDLA is offering a criminal law seminar at Orange Beach with many nationally known speakers. There are several excellent criminal law seminars each year in New Orleans.

Lawyers who do not take advantage of the available seminars are unlikely to come to mine just because it is closer. Instead, I would like to consider an alternative for the lawyers who are already motivated to stay on top of federal criminal law.

I propose that we hold weekly meetings in my conference room to discuss issues affecting our practices. I doubt that more than a handful will attend at any one time. However, even if each lawyer only came once every month or so, there would still be a good

exchange of ideas.

These meetings would be useful for talking about specific cases and procedures. They would be private enough for uninhibited conversation.

I will work on setting this up in the coming weeks. If you have suggestions, please let me know. Would Thursday afternoons be convenient?

Reversible Errors

United States v. Marroquin, 136 F.3d 220 (1st Cir. 1998) (Creation of a lab report was not the type of trial preparation to deny extra point off for accepting responsibility).

United States v. Romero, 136 F.3d 1268 (10th Cir. 1998) ("Law of the case" required element named in jury instruction to be proven).

United States v. Lowery, 135 F.3d 957 (5th Cir. 1998) (Court erroneously excluded defendant's evidence that he encouraged witnesses to tell the truth).

United States v. Mitchell, 136 F.3d 1192 (8th Cir. 1998) (Failure to adhere to unconditional promise to move for downward departure violated plea agreement).

United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998) (Dismissal of underlying bank fraud undermined convictions for conspiracy, mail and wire fraud schemes, and money laundering).

United States v. Tucker, 137 F.3d 1016 (8th Cir. 1998) (Evidence of juror bias and

misconduct required evidentiary hearing).

United States v. Ovale, 136 F.3d 1092 (6th Cir. 1998) (Plan which resulted in removal of 1 in 5 African-Americans from panel, violated Jury Selection and Service Act).

United States v. Menza, 137 F.3d 533 (7th Cir. 1998) (Defendant did not have to pay restitution for amount greater than losses).

United States v. Nelson, 137 F.3d 1094 (9th Cir. 1998) (Evidence did not support aiding and abetting use and carrying of a firearm during crime of violence).

United States v. Moses, 137 F.3d 894 (6th Cir. 1998) (Allowing child-witness to testify by video violated right to confrontation).

United States v. Brito, 136 F.3d 397 (5th Cir. 1998) (Evidence that defendant was asked to find drivers did not prove constructive possession of hidden marijuana).

United States v. O'Bryant, 136 F.3d 980 (5th Cir. 1998) (Government has burden of proving more serious form of methamphetamine).

United States v. Rodriguez De Varon, 136 F.3d 740 (11th Cir. 1998) (Defendant could not be denied minor role because she was a courier nor on the amount of contraband imported).

United States v. Gonzales, 137 F.3d 1431 (10th Cir. 1998) ("Ends of justice" continuance could not be retroactive).

United States v. Del Toro-Aguilar, 138 F.3d 340 (8th Cir. 1998) (Occasionally fronting drugs to coconspirators did not

justify upward role adjustment).
United States v. Farmer, 137 F.3d 1265 (10th Cir. 1998) (Answer to ambiguous question did not support conviction for false declaration).

United States v. Fisher, 137 F.3d 1158 (9th Cir. 1998) (1. Defendant did not fail to appear for trial that had been continued; 2. Despite not guilty plea, admission in open court could be acceptance).

United States v. Toothman, 137 F.3d 1393 (9th Cir. 1998) (Plea could be withdrawn based upon misinformation about guideline range).

United States v. Romano, 137 F.3d 677 (1st Cir. 1998) (Law prohibiting sale of illegally taken wildlife did not cover the act of securing guide services for hunting trip).

United States v. Coleman, 138 F.3d 616 (6th Cir. 1998) (Court could not categorically exclude crack/powder disparity as basis for downward departure).

United States v. Cihak, 137 F.3d 252 (5th Cir. 1998) (Fraud of coconspirators must be foreseeable to defendant to be relevant conduct).

United States v. Renteria, 138 F.3d 1328 (10th Cir. 1998) (Lying at suppression hearing invoked accessory after fact guideline not perjury).

United States v. Huskey, 137 F.3d 283 (5th Cir. 1998) (Prior convictions in same information were related cases for counting criminal history).

United States v. Fernandez, 136 F.3d 1434 (11th Cir. 1998) (Court must hold hearing when defendant makes showing of a *Brady* violation).

United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998) (A court could depart downward to credit time served on an expired state sentence for the same conduct).

United States v. Lombardi, 138 F.3d 559 (5th Cir. 1998) (Evidence did not support conviction for using juvenile to commit drug offense).

United States v. Leonard, 138 F.3d 906 (11th Cir. 1998) (Insufficient evidence that passenger of vehicle possessed drugs or gun hidden in car).

United States v. Mills, 138 F.3d 928 (11th Cir. 1998) (Defendant could not be made to share codefendant counsel's cross-examination of government witness).

United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998) (Application note governing fraudulent contract procurement should have been applied rather than theft guideline).

United States v. Sanchez, 138 F.3d 1410 (11th Cir. 1998) (Court must hold a hearing if defendant challenges validity of a prior drug conviction used for statutory enhancement).

United States v. Campbell, 139 F.3d 820 (11th Cir. 1998) (Defendant's status as a drug courier was not basis to deny minor role).

Editor: Alexander Bunin
Southern District of Alabama
Federal Defenders Organization
2 South Water Street, 2nd Floor
Mobile, AL 36602
(334) 433-0910
(334) 433-0686 FAX