

# Federal Sentencing

## The United States Sentencing Guidelines

Typically, sentencing will take place ninety days after a guilty plea or guilty verdict. Prior to sentencing, the judge must calculate the applicable guidelines range. The Sentencing Guidelines are a set of rules which apply in federal sentencing. These guidelines are advisory, which means that a judge must consider the range before imposing sentencing, but is not required to impose a sentence within the guidelines range. Depending upon the circumstances, a sentencing judge may grant a "Variance", imposing a sentence that is either lower or higher than the sentencing guidelines require.

The Guidelines are set out in a chart, which has two parts: (1) the offense level and (2) prior criminal history category. The offense level depends on how serious the offense is. For example, murder is at the top of the chart, at level 43. Theft of a small amount of money is closer to the bottom of the chart, at level 6. The offense level can go up or down based on other factors in the case. For example, the offense level will usually decrease with "acceptance of responsibility," which is most often demonstrated by pleading guilty.

The Criminal history category is calculated by giving "points" to each prior conviction. A more serious prior conviction will receive more points. A less serious prior conviction will receive fewer points, or no points at all. Older convictions will not be counted if they happened more than fifteen years ago for the more serious convictions, or ten years ago for the less serious convictions.

Once the judge determines the offense level and criminal history category, the judge will look at the chart and find the applicable sentencing range. The range is given in months. For example, a guideline range of 24 to 30 months means that a judge must at least consider a sentence between 24 and 30 months in prison. The judge may give a sentence above the range or below the range, up to the maximum sentence permitted by law. In some cases, there is also mandatory minimum sentence set by Congress, and a judge may not go below the mandatory minimum absent certain circumstances. Although a judge may impose a sentence above the top of the advisory guideline range, a judge can never impose a sentence higher than the maximum punishment set by law.

For example, the maximum sentence permitted by law for some cases involving theft of a small amount of money is five years in jail. The judge may determine that the guideline range is 0 to 6 months in jail. In such a case, the judge has the power to impose a sentence higher than the guideline range of 6 months, but cannot impose a sentence higher than five years in jail.

## The Presentence Report

Prior to sentencing, a probation officer will prepare a presentence report, which is also known as a PSR. The probation officer conducts an interview in order to prepare the report. In every case, either an attorney or paralegal will be present during this interview. The interview will take place either in the jail, for clients who are incarcerated, or at the probation office for clients who are

released on bail. The interview will usually take place within a month after a guilty plea or guilty verdict.

It is extremely important to be honest in answering all questions during the presentence interview. It is okay to answer certain questions in writing. It is okay to refuse to answer a particular question. Consulting and talking with defense counsel in private is permitted and expected during this interview. However, since making a false statement to a probation officer is a separate crime, all answers during the interview must be truthful.

The topics covered in the presentence report are as follows: family background, education, employment, physical health, mental health, offense conduct, criminal history, and finances. The probation officer will usually ask for signed release forms so that the officer can obtain different kinds of records, including employment records, school records, medical records and tax records. In addition, for those clients who are released on bail, there will be a drug (urine) test conducted at the time of the presentence interview. Typically, a probation officer will want to speak with a family member to verify the information given during the interview. In addition, the probation officer will usually make a “home visit” to see the place where a client will be living after the completion of any sentence.

Once the probation officer finishes gathering all the necessary information, the officer will write a draft report. It is important to read this initial report very carefully. There may be factual errors. There may be legal errors. Some important information may have been left out. It is defense counsel’s obligation to point out these errors and objections to the judge and the probation officer prior to sentencing. The judge and probation officer may make changes in response to these objections.

After the draft report has been reviewed by all parties, the probation officer will send a final version of the PSR to the judge. This final version will include a recommendation as to what the probation officer thinks the sentence should be. The judge will consider this recommendation prior to imposing sentence. The judge does not have to follow the recommendation of the probation officer. Ultimately, it is the judge, not the prosecutor or the probation officer, who decides what the sentence will be.

## **The Sentencing Hearing**

On the date of sentencing, the first thing the judge will ask is if all parties have received a copy of the presentence report and had a chance to review the report. It is a rule that the first draft of the PSR must be sent out no later than 35 days prior to the date of sentencing. If a client wishes, this rule can be waived, and sentencing can take place sooner.

Typically the judge will receive a written submission (either a motion or letter) from defense counsel prior to sentencing. This motion or letter will explain all relevant issues for the judge to consider. In addition to written arguments, both sides, prosecution and defense, are allowed to make oral arguments at the time of sentencing. The judge is required to give every defendant in a criminal case the chance to speak before the judge imposes sentence. This is an opportunity for clients who want to say something to the judge. It is often a good idea for clients to say something at the time of sentencing, but it is not required. Clients can also write to the judge

before sentencing. This letter should not be sent directly to the judge, but rather to defense counsel, who will then forward the letter to the judge.

A sentencing hearing, like all court proceedings, is open to the public. Family members can, and should, attend the sentencing hearing. Family members, friends, employers, neighbors, etc. may also send letters to the judge before the sentencing. These letters should not be sent directly to the judge, but rather to defense counsel, who will gather them together and send the letters to the judge all at once. In some cases, family members or friends can also speak at the sentencing hearing.

After hearing from all parties, the judge will announce the sentence. If a prison sentence is imposed, in some cases, the judge will permit a client who has been released on bail to "voluntary surrender" at a later date, usually thirty to sixty days in the future. Not everyone goes immediately into custody even when a prison sentence is imposed. It depends on the individual case, and most importantly on how the client has behaved while on bail.

If a prison sentence is imposed, the judge can make a recommendation to the Bureau of Prisons as to where (which prison facility) the sentence should be served. The Bureau of Prisons does consider this recommendation but is not required to follow the judge's recommendation. In most cases, the judge will recommend that the client be designated to a facility as close as possible to family members to encourage family visits.

If a sentence of probation or supervised release is imposed, the client will have 72 hours to report to the probation office. It is usually a good idea to go directly from the courtroom to the probation office to check in. The probation officer will usually take general information on that date and provide forms to be filled out.

## **Time Credit**

There is no longer any parole in the federal system. In most cases, a client will receive credit for all time served in federal custody prior to the date of sentencing. The only exception is for those clients who are either already serving another sentence or have been brought to court on a "writ of habeas corpus." For clients who have been brought to federal court by a writ, the time credit will depend on whether the time spent in prison has been applied to another sentence. Usually time credit is not given for time spent in immigration custody. In order to take account of time spent in immigration custody, the judge would have to reduce the sentence imposed by the amount of time spent in immigration custody.

For sentences of one year or less, there is no good time credit. A client will serve all twelve months, except for the last ten percent, which is usually served at a half-way house. For sentences of twelve months and one day or longer, a client is eligible for good time credit of up to 15 percent, as long as there have been no disciplinary problems. This means that on a ten year sentence, for example, a client will serve eight and one-half years. The last ten percent of that eight and one-half years can be served at a half-way house. Under the Second Chance Act, the maximum period of time a client may serve in a half-way house is twelve months.

## **Early Release Drug Treatment Program**

Clients who have a documented history of substance abuse may be eligible for an intensive 500 hour drug treatment program. Clients who successfully complete this program can receive up to a one year reduction in their sentence. Clients, who have been convicted of any violent crime, including gun possession, may participate in the drug treatment but are not eligible for any sentence reduction.