

University of Missouri School of Law Scholarship Repository

Faculty Publications

Summer 2006

The Model Federal Sentencing Guidelines Project: Adjustments for Guilty Pleas and Cooperation with the Government, Model Sentencing Guidelines §3.7 - 3.8

Frank O. Bowman III

University of Missouri School of Law, bowmanf@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>

 Part of the [Corporation and Enterprise Law Commons](#), [Criminal Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Frank O. Bowman III, The Model Federal Sentencing Guidelines Project: Adjustments for Guilty Pleas and Cooperation with the Government, Model Sentencing Guidelines §3.7 - 3.8, 18 Fed. Sent. R. 370 (2006)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Adjustments for Guilty Pleas and Cooperation with the Government: Model Sentencing Guidelines §§3.7-3.8



FRANK O. BOWMAN, III

Floyd R. Gibson
Missouri Endowed
Professor of Law,
University of
Missouri, Columbia
School of Law

Editor, *Federal
Sentencing Reporter*

Model Sentencing Guidelines §3.7 Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by one level.
- (b) If the defendant qualifies for a decrease under subsection (a), and the government notifies the court that the defendant has assisted the authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty thereby permitting the government to avoid preparing for trial and permitting the court and the government to allocate their resources efficiently, the court should consider the defendant's timely assistance as a mitigating factor when determining the defendant's sentence within the applicable range.]

Application Notes

1. [It is anticipated that language closely tracking Application Notes 1-5 of the current Acceptance of Responsibility guideline, U.S.S.G. §3E1.1, would serve equally well in this model guideline.]

Drafter's Commentary

So long as the federal criminal justice system is dependent on resolution of a high percentage of cases by plea rather than trial, there will be a need for incentives to plead guilty. Historically, the most common of such incentives have been reductions in sentence for those who plead guilty. The current Federal Sentencing Guidelines officially sanction at least two such incentives – the acceptance of responsibility adjustments of U.S.S.G. §3E1.1 and the early disposition (“fast-track”) adjustments of U.S.S.G. §5K3.1. I say that the Guidelines “officially sanction” these two incentives because of the evidence that a variety of other incentives to plead are also on offer throughout the federal system. These include promises to dismiss, or not indict, counts as part of charge bargains, agreements not to seek certain enhancements, such as the second-offender information of 21 U.S.C. §§ 841, 851,¹ and bargaining over facts and sentencing factors.

This is not the place to debate the necessity, legitimacy, or desirability of each of the foregoing varieties of plea incentive. For present purposes it is enough to say that any system of simplified guidelines designed to replace the current Federal Sentencing Guidelines should have a mechanism to account for (or reward, if one prefers a blunter term) a defendant's choice to “accept responsibility” for his misdeeds by pleading guilty. Model Sentencing Guidelines §3.7 essentially replicates the current acceptance of responsibility guideline, U.S.S.G. §3E1.1, so far as is possible within the model structure. Two differences between the model and current systems are apparent. First, because of the somewhat wider ranges in the model system, an acceptance of responsibility reduction will, at some points on the sentencing table, represent a larger reduction in sentencing range than is presently the case. Second, for the same reason, it was thought undesirable to provide any additional reduction in offense level and thus in sentencing range for those defendants who plead guilty early and save the court and government the resources associated with trial preparation. In short, there is no offense level reduction analogous to what is now colloquially known as “super acceptance of responsibility” under U.S.S.G. §3E1.1(b). Should it nonetheless be thought desirable to provide some acknowledgment of early plea decisions, Model Guideline §3.7 includes a bracketed Section (b) that would make such an early plea decision an advisory mitigating factor within the applicable guideline range.

It is difficult to predict with any precision how this new acceptance of responsibility provision, or indeed the entire structure proposed here, would affect the plea bargaining dynamic in federal cases. After all, back in 1987 most informed observers predicted that the advent of the Federal Sentencing Guidelines would dramatically reduce pleas and markedly increase the number of cases taken to trial. But as we know, the Guidelines have had the exactly opposite effect — the percentage of cases resolved by plea has been climbing steadily for years and even in the period of legal uncertainty that began in 2004 with *Blakely v. Washington* has remained around 95%.² Nonetheless, one can hazard a few provisional observations.

Federal Sentencing Reporter, Vol. 18, No. 5, pp. 370–372, ISSN 1053-9867 electronic ISSN 1533-8363

©2006 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website at www.ucpress.edu/journals/rights.htm

First, the Model Guidelines system would have measurably fewer decision points with mandatory effects over which bargains could be struck. For example, the current fraud guideline is built around a loss table of sixteen levels,³ while the loss table in the model fraud guideline has only six levels.⁴ Likewise, the current fraud guideline lists more than thirty possible non-loss sentencing factors, each one of which, if found by the judge, imposes a mandatory offense level increase. By contrast the model fraud guideline lists 10-12 factors with mandatory effects on offense level; the remainder of the factors mentioned in the model guideline have merely advisory effect within the applicable sentencing range. In consequence, under the model system, there are fewer decision points over which to haggle during plea negotiations. This might produce slightly less bargaining leverage for the government.

Second, on the other hand, some facts that under the existing Guidelines are matters for judicial decision would become like elements of the crime insofar as they would have to be pled and proven at trial or explicitly admitted as part of a guilty plea. This new class of what might be called "guidelines elements" would presumably become the legitimate subject of charge bargaining, and thus a matter within the ambit of prosecutorial discretion and not subject to second-guessing by probation officers or the court. This feature of the model system might slightly increase prosecutorial bargaining leverage. However, any increase in prosecutorial control resulting from a larger set of facts subject to charge bargaining might well be offset by the requirement that, absent agreements, such facts would have to be proven to a jury beyond a reasonable doubt.

It would be unwise to make precise predictions about how these and other factors would play out in the transition to a simplified federal sentencing system. However, there seems little doubt that the model system contains ample room for appropriate plea bargaining and more than adequate incentives for the entry of guilty pleas by defendants seeking to avail themselves of that avenue to resolve their cases.

Model Sentencing Guidelines §3.8 Substantial Assistance to Authorities

[Upon motion of the government stating that] [If] the defendant provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may impose a sentence [one offense level] [up to two offense levels] below the otherwise applicable guideline range.

The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(a) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(b) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(c) the nature and extent of the defendant's assistance;

(d) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(e) the timeliness of the defendant's assistance.

Application Notes:

1. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility pursuant to Model Sentencing Guidelines §3.7. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*

Drafter's Commentary

There is near-universal agreement that sentence reductions for cooperation with authorities in the investigation or prosecution of other persons are, at the least, a necessary tool of modern federal criminal investigation. There is thus no dissent from the proposition that a simplified guidelines system should contain a provision for downward departures from the range created by trial or plea based on substantial assistance to the government. However, there exist lively differences of opinion about the details of such a provision. Several probable fault lines in a debate over a new substantial assistance guideline are suggested by the bracketed language in Model Sentencing Guidelines §3.8.

The government motion requirement: Perhaps the single most hotly contested point about the current substantial assistance guideline, U.S.S.G. §5K1.1, is the language requiring a government motion as a precondition for the court's award of a substantial assistance departure.⁵ It is fair to say that virtually all defense lawyers (including all those in the working group on this project) and a great many judges and academics would prefer to eliminate the government motion requirement, leaving the determination of whether a defendant has provided substantial assistance within the province of the judge.⁶ The Sentencing Commission has thought otherwise, and its position is enthusiastically supported by the Department of Justice. On this point, for reasons I have explained at length elsewhere, I side with the Commission and the Department.⁷ However, this is not an issue that needs to be resolved for the present. As indicated by the bracketed language in Model Sentencing Guidelines §3.8, a model substantial assistance guideline can be drafted to match either of the competing preferences with the addition or subtraction of seven words.

Extent of departure: In the existing Federal Sentencing Guidelines, once a judge has granted the government's motion for a substantial assistance departure, in any case not involving a statutory minimum mandatory sentence the court is effectively free to depart as little or as much as seems appropriate to him.⁸ There is at least a question as to whether in a new system the same unfettered discretion should be preserved, or whether the maximum extent of a substantial assistance departure should be prescribed by rule. Some might argue that the value of substantial assistance is so difficult to assess that no advance quantification is possible. Others might respond that the mitigating value of substantial assistance is no more intrinsically difficult to quantify than the aggravating value of, say, role in the offense or participation in a fraud scheme employing "sophisticated means," yet the current guidelines quantify the effect of those enhancements.⁹ Moreover, one need not possess a precise scale for valuing substantial assistance from case to case to conclude that some maximum value should be assigned to substantial assistance as a general category.

Once again, the model guideline does not resolve these debates. Rather, it includes as an option for discussion bracketed language that would impose a limit of either one or two offense levels on the extent of the available departure. The bracketed material, and the limitation, could be omitted entirely.

Effect of mandatory minimum sentences: Under existing law, in a case involving a statutory mandatory minimum sentence, the court may depart below both the guideline range and the mandatory minimum sentence only if the government moves for a guidelines departure under Section 5K1.1 and a statutory departure under 18 U.S.C. § 3553(e).¹⁰ This model guideline does not attempt to address the issues raised by the interaction of the guidelines and mandatory minimum sentences in such cases. However, these issues should be discussed and an appropriate resolution integrated into any real-world embodiment of this model.

Notes

- ¹ These statutes provide that a defendant who commits a second drug offense is subject to having the maximum and minimum term of his sentence doubled if the government files and proves the allegations in a "second-offender information," 21 U.S.C. § 851.
- ² U.S. SENTENCING COMMISSION, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Sec. 3, Fig. C (2006).
- ³ U.S.S.G. §2B1.1(b)(1) (2005).
- ⁴ See Frank O. Bowman, III, *Economic Crimes*, 18 FED. SENT. REP. 330 (2006).
- ⁵ The rule is slightly more complicated than this categorical statement would imply in that courts have held that the government may not withhold a motion for improper reasons. See, ROGER W. HAINES, JR., FRANK O. BOWMAN, III, AND JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1473-96 (2006) (discussing the nuances of the government motion requirement). However, as a practical matter, substantial assistance departures are virtually never awarded in the absence of a government motion.
- ⁶ See, e.g., *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503 (2001). For a sampling of the extensive academic literature to the same effect, see HAINES, BOWMAN & WOLL, *supra* note 5, at 1474 n. 68.
- ⁷ Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on Substantial Assistance Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7 (1999). See also, Ronald S. Safer and Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon*, 12 FED. SENT. REP. 41 (1999).
- ⁸ See generally, HAINES, BOWMAN & WOLL, *supra* note 5, at 1500-03. There are some limitations on the judge's departure power. Several courts have held that a defendant may not appeal the extent of a substantial assistance departure, but that the government may. See, e.g., *United States v. Pepper*, 412 F.3d 995, 997 (8th Cir. 2005). Many courts have held that the extent of the departure must be justified based on the defendant's substantial assistance and not on other factors such as family circumstances, aberrant behavior, or extraordinary rehabilitation. HAINES, BOWMAN & WOLL, *supra* note 3, at 1501. Nonetheless, the judge's discretion is broad indeed.
- ⁹ See U.S.S.G. §§3B1.1 and 3B1.2 (adjustments for aggravating and mitigating role), and §2B1.1(b)(9)(C) (2005) (sophisticated means enhancement to fraud and theft guideline).
- ¹⁰ For discussion of the complications involved in substantial assistance cases with mandatory minimum sentences, see *id.*, at 1472-73.