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## Keeping up with . . . Sentencing Under the New Federal Guidelines

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By Joel M. Androphy

Gone are the days when your five-year old could determine the range of punishment for one of your criminal clients. Gone are the days when your client under investigation prayed for a federal versus state indictment to guarantee a more comfortable prison environment. Gone are the days of calculating parole release dates.

It is no longer a simple matter of reviewing the applicable criminal statute, preparing a sentencing memorandum, and hoping the federal judge has some compassion for the criminal offense or your client's family obligations. The reason for all the chaos is the Sentencing Reform Act of 1984, 18 U.S.C. §§3551-3742, enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II (October 12, 1984), effective November 1, 1987.

Determining a sentence under the guidelines is a multi-step process. The two basic components of the new sentencing procedures involve (1) calculating a "total defense level," and (2) determining the defendant's "criminal history category." Once these factual determinations are made, reference to a numerical table dictates the narrow guideline range for each case.

For example, the basic offense level for theft is "4." Increases in that level, which raise defendant's sentencing range by approximately 12 percent, are based upon the value of the property taken (e.g., an increase of seven offense levels for property valued at \$50,001-\$100,000), and other fac-

tors such as whether the offense involved more than minimal planning, and whether it was from the person of another. Further adjustments are made based upon the vulnerability of the victim, defendant's role in the offense, and whether defendant obstructed the investigation or prosecution of the offense. Convictions on multiple counts do not result in sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. For example, embezzling money from a bank and falsifying related records, although distinct offenses, involve the same type of conduct, the same victim, and the same degree and amount of harm. The defendant's acceptance of responsibility (e.g., restitution, admission of involvement, guilty plea) is also a basis for adjustment.

A defendant's criminal liability history category is based upon the number and severity of prior offenses, and whether the present offense was committed while on some form of criminal justice supervision. Each of the six possible criminal history categories increases the severity of the punishment range by approximately 12 percent.

The sentencing judge may then impose a sentence within the applicable guideline range. Probation is subject to numerous restrictions. If the judge departs from the guidelines because of any aggravating or mitigating factors not taken into account by Commission, reasons for such departure must be stated in writing. Under certain

circumstances the judge's sentence will be subject to appellate review.

Problems and ambiguities in applying the guidelines will inundate our courts for years to come. For example, do the federal guidelines apply to criminal activity that occurred before November 1, 1987. Apparently, in an effort to avoid a confrontation with the *Ex Post Facto* clause, the Department of Justice has taken the position that the guidelines only apply to criminal conduct committed after November 1, 1987. Practitioners should also be comforted with the fact that the United States Supreme Court in *Miller v. Florida*, 41 Crim. L. Rep. (BNA) 3269 (1987), has recently decided a similar issue with regard to the modification of a state's sentencing guidelines. The Court held that the revised guidelines increasing the length of sentences could not be applied to a person whose crimes were committed before the law's effective date.

For judges and lawyers it is a new educational experience. For clients it may be either 10 years playing racquetball in Big Spring or two years plowing a field in Huntsville. Interesting choice.

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