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The Challenges of Investigating Section 5K1.1 In Practice

From the very beginning, almost everyone familiar with the sentencing guidelines has recognized that substantial assistance motions pose a severe threat to the goal of horizontal equity in sentencing. The problem stems in part from the fact that any scheme using sentencing leniency to reward cooperation reduces the likelihood that two defendants of similar culpability and criminal history will receive the same sentence if one cooperates and the other doesn't. The damage, however, is potentially magnified by the particular system established by the federal guidelines: The absence of clear guidelines as to how cooperators should be treated makes it likely that the same two defendants will not receive like treatment even if both render the same degree of assistance to the government.

Threatened damage does not always come to pass, however. After a decade of guideline sentencing, one would like to be able to answer the most basic questions about this threat to a central goal of the Sentencing Reform Act: (1) To what extent has § 5K1.1 actually resulted in inequities?, and (2) If inequities have indeed resulted, what can be done about them?

In this regard, one can only welcome the efforts of the Sentencing Commission's staff to go beyond supposition and anecdote¹ and provide a quantitative and, where that is impossible, a qualitative picture of how § 5K1.1 is working. Both the initial report of the Substantial Assistance Staff Working Group and the subsequent staff report by Linda Drazga Maxfield and John H. Kramer are models of what sentencing research should be. They ask the right questions. They gather appropriate data and present it clearly. And, perhaps most importantly, they are quite careful to identify the limits of their presentations. The Working Group's multivariate analysis thus takes pains to point out: "Variables that were not available for analysis likely have strong explanatory impacts on the substantial assistance process: the amount of cooperation, the quality or usefulness of the information, the charging policies of law enforcement, and the plea bargaining practices of the prosecution."² The chief conclusion of the Maxfield-Kramer report is that more research is needed.

Who can argue with a call for more research? As one who regrets the paucity of empirical support for the generalizations that fill much legal academic work, I don't want to be a naysayer here. But we ought not underestimate how far we are from being able to assess the degree to which § 5K1.1 practice is actually

undermining sentencing equity.

The Working Group's paper offers dramatic evidence that § 5K1.1 practices differ across districts. The difference between the Eastern District of Virginia's 3.9% substantial assistance rate for 1994 and the Eastern District of Pennsylvania's 49.3% rate,³ for example, surely has more to do with § 5K1.1 practice than with variation in caseload or actual cooperation rates. But do these statistics indicate that cooperators rendering similar degrees of assistance are treated differently? When I sought an explanation of this discrepancy from a source familiar with E.D. Pennsylvania practice, I was told that the U.S. attorney's office there was particularly averse to charge bargaining, that the office believes it has an inordinate number of significant multidefendant cases, and that, in any event, the district's judges seemed to give unusually small discounts to cooperators. When I asked a source familiar with E.D. Virginia practice to explain that district's atypically low rate, his answer was quick and simple: The judges in that "rocket docket" district⁴ want to sentence cooperators soon after they plead guilty, and are not keen on giving the U.S. attorney's office time to call cooperators as witnesses in related cases or otherwise obtain the benefits of their assistance prior to sentencing. Prosecutors in that district have adapted by dispensing with § 5K1.1 motions at sentencing, and rewarding cooperation once it has been completed by filing Rule 35(b) motions.

Rule 35(b) motions are, of course, not the only way prosecutors can obtain leniency for cooperators without filing § 5K1.1 motions. Indeed, the Working Group's report suggests that only "a few districts... use Rule 35(b) motions rather than § 5K1.1 departures as a matter of prosecutorial policy."⁵ The far more common alternative to § 5K1.1 practice appears to be charge bargaining, or sentencing fact bargaining. It is hardly surprising that, in the U.S. attorneys' offices visited by the Working Group, the prosecutors in the one "with the lowest substantial assistance rate of the districts visited" "regularly engaged in charge bargaining that allowed defendants to plead to lesser charges or referred the case to state/local courts for prosecution."⁶

The challenge is for an outsider to figure out exactly *when* charge discounts or sentencing fact discounts are used in lieu of § 5K1.1 motions. But this is the same challenge that has bedeviled all efforts to investigate the malleability of the guidelines more



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generally, and it is not one that the Commission or anyone else appears equal to. When a defendant is arrested with a sum certain of illegally obtained money or property or an easily ascertainable quantity of drugs on his person, a review of his case file will likely indicate whether he received a sentencing discount in exchange for his cooperation and/or his guilty plea. Determining the amount of loss or quantity of narcotics involved in a multi-defendant fraud or drug conspiracy — the kind of case most likely to produce cooperators — will generally involve a far more impressionistic process, however, and one that is far more amenable to undetectable manipulation.⁷ Perhaps reviewing a non-cooperating co-defendant's case file will reveal whether special leniency has been sought; perhaps not. Unless we rely on the characterization of the Assistant (or defense counsel) handling the case, we probably will not be able to tell the difference.

Even if careful attention to the charging practices of each district enabled us miraculously to identify those defendants who obtained a sentence reduction (via § 5K1.1 or some other route) as a result of their substantial assistance, we would still want to determine whether defendants rendering similar degrees of assistance were receiving comparable sentence reductions (or recommendations). The Working Group sought to explore disparities in this regard, but its presentation contained one critical caveat: Its multivariant model was unable to consider the "quality or usefulness" of a cooperator's information, testimony, or undercover assistance.⁸ The model thus was not able to distinguish between (1) a case in which the defendant had provided information to the government but did not receive a § 5K1.1 motion because the U.S. attorney's office believed information "substantial" only when it led to the indictment of another person, and (2) a case in which the office's refusal to file the motion was based on the defendant's lack of candor during debriefings.

I do not fault the Working Group's refusal to include a factor that it conceded would likely have a "strong explanatory impact[] on the substantial assistance process."⁹ Indeed, I don't see how it could have done otherwise. Were the Commission staff to rely on prosecutorial characterizations of assistance quality, would it not be ceding much of its fact-finding mandate to the very line Assistants whose conduct it was assessing? Just as one prosecutor who uses § 5K1.1 motions to entice recalcitrant defendants into pleading will blithely attest to their candor, so may his overly demanding colleague be quick to attribute a defendant's inability to say more to "disingenuity." On the other hand, it would be well-nigh impossible for the Commission to second-guess prosecutorial assessments in this area.

Given that the Working Group's understandable failure to consider assistance quality and value substantially limits the usefulness of its study, can we expect further work to cure the problem? I suspect not. Perhaps I am unduly pessimistic, but I do not see how even the most diligent investigator can take a broad range of cases and second-guess line Assistants' assessments of worth.

This leads to a larger and even more pessimistic point. Even if the Commission staff were able to surmount all the methodological challenges and quantitatively confirm that there are grave disparities in the way cooperators are treated across districts, it is far from clear that policy articulation and hierarchical supervision within each office would solve the problem. The Working Group makes much of the need for national standards, and structures to ensure adherence to them. In the end, however, the line Assistants whose judgments are supposed to be monitored will still dominate the § 5K1.1 internal decisionmaking process. This domination is in part a matter of informational asymmetry: It will often be as difficult for a U.S. attorney's office's § 5K1.1 committee to question a line Assistant's assessment of a cooperator's value and candor as it is for the Commission staff to do so.

Yet there are other factors involved as well. The decision as to whether a § 5K1.1 motion will be filed may precede sentencing, but it comes at the end of what likely was a complicated bargaining process that began even before the defendant's first proffer. Although the agreement that typically formalizes the relationship between a cooperator and the government will ostensibly leave the government with complete discretion as to whether it will file a § 5K1.1 motion, the development of that relationship will inevitably be framed by the line Assistant's statements about her expectations and the degree of her satisfaction with the cooperator's performance. Such statements will often create legally cognizable reliance interests, particularly in those circuits that have imposed a meaningful obligation on the government to exercise its discretion in "good faith."¹⁰ And even where the reliance interest is not legally cognizable, it will still carry weight in an office's deliberations, since to renege on an Assistant's veiled assurances or threats is to make it more difficult for her to negotiate in the future, particularly in a small legal community.¹¹

So what's wrong with trying to gather more quantitative evidence about § 5K1.1 practices, and calling for more formal structures to monitor § 5K1.1 practices within and across U.S. attorneys' offices? Nothing really, as long as we don't overestimate the returns on such efforts, or get misled into presuming that the appearance of horizontal equity in this

extraordinarily fact-sensitive area is anything more than the invocation of the right code-words by those in the trenches.¹²

Notes

¹ See, e.g., Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. R. 292 (1996); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L. J. 69 (1995).

² United States Sentencing Commission Substantial Assistance Staff Working Group, *Sentence Reductions Based on Defendants' Substantial Assistance to the Government*, at 146 (1997).

³ *Id.* at 112-14 (table 12). This variation was not confined to 1994. In 1997, E.D.Pa. had a substantial assistance rate of 41.8%, compared with 5.8% in E.D.Va. United States Sentencing Commission, 1997 Sourcebook of Federal Sentencing Statistics (1998).

⁴ See Enrique J. Gonzales, *Speed is the Ticket in this Court; Virginia District Called Fastest for Trials Among 94 in the Nation*, WASH. TIMES, Oct. 12, 1989, at B5 ("The U.S. District Court judges and clerks in the Eastern District of Virginia move cases so quickly and efficiently that the district is known as the East Coast's 'rocket docket.'").

⁵ Substantial Assistance Staff Working Group, *Sentence Reductions*, *supra* note 2, at 116.

⁶ *Id.* at 57.

⁷ See, e.g., *United States v. Graham*, 146 F.3d 6, 11 (1st Cir. 1998) (fraud defendant convicted after trial points out that "loss attributed to her was substantially higher than the loss attributed to other similarly situated defendants who had cooperated with the government").

⁸ Substantial Assistance Staff Working Group, *Sentence Reductions*, *supra* note 2, at 146.

⁹ *Id.*

¹⁰ *Id.* at 12-15; see, e.g., *United States v. Harpaul*, Cr. 97-303 (ADS) (E.D.N.Y. Oct. 20, 1998) (after consideration of submissions ordered in 4 F. Supp.2d 137 (E.D.N.Y. 1998)).

¹¹ The interplay between repeat player prosecutors and defense lawyers in the cooperation system is something I explore at greater length in my article, *Cooperating Clients*, see *supra* note 1.

¹² So long as their limitations are understood, § 5K1.1 committees can at least help ensure some consistency in the positions that a U.S. attorney's office takes on cooperator sentences. The use of such committees was recommended in a recent report of the Justice Department's Inspector General. See Dept' of Justice, Office of the Inspector General, *CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions* (dated December 1997; released July 1998).