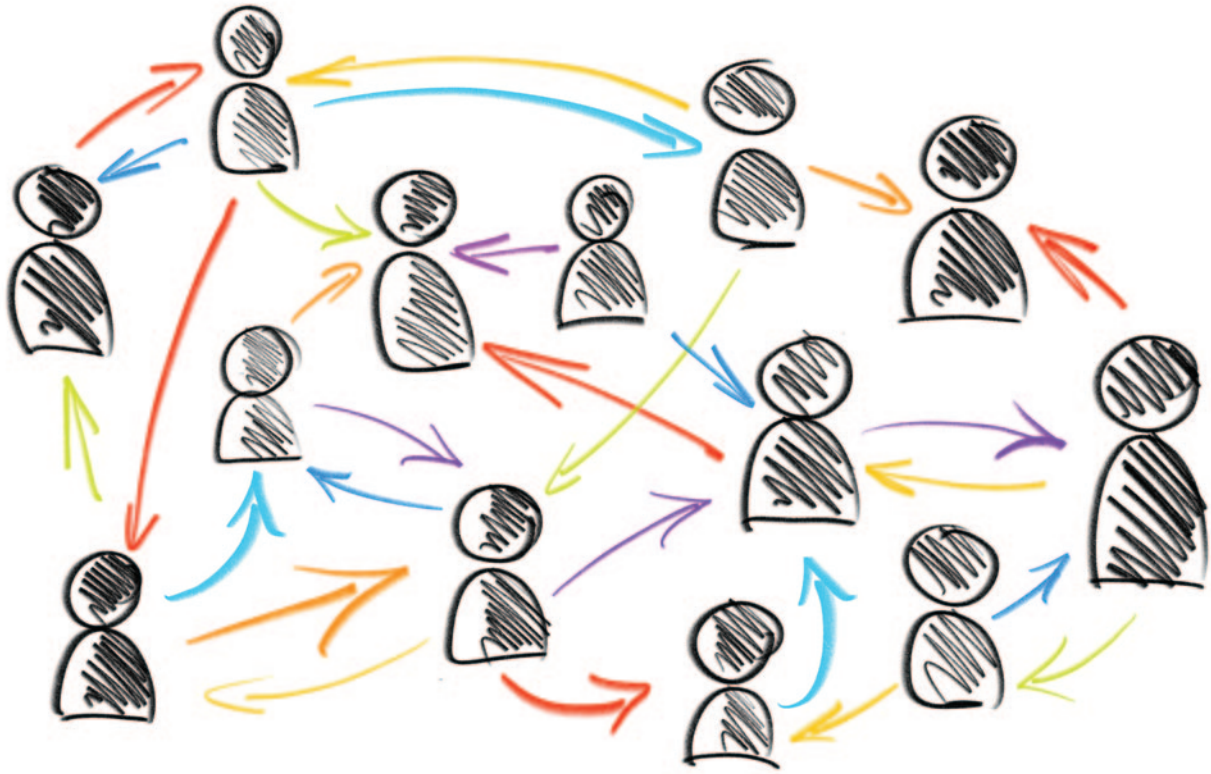

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Formulating and Presenting Effective Sentencing Arguments When Representing Cooperators

Introduction

For many defense lawyers, representing a cooperator can be a disorienting endeavor. Effective advocacy requires that counsel collaborate with prosecutors in order to maximize the impact of the cooperator's assistance and, if carried out properly, this joint effort enhances the strength of the prosecution. For those who have spent decades refining the skills necessary to tear down the government's handiwork, effectively joining forces with prosecutors can be an unfamiliar and confounding exercise.

Operating in this abnormal environment sometimes causes defense counsel to cede to the government three critical assessments that must be determined: the value of the information the cooperator provides, the cooperator's relative worth as compared to others similarly situated, and, ultimately, the extent of the departure due under U.S.S.G. § 5K1.1. The particular forces that cause defense counsel to abdicate their responsibility — whether consciously or unconsciously — to advocate on any or all of these points might be an interesting study, but those are not the focus of this article. Instead, the focus here is on the measures defense counsel can undertake to overcome that tendency by gathering and presenting information that serves to boost their clients' ability to obtain the greatest benefit for their service as cooperators.

In setting forth those measures, this article challenges what is often treated as a foregone conclusion by most prosecutors, some judges, and too many defense counsel: that the government should have the exclusive authority — or at least the primary standing — to assess the value of a cooperator's assistance and thus ultimately control the amount of the sentencing reduction. That conclusion rests largely on a two-pronged hypothesis: (1) that § 5K1.1 itself contemplates that only the government can determine the true impact of a cooperator's assistance in a particular prosecution because only the prosecutors understand fully how that assistance fits with the broader investigative effort, and (2) because § 5K1.1 departures are often litigated and resolved via *in camera* proceedings — which the prosecutors, but not defense counsel, are privy to — the government is better situated to assess the value of the assistance as compared to other cooperators, and thus a more reliable determiner of how great a reduction is due. In other words, the prevailing wisdom is that the government knows better because it knows more.

Neither the assumption that the government is better postured to evaluate cooperation efforts nor its underlying dual premises withstand scrutiny. As to the

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first basis, it is true that the government almost always enjoys greater access to information about a cooperator's usefulness in a particular case, and the application notes to § 5K1.1 plainly provide that the government's assessment of the extent of the cooperator's assistance be given "substantial weight." However, neither the guideline nor the application notes suggest that defense counsel are prohibited from offering evidence or arguing about the value of a cooperator's role in a given case, and the principles underlying the adversary system would not countenance such a result. While few lawyers make a conscious decision to defer to the government on this point, too often they effectively do so as a matter of practice by not searching out the information necessary to challenge the prosecutors' argument in a convincing fashion. In truth, virtually all the data necessary to gauge a cooperator's usefulness in a particular investigation can be compiled by defense counsel. To the extent counsel lacks certain information "material to … punishment," *Brady*, as amplified by later Supreme Court precedent, mandates disclosure. Because it may not always be clear how that information is relevant or where it fits within the larger framework of a § 5K1.1 argument, it is critical that the defense formulate and press specific discovery requests even after entering a plea.

The second component underlying the "government knows best" assumption is also flawed. To be sure, the safety of a cooperating witness often requires that filings and rulings be sealed, and courts are understandably wary of providing sweeping discovery that would undermine that concern. But that does not mean that lawyers seeking to formulate arguments about a particular cooperator's comparative value lack options. Plenty of reported cases discuss the basis for and appropriate size of a § 5K1.1 departure, and publicly available transcripts and rulings contain even more attention to those issues. Those judicial statements can bolster arguments made on behalf of comparable cooperators. Moreover, in some instances counsel will find the most compelling data for formulating departures — sentencing data tracking § 5K1.1 departures across districts, circuits, and the country as a whole — is publicly available on the Sentencing Commission's website.[1] Targeted research efforts through traditional and nontraditional means can pay huge dividends for those who know how and where to look.

This article seeks to reorient defense counsel operating in what can seem like an inverted environment. Simply because a client's interests might align with the government on some issues should not diminish counsel's ability to zealously advocate when those interests diverge, as they almost always do. By discussing some of the tools available, this article seeks to level the playing field at least a bit and assist defense counsel in formulating and advancing compelling arguments on behalf of their cooperating clients.

Legal Framework

Section 5K1.1 directs that:

> an appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> 1. 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;
> 2. the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
> 3. the nature and extent of the defendant's assistance;
> 4. any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
> 5. the timeliness of the defendant's assistance.[2]

The guideline makes clear that this list of potentially relevant factors is not exhaustive, providing that because "[t]he nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis … [l]atitude is … therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed [in the guideline]."[3] While affirming this broad discretion, the guideline's application notes also reflect that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain."[4]

Counsel should be mindful that despite this language, the scope of the government's authority is limited in the § 5K1.1 context. As numerous cases have recognized, the only power fully delegated to the government is the authority to ask the court to reduce the defendant's sentence when he or she has rendered substantial assistance. Once the government has done so, the court alone determines the extent of departure based on application of § 5K1.1.

Structuring Successful Arguments

A. Measuring the Dimensions of a Cooperator's Value

The government all too often fails to appreciate the scope of disclosure necessary to undertake the full measure of a cooperator's assistance. While defense counsel are typically provided generic data about the number of indictments or convictions in cases tied to cooperator's assistance, counsel are encouraged to dive deeper. The measure of the catch should consider not only the number but also the size of fish landed. What were the loss amounts of the cases that resulted from the cooperator's assistance? How many kilos of drugs were seized — and thus prevented from being distributed on the streets — because of evidence the cooperator supplied? Was there any restitution to victims or forfeiture to the government in the case made thanks to the cooperator? In addition to cash, was there any tangible asset forfeiture? How many vehicles, houses, and parcels of property did the government forfeit as a result of the client's cooperation? All of this information has value in gauging the cooperator's worth under the traditionally applied objective metrics, and defense counsel should strive to secure it — and make it known to the sentencing judge — as a matter of course.

Counsel also can and should gather and present data that is more subjective. For example, did the cooperator give the government information that helped break a logjam among conspirators, indicted or otherwise? Did the information provided help advance a case which, despite the investment of substantial government resources, had been stymied? Was the government able to utilize resources in

other areas because of the shortcuts provided by the cooperator? For example, as a result of the cooperator's assistance, was the government able to reach a resolution prior to what would otherwise have been a lengthy and complicated trial? Did the cooperator allow the government to short circuit investigations, such as by alleviating the need for the government to secure and execute a search warrant or to obtain a wiretap? Did it become unnecessary for the government to obtain or review huge volumes of documents, or conduct forensic examinations on multiple computers? Was it no longer necessary for the government to engage expert witnesses?

All of these results are exceptionally beneficial to the government because they allow finite resources to be allocated elsewhere. When that happens, the cooperator's value extends beyond the particular cases in which he or she provided information. While more difficult to measure, this form of benefit is nevertheless plainly relevant to the court's assessment of the cooperator's impact, and it must be a factor in the calculus used to determine the proper sentencing reduction. Counsel should recognize and treat it as such, being creative and working to peel back the layers of value to maximize the cooperator's worth.

B. Plan Your Work, Work Your Plan

The most important step in maximizing a client's § 5K1.1 departure is to challenge, when appropriate, the government's attempt to undervalue clear meaningful assistance. Whether the government does so via application of a rigid "policy" or otherwise, recommendations designed to constrain the court's ability to substantially reduce the defendant's sentence must be challenged when they fail to reflect the true impact of the cooperator's role. Except where the prosecutor recommends essentially no punishment, or in rare cases where it cannot plausibly be argued that a greater departure is appropriate, counsel should use the government's recommendation as a starting point and encourage the court to depart further. That process should include some or perhaps all of the following measures:

1. *Explain the process to the client in detail at the outset*. Defense counsel should thoroughly explain the process to the client, including the danger of the cooperator minimizing or otherwise failing to provide information fully and credibly. Any cooperator might well find it counterintuitive that minimizing his or her conduct or otherwise failing to disclose all relevant information, no matter how bad it might appear, could not only reduce the amount of the § 5K1.1 departure received, but also jeopardize whether or not such a motion is ever made. The client must also understand that cross-examination will be rigorous even when the testimony is corroborated, and that efforts to embellish, including fabrications, will not make the process easier. The client must recognize that, if anything, such efforts will turn out to be disastrous. While it may seem obvious to the lawyer that making things up not only disqualifies a cooperator from a sentencing reduction but likely exposes him to enhanced punishment, a first-time cooperator may fail to appreciate this or overlook the risk in his or her haste to claim the reward. The time invested in providing the client painstaking detail about the course of cooperation — and the hazards that exist along the way — minimizes the risk of turning the effort into a catastrophic failure.

2. *Prepare a "cooperation log" that documents the universe of the defendant's cooperation*. This includes compiling every written communication (particularly texts and emails) wherein the cooperator provides assistance (either directly or through counsel) as well as recording the date, location, and length of all of the cooperator's meetings and phone communications with the government. Counsel should also take and maintain detailed notes of the information provided to the government. In addition, after each proffer or witness preparation meeting, it is a good idea for defense lawyers to ask the prosecutors to let defense counsel know if the prosecution was satisfied with the truthfulness and quality of the cooperation, and defense counsel should duly note the response in a memo to the client's file. It is not uncommon for the prosecutor to comment favorably, and these comments can be utilized in furtherance of efforts to maximize § 5K1.1 credit. Too often, counsel who know they will not have to try the case can get complacent in their preparation efforts, relying on interview memoranda prepared by government agents. This can be problematic in two respects. First, those memoranda are mere summaries and often lack the detail necessary to capture the full extent of the defendant's cooperation. Secondly, while counsel often receive copies of those memoranda, that is not always the case. Counsel's efforts to build their own record can pay large dividends down the line.

3. *Understand fully the degree to which a client's cooperation aided the government's case*. In light of § 5K1.1's directive to afford "substantial weight" to the government's evaluation, some defense counsel conclude that only the government's assessment is relevant and decline to weigh in on the question in a meaningful way. But the guideline simply mandates that the court listen to what the government has to say on the topic — it does not suggest that only the government can be heard. Defense counsel should be fully prepared to offer an evaluation as well, and doing so requires a thorough analysis of the volume of the information and its value. For example, was the cooperator the sole source of information used to formulate charges against others? To answer this, counsel would need to compare that information to those charges and compare information received by others. While often a tedious process, the reward can be significant when counsel is able to show that the cooperator was singularly essential to the government being able to move forward against a particular individual or on a particular theory.

4. *File a response to the government's § 5K1.1 motion*. Because the goal of cooperation is securing a § 5K1.1 motion, counsel sometimes view filing a response to that motion as the equivalent of looking a gift horse in the mouth. But a "response" in this context is not an "opposition" suggesting that a reduction is not due; it is merely an effort to ensure that the size of that reduction is properly calibrated. Counsel who fail to file a response to the government's motion often rationalize that choice based on the narrower range of dispute than in traditional sentencings and their plan to argue the issue at the sentencing hearing. This is tenu-

Assessing a Cooperator's Assistance

☑ True | ☐ False	The government almost always enjoys greater access to information about a cooperator's usefulness.
☐ True | ☑ False	Defense lawyers are prohibited from offering evidence or arguing about the value of a cooperator's role.
☐ True | ☑ False	Section 5K1.1 contemplates that only the government can determine the true impact of a cooperator's assistance.
☐ True | ☑ False	The court and the prosecution determine the extent of departure based on application of Section 5K1.1.
☑ True | ☐ False	Nearly all the data necessary to gauge a cooperator's usefulness can be compiled by defense counsel.

ous logic for any number of reasons, but the most obvious is that in many cases the court has at least formulated a rough plan for its ruling, if not resolved it almost in full, before the hearing begins. Leaving the government's filing without a response can be a recipe for failure in even the simplest of cases, but certainly so when the analysis involves complicated issues of fact (e.g., the nature, scope, timing, and usefulness of the defendant's cooperation; what other similarly situated cooperators have received) or law (e.g., the applicable legal framework for determining what constitutes a "risk of injury" to the defendant; the degree to which defendant should be credited with prosecutions not tied directly to the information he provided). Even where the parties agree on the application of certain elements of § 5K1.1, a written submission from the defendant is critically important to allow the court to make fully informed decisions about the issues.

5. *Make a substantive presentation at sentencing.* In addition to filing a response to the government's § 5K1.1 motion, counsel should be prepared not only to argue the issue at the sentencing hearing, but also offer testimony and exhibits as necessary. To be clear, this presentation should be made separately from the discussion of other guideline issues and the factors set forth in 18 U.S.C. § 3553(a) factors. In addressing the court on § 5K1.1 issues, counsel should consider steps such as:

   - ❖ Seeking a stipulation or, if necessary, calling the case agent to elicit testimony about the extent of the defendant's cooperation efforts (e.g., number of times interviewed, length of interviews, form and frequency of other communications such as emails and phone calls, recordings made, etc.), the substance of those communications (e.g., original information provided about activities and conduct, recommendations about avenues of investigation and new subjects), and the manner in which that cooperation was used by the government (inclusion in search warrant applications, surveillance of identified individuals, as a means of securing pleas and cooperation from those implicated, or otherwise).[5]
   - ❖ Offering exhibits that reflect the connection between the cooperator's assistance and subsequent government successes, such as memoranda of the defendant's interviews implicating others and indictments or plea agreements echoing those allegations. Counsel should also prepare and submit to the court — ideally in response to the government's § 5K1.1 motion but at least as an exhibit at sentencing filed under seal — the "cooperation log" referenced above. The ultimate goal is to demonstrate to the court that the defendant was a fully engaged and committed cooperator, by showing both the frequency of interaction and the degree to which the government used the information the cooperator provided, both directly and indirectly, to enhance existing prosecutions or initiate new ones.
   - ❖ Submitting evidence of sentences imposed on other cooperators. There are at least three ways to define the scope of cooperator sentences worthy of comparison: the nature of the cooperation's efforts; the results realized from those efforts, and the district where the sentence was imposed (or perhaps even judge who imposed it). Ideally, these three would overlap: counsel would be able to point to cooperator in the same district or even before the same judge who received a larger departure than that recommended by the government despite providing assistance in a volume and also producing results equal to or less than the defendant. But perfect should not be the enemy of good — evidence of other cases can be valuable even if just one of the defining criteria is present. See (E), *infra,* for a discussion of the process of researching and compiling sentences that can be used for their precedential value.

C. Challenge the Notion That the § 5K1.1 Policy of an Individual U.S. Attorney's Office Should Carry Any Weight

It has become increasingly common for individual U.S. Attorney's Offices to create and maintain policies seeking to reduce the process of a evaluating a cooperator's value to a rigid framework. Under this approach, § 5K1.1 departure recommendations are tethered to specific forms of cooperation such as wearing a wire, making consensual phone record-

ings, or conducting controlled transactions of illegal goods. Most often, these policies mandate that a cooperator testify in order to be eligible for a significant level departure or percentage reduction.

Policies of this type are grounded in the notion that uniformity is critical to applying § 5K1.1 properly. While consistency is a laudable goal, efforts to reach it through an inflexible framework can undermine the substance and purpose of the guideline, create perverse incentives, and negate an individualized level and quality of your clients' cooperation. Interpreting § 5K1.1 incorrectly on a consistent basis does not somehow validate those interpretations; it simply means that the government reliably reaches the wrong result. Recognizing that § 5K1.1 affords the court substantial discretion to calibrate departures based on a range of factors, the government's use of a formulaic approach signals that the court should as well. From the government's perspective, even if the court's formula is not as stingy as the government's, the fact that the process has been reduced to a mathematical exercise can be beneficial. If the government can calculate a departure level through what appears to be a rationally based and consistently applied system, any methodology that produces a materially different result can be perceived as inherently suspect.

It is not difficult to envision a scenario where even the most well-intentioned but nevertheless unyielding system produces an irrational result. Requiring that a cooperator testify before receiving substantial credit can, in theory, appear logical: testifying can be difficult, requiring more time to prepare and a heightened dedication to the government's cause, and represents a form of cooperation that arguably increases the potential for harm to the cooperator because of its public nature. To be sure, when a charged defendant insists on going to trial, the cooperator's testimony will be vital to success. But as often happens when generalized policies are applied rigidly, requiring testimony necessarily undervalues the cooperative efforts of one who provides information of such high quality that the government is able to use it to secure quick guilty pleas. Is the cooperator in that scenario less valuable than the one who testifies at trial, particularly where multiple guilty pleas result? Of course not. If anything, cooperation that comes in a form and volume so compelling as to avoid the need for trial should be rewarded, not diminished. But under a system that mandates testimony in order to receive the maximum sentencing reduction, the nontestifying but nevertheless exceedingly productive cooperator loses out. Making the dubious nature of that type of logic clear to sentencing judges can effectively overcome the government's effort to obscure incongruous sentencing recommendations behind purportedly logical and consistently applied individual office policies.

D. The Challenge of Asserting Ownership Over Positive Prosecutorial Developments

Defense counsel too often fall into the trap of trusting that the court will apply the reasoning of "post hoc ergo propter hoc" ("after this, therefore because of this") in apportioning credit for positive developments following a client's cooperative efforts. For example, when the client provided specific information and another individual was later charged, many counsel assume that the cooperator will get credit for that development. But the post hoc fallacy is fallacious for a reason: it can sometimes represent an oversimplification of cause and effect, overemphasizing the significance of temporal proximity.

All too often, the government attempts to undermine cooperator efforts to claim credit for positive investigative developments by pointing to intervening factors. Whether by arguing that the information supplied was already known or that evidence from other sources in fact generated the positive development, the government often resists the notion of giving the cooperator credit. Because the government has access to more information than the defense, it frequently enjoys the ability to at least raise doubt about whether a direct causal link exists between information and results. But defense counsel has remedies; most notably, *Brady*-based motions intended to determine whether and to what extent information provided by the cooperator can be linked to prosecutorial successes. Because *Brady* applies to "guilt or punishment," its import extends beyond the plea and mandates the disclosure of information that impacts sentencing. By filing such motions to determine when and how the government used the cooperator's information, defense counsel can often gather insight regarding the true value of the client's cooperation, particularly when its impact may not be obvious.

E. Pointing to Comparators

Section 5K1.1 says nothing about the need to ensure that the defendant's

sentence aligns with those imposed on similarly situated cooperators. For this reason, some defense counsel believe that such arguments must await the court's evaluation of "the need to avoid unwarranted disparities" in the § 3553(a) analysis. But that process comes after the § 5K1.1 evaluation, and waiting to raise these points effectively forfeits a valuable opportunity to maximize the sentencing reduction. Nothing in § 3553(a) or elsewhere prohibits counsel from pointing to sentences received by other similarly situated cooperators to challenge the government's recommendation where the government proposed, or the court imposed, a greater sentence reduction. Counsel who fail to argue those points forgo an opportunity.

To be sure, gathering information about similarly situated cooperators can be challenging. Significantly reduced sentences are obviously not widely publicized by the government. Section 5K1.1 motions are often filed under seal, particularly when there is a risk of harm to the cooperator. But even when that is not the case, the government typically seeks to keep its recommendations under wraps. Even if the recommendation and ruling are made in open court, they seldom find their way into reported or unreported decisions at the district, much less circuit, court level.

Counsel seeking to overcome these challenges can employ several methods. First, counsel should identify the metrics most effective for comparison. Does the volume of information provided, the use to which it was put, or the circumstances under which it was provided matter most? If, as often happens, the answer is some combination of the three, counsel should seek to define what a relevant comparator looks like.

Having done so, counsel should consider the following sources of information:

- *Other counsel practicing in the district*. Defense attorneys should reach out to other counsel in the district. Often those in the district's Federal Public Defender's Office or attorneys on the CJA list have the most experience in dealing with 5K1.1 motions, but counsel should also consider a wider appeal to other defense counsel who frequently practice in federal court.

- *PACER*. Though cumbersome, searches on PACER can reveal cases containing publicly filed 5K1.1 motions. Once identified, counsel should review those filings — as well as the defendant's response and the court's ruling — in order to collect information of value.

- *Motion practice*. Whether tethered to *Brady* or otherwise, counsel should make full use of the court's authority to order the government to provide information that may be of value in this context. To be sure, challenges exist when the information sought is contained in sealed filings, and the court will need to balance the defendant's need for the requested information against the risk of harm disclosure presents, even where a protective order limits further dissemination of the information. Regardless, counsel should endeavor to determine whether the government has taken positions in analogous cases or otherwise possesses information that would support a greater sentencing reduction than it has recommend in the defendant's case.

- *USSG website*. Often overlooked, this site contains a wealth of valuable information about sentencing practices district, circuit and nationwide. The Sentencing Commission publishes its Sourcebook of Federal Sentencing Statistics (https://www.ussc.gov/topic/sourcebook), and its website contains such information back to 1996. Within those materials, counsel can access the data capturing the extent of 5K1.1 departures by type of crime and readily determine the mean and median sentences broken down by type of offenses. With this information, counsel can quickly determine how the government's recommendation in a given case stacks up to the reductions others have received.

F. Avoiding the Pitfalls

Counsel should be mindful of several hazards when representing cooperators. Errors of commission and omission are numerous in that context, and counsel who are forewarned are forearmed. Below is a non-exhaustive list of pitfalls:

1. *Assuming that reductions under Fed. R. Crim. P. 35 will be forthcoming and will rectify inadequate § 5K1.1 recommendations*. Where a cooperator is expected to provide ongoing assistance, or where the information he has previously provided has not fully ripened, there can be a tendency to trust (or worse, assume) that any deficiencies in the § 5K1.1 recommendation will be rectified via motion to reduce the sentence under Rule 35. There are two major problems with this line of thinking. First, there is no guarantee the government will make a subsequent request, and virtually no remedy (short of establishing a rarely provable unconstitutional motive) if it does not. Second, as a recent study by the U.S. Sentencing Commission determined, even when the government files a Rule 35 motion, reductions under it benefit the defendant less than those granted under § 5K1.1.[6] Bottom line: assume that the § 5K1.1 recommendation is the client's one and only shot at a sentence reduction.

2. *Confining cooperation-based arguments to the § 5K1.1 discussion*. The Application Instructions contained in § 1B1.1 direct sentencing courts to adopt a three-step process in fashioning a sentence. First, the court must apply the guidelines to calculate the appropriate guideline range. Second, the court must determine whether and to what extent a departure is appropriate. Finally, the court must consider the factors listed in § 3553(a) to arrive at the appropriate sentence.

In light of this framework, counsel often conclude that cooperation-related arguments are prohibited outside of the second step of the process and forbidden altogether if the government does not file a § 5K1.1 motion. This is incorrect. Even where the government refuses to file a § 5K1.1 motion, arguments based on the defendant's cooperation are validly considered. While a court may not depart downward absent the government's motion, it is well-settled that following the ruling in *United States v. Booker*,[7] a sentencing judge may consider the defendant's cooperation in determining whether to grant a variance.[8] Accordingly, counsel should not be deterred in alerting the court to the defendant's efforts to cooperate even where the government declines to file a § 5K1.1 motion. The defendant loses nothing — and could gain much — by making the court aware, in the context of the § 3553(a) analysis, of efforts to remedy or at least mitigate the harm caused by the offense.

3. *Assuming the government and court are fully versed in the relevant issues*. Most judges have handled vast numbers of sentencings, and that experience includes frequently applying the § 5K1.1 factors. Defense counsel should not, however, assume that familiarity with that process necessarily translates into proficiency in all of the various areas discussed above. This advice is not meant to cast aspersions on any judge, but instead simply to highlight an obvious fact: because defense counsel are often less aggressive in litigating § 5K1.1 issues — or even less aware that some of those issues exist to be litigated — sentencing judges confront those issues less frequently, and discussion of them is less common. Recognizing this, counsel should be prepared to educate the court on both the law and the nuanced aspects of these issues as part of advocating for greater sentence departures.

4. *Failing to recognize the impact of public filings*. Even judges resistant to accepting filings under seal recognize the risks presented when a defendant's cooperation becomes public. For this reason, motions to file pleadings related to § 5K1.1 under seal are routinely granted even when there is no direct threat of physical harm. Counsel should not assume that the government will always file its motion under seal; the government often combines its § 5K1.1 motion with its sentencing memo and files it as a publicly available pleading. Defense counsel should communicate with the government beforehand to avoid that result. In addition, counsel should request that the court edit related docket entries as appropriate to maintain the appropriate level of secrecy.[9]

Conclusion

Because representing cooperators is a less common aspect of criminal defense work, the issues such work presents are less familiar. That unfamiliarity can mean that key issues are sometimes misunderstood, underestimated, or overlooked. But the stakes are no less important even when it appears that the client's interests are aligned with the government. By better understanding the challenges presented in the cooperation context, defense counsel will find themselves better equipped to overcome them. More importantly, being fully informed about the difficulties means that the client will be best situated to reap the fullest return on the risks undertaken by cooperating.

Notes

1. For reasons not entirely clear, the Sentencing Commission website recently modified its structure in a way that reduces the level of granular detail previously available. As discussed below, the information that remains may still be of value, and hope remains that the Commission will at some point restore the detail to its previous levels.

2. See U.S.S.G. § 5K1.

3. See § 5K1.1, Background.

4. See § 5K1.1, App. Note 3.

5. Counsel taking this approach should expect the government to object and should therefore follow the *Touhy* procedure set forth in 28 C.F.R. §§ 16.21 *et seq.* well in advance of the sentencing hearing.

6. *The Use of Federal Rule of Criminal Procedure 35(b)* (2016) (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/Rule35b.pdf).

7. *United States v. Booker*, 543 U.S. 220 (2005).

8. *See, e.g., United States v. Landron-Class*, 696 F.3d 62, 66 (1st Cir. 2012) ("a sentencing court has discretion to consider the defendant's cooperation with the government as an 18 U.S.C. § 3553(a) factor, even if the government has not made a … § 5K1.1 motion for a downward departure"); *United States v. Judge*, 649 F.3d 453, 460 (6th Cir. 2011) ("district courts may, at a defendant's request, grant variances at sentencing based on the defendant's substantial assistance to the government"); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence").

9. *See, e.g., United States v. Doe*, 870 F.3d 991, 993 n.1 (9th Cir. 2017) (referencing defendant by "the pseudonym 'Doe' to protect his identity and safety").

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