

Maximize Benefit of Client's Cooperation with Government

Defendants who cooperate with the government are a much-maligned group. They are the pariahs of the prison system. Some defense lawyers won't represent them. There is even a joke among defenders that asks what the difference is between a rat or a snitch and a cooperating individual. The answer? The rat is "the other guy's client"; the cooperating individual is "my client." The reality is that many of our clients are interested in cooperating, because they know that a government motion pursuant to 5K1.1 of the guidelines, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35, is one of the surest ways to obtain a lower sentence. It might be because of the near certainty of being convicted in federal court (there is a 97 percent conviction rate). It might be because, despite the promise of *Booker*, federal sentences continue to be harsh. But for whatever reason, more and more criminal defendants find themselves cooperating with the government in an effort to get lower sentences. Although all criminal defense lawyers know that cooperation can lead to a lower sentence, not all lawyers take advantage of every opportunity to maximize the impact of cooperation.

One often overlooked way to maximize the benefit of cooperation is to place your client's cooperation in the context of his or her rehabilitation and remorse. When I am on panels at legal conferences with federal judges, I often engage them in discussions about what leads them to give a defendant a lower sentence. I have learned that, because judges take their duty to protect the public seriously, they



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are always looking for evidence that a defendant has had a "change of heart," has demonstrated "genuine remorse," and is highly unlikely to re-offend. Even the prosecution is less likely to come down as hard on a defendant it believes has been rehabilitated. One prosecutor put it to me this way. He told me that his office was "willing to go to bat for a fellow who we no longer view as an enemy of the state at war with society, but now as an ally of law enforcement and a citizen who recognizes his duty to report crime."

The key to tying cooperation to rehabilitation is to determine whether the client is truly unlikely to reoffend. Our office utilizes mitigation specialists and mental health professionals to help us explain to the prosecutor, the probation officer, and the judge why our client is cooperating. If a client is not simply trying to cut his or her losses, but wants to contribute to a better society and to demonstrate a break with a criminal past, we make every effort to bring that to the attention of prosecutors and the sentencing judge. We may obtain reports and testimony from mental health professionals, letters to the court from the client, letters and testimony from people who have witnessed transformations in the client's life, and sometimes even testimony from the government agents with whom the client has cooperated. A truly heartfelt allocution from a remorseful client can be particularly effective. This kind of evidence supports lower sentences, because, as the U.S. Supreme Court noted even before the guidelines:

Few facts available to a sentencing judge are more relevant to the likelihood that a defendant will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, and the degree to which he does or does not deem himself at war with his society.

(*Roberts v. United States*, 445 U.S. 552, 558 (1980) (internal quotations, bracketed insertions, and citations omitted).)

Of course, the only reason some clients cooperate is to get lower sentences. For these clients, it is important to remind the court that truthful coopera-

tion, whatever the motivation, is still an important indicator of rehabilitation—or at least a step in the right direction. As the Supreme Court noted when commenting on a defendant’s refusal to cooperate, “[T]he criminal defendant, no less than any other citizen, is obligated to assist the authorities. . . . By declining to cooperate, [the defendant] rejected ‘an obligation of community life’ that should be recognized before rehabilitation can begin. Moreover, [the defendant’s] refusal to cooperate protected his former partners in crime, thereby preserving his ability to resume criminal activities upon release.” The ideas expressed by the Supreme Court in *Roberts* can also be particularly helpful in arguing for a lower sentence in a case in which the prose-

cution has not filed a departure motion but has conceded that your client has cooperated fully and to the best of his or her ability. Even if a client’s cooperation does not amount to “substantial assistance,” the fact that the client has all he or she can do to make amends with society can be a powerful argument for a lower sentence. This is especially true if there is other evidence of a client’s remorse and rehabilitation.

Defendants who are willing to put their lives and safety, as well as the lives and safety of their families, at risk by providing truthful information to the government, earn whatever reduction in sentence they get. As defense counsel, we are committed to maximizing that reduction. ■