K&LNG Alert

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White Collar Crime / Criminal Defense

Pre-Indictment Strategies in a Post-*Booker* World (Roundtable Discussion with former prosecutors)

In *Booker v. United States*, the Supreme Court held that the Federal Sentencing Guidelines are not binding on federal judges, but rather are what their name suggests: guidelines. In response, the United States Department of Justice instructed its prosecutors that they were required to follow the Guidelines in their prosecutions, even though they can no longer claim with certainty that a judge will impose a particular sentence. How do these unsettling events impact defense counsel strategies when a corporate (or individual) client is faced with the threat of criminal prosecution? K&LNG asked several of its attorneys who practice white collar defense and who are former prosecutors to provide their views. This is the fifth in a series of K&LNG Alerts to address the significance of the *Booker* decision. The other four can be found under "Newsstand" at www.klng.com.

MARK A. RUSH (PITTSBURGH)

The federal pre-indictment landscape has certainly become more interesting post-*Booker*. Most importantly, the *Booker* decision facilitates creative planning, posturing, and negotiations with the United States Attorney. The environment in which the United States Attorney can charge and make certain demands and, thus, promise a specific sentence after conviction is no longer a certainty. Having said that, it is important to realize that the *Booker* decision did not eviscerate the Guidelines, but made them advisory with the very real caveat that they should be applied. Of course, all strategies in criminal defense are designed with the endgame in mind – "How do I get a declination of prosecution? How do I get the most favorable indictment for purposes of trial or a plea? What issues do I put in play now to facilitate an effective sentencing hearing and favorable sentence?" Pre-*Booker,* the United States Attorney could demand that a target company waive attorney-client communications privilege and work-product doctrine and cite directly to the Sentencing Guidelines in support of that exercise of muscle. Now the court can evaluate a corporation's cooperation and appropriately give credit on a case-by-case basis without the requirement of following a mathematical formula. Pre-*Booker* departures for substantial assistance with the United States Attorney rested solely within the discretion of the United States Attorney. Post-*Booker* assistance provided to the United States, which the United States Attorney does not believe rises to the level of substantial assistance, might now provide a basis for a lower sentence to a receptive sentencing judge.

(Mr. Rush served as an Assistant United States Attorney in the Western District of Pennsylvania, and during that time also lectured and published for the Executive Office of United States Attorneys. He has defended corporations and individuals who are subjects of federal grand jury investigations and investigations by the SEC, FBI, EPA and FTC. Mr. Rush also served as an investigator/counsel for the WorldCom bankruptcy examiner.)

BARRY M. HARTMAN (WASHINGTON, DC)

A defendant's leverage during negotiations may have improved somewhat. Before *Booker*, individuals faced with mandatory Guideline sentences (a minimum of 12-15 months in single-count environmental cases) often raced to the prosecutor's office to reach agreement and testify against other individuals or the company and hope for a "5(k)" departure that would help avoid actual jail time. Corporations, on the other hand, found themselves unable to level a defense since their witnesses were entering pleas to avoid the harsh sentences that post-trial application of the Guidelines would bring.

The non-mandatory nature of the Guidelines may cause individual defendants to be less anxious to enter a plea, which could provide corporations with greater opportunities to raise some defenses. This, in turn, may benefit corporations who need the individuals in order to level an effective defense.

(Mr. Hartman served as Acting Assistant Attorney General for the United States Department of Justice and handled criminal prosecutions both before and after the Federal Sentencing Guidelines went into effect. Mr. Hartman also served as an investigator/ counsel for the WorldCom bankruptcy examiner.)

JOHN A. AZZARELLO (NEWARK)

Before *Booker*, defendants who sought to avoid jail time through cooperating with the government had to provide *full and complete cooperation* to obtain a downward departure under U.S.S.G. Section 5K1.1 ("5K1.1"). Under this all or nothing approach, a defendant could not obtain the benefits of a cooperating plea agreement based on limited or selective cooperation. For example, the government could refuse to offer a cooperation agreement to a defendant unwilling to incriminate a relative or close friend involved in the criminal activity. In this situation, if a district judge were inclined to reward a defendant's less than full cooperative efforts, he or she lacked the authority to do so without a 5k1.1 motion from the government. Creative lawyering in the post-*Booker* world may enable a defendant to obtain the benefits of selective yet valuable cooperation even in the absence of a cooperating agreement and 5K1.1 motion from the government. If the judge assigned to your matter has relied on *Booker* to avoid a mechanical application of the Guidelines and your client needs only a small departure to avoid incarceration, counsel should consider documenting any offer to cooperate and actual cooperation that the government deems less than complete and unworthy of a 5K1.1 motion. At sentencing, if the court desires, it can recognize a defendant's cooperative conduct and impose a more reasonable (i.e., lenient) sentence notwithstanding the absence of a 5K motion from the government. In this regard, defense counsel can emphasize that the court's hands are no longer tied by the absence of the government's 5K motion given the "advisory" nature of the Guidelines.

(Mr. Azzarello served as an Assistant U.S. Attorney for the District of New Jersey for ten years, the last three of which he served as Deputy Chief of the Criminal Division. Mr. Azzarello tried several criminal cases to verdict including fraud and public corruption cases. Most recently, Mr. Azzarello served as counsel to the National Commission to Investigate Terrorist Attacks Upon the United States, commonly known as the 9/11 Commission, where he investigated the response to the 9/11 terrorist attacks by federal, state and local government.)

WILLIAM O. PURCELL (NEW YORK)

Before *Booker*, most sentences with downward departures below Guidelines range were based on government-sponsored Section 5K1.1 substantial assistance and cooperation motions. Some evidence to date indicates that the same has continued to be the case even after *Booker*. A recent report released by the United States Sentencing Commission paints an interesting picture of how *Booker* may or may not have impacted sentencing. This report may be accessed on the internet at http://www.ussc.gov/ Blakely/PostBooker_5_26.pdf.

In any event, substantial assistance to the government and cooperation will continue to play an important role in plea negotiation strategy. However, defense counsel may now have a stronger hand in dealing with the prosecution's demands for greater cooperation, e.g., corporate waiver of the attorney-client privilege. Although Section 5K1.1 permits the courts to "consider" a downward departure for substantial assistance "upon motion of the government," since the Guidelines are no longer mandatory, it may now be possible to argue that the court should consider substantial assistance downward departures even without a government motion or letter. Each of the elements the court would be considering are permitted under the Guidelines and the only thing lacking would be the endorsement of the government. Since the Guidelines are no longer mandatory, the argument can be made that the courts are now permitted to consider these factors even without the government's approval.

(Mr. Purcell served as Assistant District Attorney in New York County for four years, the last one and a half years trying murder cases in the Homicide Bureau. He is a Fellow of the American College of Trial Lawyers. He has handled numerous successful negotiations with state and federal prosecutors both before and after the Guidelines.)

MIKE DEMARCO (BOSTON)

In multi-count cases, *Booker* could have a profound impact on grouped or consecutive sentences versus concurrent sentences.

18 U.S.C. §3584 addresses multiple terms of imprisonment and authorizes but doesn't require consecutive sentences in some cases. The Guidelines require consecutive sentences in certain cases. See U.S.S.G. §561(a). Now that the Guidelines are truly "advisory," for defendants who face more than one offense, if the offense doesn't require a consecutive sentence, an undischarged state sentence, or multiple counts, consideration of the factors under §3553(a) may suggest that no consecutive sentence, or no increased sentence for multiple counts, should be imposed.

The obvious effect of this on negotiations with the Government since *Booker/Fanfan* is that creative lawyering is now more acceptable, especially for those counsel who are familiar with the court and the jurist assigned the case. Knowing the court's approach on sentencing in certain cases coupled with the discretion now afforded sets a new standard for defense counsel in discussions with prosecutors over the charges and the case's disposition.

(Mr. DeMarco was an Assistant District Attorney in Boston and Counsel to the Boston Police Commissioner for six years. He is a Fellow of The International Academy of Trial Lawyers and listed in The Best Lawyers in America.)

DAVID S. KWON (NEWARK)

It is important to stress that the *Booker* decision is hardly a magic bullet for future targets of criminal investigations and criminal defendants. To begin, since *Booker* preserved the Guidelines as advisory, judges will presumably continue to refer to the Guidelines, perhaps as a starting point, in determining a defendant's sentence. Moreover, as also noted, the Justice Department has directed federal prosecutors to proceed as though the Guidelines still fully applied. And many judges may be reluctant to deviate downward in white collar prosecutions, particularly in today's post-WorldCom environment.

Having said that, I do believe that defense counsel may have even more reason to aggressively investigate the allegations and make a presentation to the prosecutors during the pre-indictment stage. Given the uncertainty that has been injected into the sentencing process as a result of *Booker* and the need for a prosecutor to be more attentive and careful in how an indictment is framed, defense counsel may have a better opportunity to challenge the merits of certain allegations made by the government. This could be particularly important in addressing allegations that, under the Advisory Guidelines, would support an enhancement in sentence. For example, as a result of *Booker*, a prosecutor may need

to be more precise in alleging a loss amount before seeking an indictment, and a prosecutor's inability to substantiate the alleged loss amount may undermine the government's leverage in plea negotiations. Where the potential loss figure is difficult to calculate, a well-prepared defense counsel might be able to highlight flaws in a prosecutor's theory of loss before an indictment is issued. In white collar prosecutions, this could be particularly beneficial given the fact that it is the loss figure that sometimes dictates whether a defendant receives a jail sentence and how long that sentence will be. Moreover, since judges are no longer bound by the Guidelines, a judge will now have far more flexibility in deciding what mitigating facts to consider at sentencing. Thus, while a prosecutor may still need to prepare a 5(k) letter to support a downward departure for determining the advisory Guidelines, a court will be able to consider a broader range of factors, and that possibility may motivate prosecutors to entertain more favorable plea offers than they would have prior to *Booker*, albeit within the advisory Guidelines. Ultimately, though, even when defense counsel is unable to secure a favorable pre-indictment plea or avoidance of prosecution altogether, defense counsel may be able to influence how an indictment is shaped and what specific allegations are made.

(Mr. Kwon served as an Assistant District Attorney for the New York County District Attorney's Office and a Special Assistant United States Attorney for the Eastern District of New York. As a prosecutor, Mr. Kwon led a joint federal-state-city task force investigating fraud and abuse in the mortgage lending industry and, while at K&LNG, Mr. Kwon has defended clients in white collar prosecutions in New Jersey federal and state courts, and has assisted clients under investigation by state and city prosecutors in New York.)

BARRY M. HARTMAN (WASHINGTON, DC)

Know your judges. By some counts, as many as 40% of the federal judiciary objected to the mechanical application of the Guidelines. It is well worth knowing how the judges in the district where your matter is pending are reacting to *Booker*, so you can gauge whether the non-mandatory nature of the Guidelines will create sufficient leverage to influence negotiations. In one recent case, *United States v. Rapanos,* a pre-*Booker* sentence of several years was reduced to probation. The recent report referred to by Bill Purcell may provide insight into this as well.

JOHN A. AZZARELLO (NEWARK)

I agree with Barry's assessment that it is very important to know how the judges in the district where your matter is pending are reacting to *Booker*. The identity of the judge is particularly important if your client is a target who has a projected Guidelines offense level *slightly higher than Zone B* where incarceration was mandatory before *Booker* in the absence of a downward departure. As Barry noted, prior to *Booker*, there was a great incentive for individual targets in this situation to run to the prosecutor's office to sign a cooperation agreement with the hope that a good "5(k) letter" from the government would help them avoid incarceration. The incentive to cooperate was present even for employees of a corporation who were reluctant to cooperate because they feared they would be blacklisted by the industry or because of a close relationship with other targets of the investigation. In the post-*Booker* world, defense counsel with a client in this position should consider forcing the government's hand until they take a cooperating or non-cooperating plea from someone else in the case. Under certain circumstances, you may even consider waiting for the government to return an indictment in the case. This strategy will allow counsel to identify the judge to whom your client's case will be assigned. If the judge is someone who sought to avoid the mechanical application of the Guidelines before *Booker* and has relied on *Booker* to avoid imposing a prison term on first-time offenders charged with similar conduct, then you could have greater leverage in your plea negotiations with the government. Under this scenario, cooperating with the government under

unfavorable circumstances may not be the only way for your client to avoid incarceration. If you discover the case will be assigned to a judge inclined to follow the Guidelines, your client can still offer to cooperate with the government to avoid incarceration.

BARRY M. HARTMAN (WASHINGTON, DC)
It is also worth noting that under the Guidelines considerations such as standing in the community were essentially excluded from a judge's calculation. That is no longer necessarily the case.

WILLIAM O. PURCELL (NEW YORK)
Ironically, consideration of some of these issues by the courts without a requirement of government endorsement may eliminate some of the most significant disparities in sentencing which occurred while the Guidelines were mandatory. Because prosecutors in different districts had different views as to the value of substantial assistance, what was substantial assistance in one district was not substantial assistance in another, and there was no requirement for explanation of any rationale for the differences. By permitting courts to depart on these grounds, there may eventually be a body of case law explaining the reasons for these departures.

MARK A. RUSH (PITTSBURGH)
As stated earlier, it is all about the endgame. Many of my partners in this roundtable discussion have stressed the importance of knowing the judiciary in the district in which the indictment was returned. I join in that very loud chorus. Knowing your judge and his\her opinions, writings and views on the enforcement of criminal law has not been so important since the Guidelines were enacted. Obviously, an individual judge's views are not at issue pre-indictment, since a judge has not yet been assigned to the matter, but knowing the views of the bench as a whole may very well be.

In sum, post-*Booker* lawyers have the opportunity to lawyer again. Federal criminal defense is a step removed, albeit a small step, from an accounting exercise based on values assigned. *Booker* does not favor or promote one specific strategy. It promotes lawyering.

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