WHEN LESS IS BETTER THAN MORE

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Judges are generally cautious by nature. If given the choice, they would rather be perceived as being firm (and hopefully fair) when it comes to sentencing rather than accused of being too lenient. Heaven forbid that one should be labelled a lily-livered wrist slapper.

During plea and sentence negotiations, counsel should be mindful of the above concerns but never bashful about seeking, whenever possible, to remove the prospect of incarceration from the equation as soon as possible. If probation (barring any unpleasant surprises in the pre-sentence report [PSR] or new arrests between plea and sentence) is the likely outcome, counsel should, where appropriate, not hesitate to seek less than the maximum possible period of supervision.

Until January 2014, the permissible probationary periods for eligible defendants was five years for a felony, three years for a class A misdemeanor and one year for a Class B misdemeanor. Since then, the options under PL 65.00 (3)(a) are THREE, FOUR or FIVE years for a FELONY (other than for Class A2 drug felony or Class B second drug felony conviction or first time PL 220.48, conviction or felony sexual assault); TWO to THREE years for a CLASS A MISDEMEANOR (PL 65.00(3)(b)(i), (other than a sexual assault [six years]); and ONE year for a CLASS B MISDEMEANOR(PL 65.00(3)(c) (unless it's for Public Lewdness which requires at least one year and no more than three years). For an UNCLASSIFIED MISDEMEANOR, the probationary periods are TWO or THREE years if the authorized jail term exceeds three months, otherwise the probationary term must be ONE year. (PL 65.00 (3)(d)).

Notwithstanding these changes, it seems that up until recently, when courts (especially at the felony level) have seen their way clear to impose probation in lieu of incarceration, (in Erie County at least), anything less than the maximum period has been the exception and not the rule. However, with burgeoning probation case loads and increasing recommendations for early discharge (as early as two years in felony cases with full compliance and no violations), lesser periods of probation are being recommended and imposed with increasing frequency.

Beyond practical concerns, some defendants (e.g. those with little or no criminal history, no demonstrable need for drug or alcohol treatment or other rehabilitative services, those who have fully paid restitution), just don't appear to need or deserve the full probationary ride in the first place. In those cases (as well as those where counsel has serious concerns about the client's ability to go the distance without violating), asking for less may be better than just being satisfied with keeping the client out of jail (at least in the short run).

In cases where there is no apparent need for the watchful eye of a probationer officer, (e.g. where the defendant has otherwise lead a law abiding life, is employed, has to travel out of town frequently on legitimate business, has already paid restitution, has no issues with drugs or alcohol), counsel should be bold enough to request a conditional discharge.

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The periods of conditional discharge under PL 65.05 are THREE YEARS for a FELONY(3[a]), and ONE YEAR for a MISDEMEANOR or VIOLATION (3[b]). In cases where payment of restitution is one of the conditions of the discharge, the court may (before the time expires), extend the period for up to two more years. Where one of the conditions includes participation in a court-approved alcohol or substance abuse program (PL 65.10[2][e]), the administrator of such program must inform the court of any violations of its conditions of participation. The court, in turn, can violate the defendant (because a conditional discharge, like probation is a revocable sentence), and re-sentence him to jail, if warranted, up to the maximum permitted for the offense in question. The defendant must first be afforded due process and an opportunity to be heard before any alleged violation can be sustained and the defendant is re-sentenced.

As with a sentence of probation for which a court must first be satisfied based on the nature of the offense and the defendant's character, history and condition, that jail isn't necessary, the defendant could use guidance and the interests of justice would not be offended, (PL 65.00[1][a][i-iii]), a conditional discharge may be granted where the court is also satisfied that probation would not be appropriate, (PL 65.05[1][a]).

The laundry list of possible conditions of probation and of conditional discharge is set forth in PL 65.10(1-5[a]). As a practical matter, the terms of probation (many of which are standard), are likely to be lengthier and more demanding for the former than the latter, and if the defendant fails to comply with any or all of them, the probation officer will likely submit a DECLARATION OF DELINQUENCY to the sentencing court, seeking to have the defendant violated and, if sustained, resentenced to term of incarceration. In such case, the defendant is entitled to continued legal representation, a summary hearing (on a preponderance of the evidence standard, CPL 410.70[3],) and an opportunity to be heard before resentencing. (See CPL 410.10-410.90).

Counsel should be mindful that it this the COURT and NOT the probation department that sets (and, if warranted), modifies the terms of a probationary sentence. The Probation Department's obligation is to supervise the probationer (with the goal of rehabilitation), and enforce the conditions of probation as directed by the court and not overstep its authority by adding terms and conditions of its own accord without prior court approval.

Counsel should also carefully scrutinize the myriad of boilerplate conditions submitted to the sentencing court to make sure that they actually apply to your client, are reasonable (is it possible to stay out of every place that has beer for sale?), and are not just setting him/her up for failure sooner or later.

Counsel should review the PSR (SEE CPL 390.20) BEFORE the sentencing date and should also examine all the proposed conditions ahead of time and alert the court to any concerns rather than spring them on the spot at sentencing. This is especially so with sex offenses where the conditions of probation are often long and laborious.

The conditions of a conditional discharge, by contrast, are usually short and straightforward (but not necessarily easy to comply with depending on the client), such as: "lead a law-abiding life, stay away from the complainant, pay restitution by a designated date," etc. The beauty for the defendant is not having to report to a probation officer (or having him/her show up at the house unannounced to conduct a search for drugs, alcohol or contraband), or run the more likely risk of being violated if he/she

doesn't toe the line. Absent a violation of a specific condition (e.g. restitution), a defendant subject to a conditional discharge (while within the court's jurisdiction for the duration) is usually "out of sight-out of mind."

Counsel should also not hesitate in the right case to swing for the fences and request an UNCONDITIONAL DISCHARGE. While not particularly common (perhaps because sentencing judges may be reluctant to let a convicted defendant waltz out of the courtroom without having suffered any meaningful penal consequence), it is an available sentencing option FOR FELONIES, MISDEMEANORS and VIOLATIONS if the court is satisfied that imposing ANY conditions would not serve any proper purpose. (PL 65.20[1]).

As with a conditional discharge, if a court imposes an unconditional discharge for a felony, it must set forth its reasons on the record. This is because it is generally considered to be an unusual disposition for a serious offense for which an explanation is required. So, if a court shows more in the way of leniency by imposing a much lesser sentence, there should be good reasons. That assumes, of course, that counsel sees fit to request such consideration in the first place.