White-Collar Defense

Three days before the White-Collar Defense Roundtable took place, the Supreme Court issued its much-anticipated decision on U.S. Sentencing Guidelines in *U.S. v. Booker* and *U.S. v. Fanfan*. Naturally, the main topic of discussion for this month's roundtable was the impact of the Court's decision on prosecutors, defense counsel, corporate clients, and judges. This month's panelists bring perspectives from the East and West Coasts, hailing from Los Angeles, San Francisco, and Washington, D.C. They are William Keane of Farella Braun + Martel, John Cline and Brian O'Neill of Jones Day, Stephen Freccero of Morrison & Foerster, Roscoe Howard and Mark Nagle of Sheppard Mullin Richter & Hampton, and George Newhouse of Thelen Reid & Priest. The discussion was moderated by Custom Publishing Editor Chuleenan Svetvilas and reported for Barkley Court Reporters by Krishanna M. DeRita.

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MODERATOR: What do you think of the Supreme Court's opinion on U.S. Sentencing Guidelines in *U.S. v. Booker* and *U.S. v. Fanfan*?

FRECCERO: The Supreme Court said the Guidelines are unconstitutional because of non-jury fact-finding, which was a decision most people expected. The surprising thing about the ruling is the Court's remedy—severing the mandatory aspects of the Guidelines. The Supreme Court managed to disappoint just about everybody, no matter which side of the issue they were on, creating more uncertainty than resolution in its decision.

For the last 18 years or so the Guidelines have been understood as an attempt to curb discretion in federal sentencing. What we now have is an affirmation of courts' discretionary power in sentencing. For white-collar crime, it raises a lot of issues—the main one is how the courts will respond.

Within one day, Judge Cassell in Salt Lake City—who issued the first District Court opinion after *Blakely*, saying that *Blakely* meant that the Guidelines were constitutionally suspect—issued a sentencing decision based on *Booker-Fanfan* and took the Guidelines and applied them under the reasoning that the point of the Guideline system is to have consistency. This is what I anticipate many courts will do.

HOWARD: The *Blakely* decision was confusing. If nothing else, *Booker-Fanfan* is better. I was actually a fan of the Guidelines. Before the Guidelines, it was pretty obvious that if you were a minority, if you were black, you got hammered during sentencing. There was no doubt about it, especially if you were sitting in a courtroom in Virginia, Georgia, South Carolina, one of those places, you got nailed.

But it seems odd to talk about consistency and then take away the necessity that the courts have to follow the Guidelines. All the judges felt confined by the Guidelines. Now the courts have to look at the Guidelines, and then they can do what they want. As a prosecutor, I felt that the smarter judges found their way around the Guidelines and came to a sentence they thought was just and fair in their own judgment. To some extent, *Booker-Fanfan* reflects that reality and makes it easier for the courts and harder on defendants.

NEWHOUSE: Let's face facts: The 18-year trial period with Guidelines was a failed experiment. The Court has recognized that although consistency in sentencing is a laudable goal, it cannot be achieved in a manner consistent with either the Sixth Amendment or notions of individualized justice.

For white-collar practitioners, the winners, clearly, are Article III judges. The judges hated the Guidelines from day one. Some judges refused to apply them. In this almost revolutionary remedy, the Supreme Court surgically altered a statute and then created a whole new standard of review. Now the judges certainly have a great deal of sentencing discretion returned to them, and I applaud that result.

Defense lawyers are also winners because prosecutors are the losers, which is the flip side of this. Prosecutors used those Guidelines to pressure white-collar defendants into unfavorable plea bargains, which resulted in far fewer trials and less justice.

CLINE: The Court's decision raises interesting questions. What will happen to cases pending on direct appeal? Some cases have *Blakely* or *Booker-Fanfan* issues that were raised in the trial court and other cases don't. Justice Breyer's

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opinion indicates that the usual plain-error and harmless-error standards will apply on direct appeal. The Courts of Appeals may hold that in any case where a district judge sentenced other than at the bottom of the range, the error is either harmless or not plain because the judge had discretion to go lower and didn't. So cases other than those where the judge sentenced at the bottom of the Guideline range may be affirmed under a plain-error or harmless-error standard.

What will this reasonableness review that Justice Breyer contemplates mean? Under this new regime, the Courts of Appeals will review sentences imposed under the *Booker-Fanfan* approach for reasonableness. My fear is that the courts will look at the Guidelines as the touchstone of reasonableness, so we could be back to the Guidelines even though ostensibly they are not mandatory.

O'NEILL: I'm not troubled by the Supreme Court's decision. The problem is, is this going to last? I don't think it will. This new system will be good for two years and then we will have a problem. To the extent it comes back for review, the big issue is going to be about protecting the judicial role—even Scalia thought it was a good thing to do.

I don't think the reasonableness will be appealed. What you want to keep is a system that has a reference point—what's good, what's bad, what's outside that range—and trust these judges. After all, they are experienced lawyers, they have been recommended by a senator who's presumably not a moron. They've been vetted by a senate. They have to put in reports of their downward departures. What's that about? That's nothing more than this congressional idea we shouldn't have an independent judiciary.

NAGLE: The Court's decision places a renewed premium on knowing as much as you possibly can about your district court judge's characteristics. Once you're in court, that judge's philosophy of sentencing is going to be a vitally important thing to learn to an even greater extent than was true previously. Tough judges will continue to be tough judges.

Another consequence of the decision is a particularized need to work through very carefully exactly how your client will receive credit for cooperation provided to the prosecution. After all, the decision renders the entirety of the Guidelines advisory now—not just those factors that tended to drive sentences upward, but those that tend to drive sentences downward.

KEANE: The first thing that came to mind when I started going through the opinion was Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. In the long term, when Congress gets done with these new sentencing issues, defendants may be longing for the Guidelines. But in the short term, being able to negotiate an 11(c)(1)(C) deal with some certainty could be critical. But there's really no sense this early of how the judges will handle it. To the extent that you can negotiate a specific plea, you will be a lot better off.

The Northern District of California traditionally has allowed 11(c)(1)(C) pleas. Prosecutors are going to be very wary about not knowing what some of the judges will do. Even in a cooperation context, I have also negotiated 11(c)(1)(C) pleas. Even with a downward departure, you can agree on what the Guidelines calculation is and leave open what the downward departure will be. But can you get some certainty on what is the downward in the cooperation context? Have others had previous success in negotiating 11(c)(1)(C) pleas in your districts?

NEWHOUSE: In Los Angeles, the judges have not been favorably disposed to binding plea bargains. They are a tough sell. One effect of this decision will be to renew those applications. Judges will tend to go along with them in complex cases, such as the *Credit Lyonnais* case, which pleaded out last year. In such cases, the judges are inclined to say: "There's no way I can endure this trial. I'm more than happy to sign off on an 11(c)(1)(C) plea deal because it means that it will dispose of the entire case."

Now, at least the white-collar practitioner will have a lot more individual discretion to push back at times and say, "No, thanks. I'm not going to sign my guy up for a 20-year securities fraud sentence." Instead, the district judge will have discretion to view the defendant's situation as a first-time offender, no criminal record, a man in his fifties who doesn't need a 20-year sentence. Increased judicial discretion is a good thing and that is the essence of *Booker-Fanfan*.

HOWARD: Now when you negotiate, at least you know whom you are negotiating with. On the East Coast, especially in D.C., judges pick and choose how they want to affect 11(c)(1)(C). Prior to *Booker-Fanfan*, we would actually negotiate the plea in the plea agreement itself. We would say, these are the Guidelines, you know you are entitled to a downward departure, we've agreed this is your criminal history, sign this. And it wasn't 11(c)(1)(C). It was just a plea agreement.

The judge can sentence anywhere in the Guidelines they want. Now with the cuffs off, 11(c)(1)(C) will become more important. With complex cases, judges are going to want you to provide some order. To do that, you determine the things you can agree on preindictment, and then you go to the judge. Judges may have ignored 11(c)(1)(C) in the past. But now you are going to see judges say, "Counsel, have you thought about getting together?"

FRECCERO: In the preindictment negotiation stage, you are not going to know who will be the judge assigned to the case. One benefit of the Court's decision is whether the whole cooperation "cudgel" still applies. It became settled law that you could not have a downward departure based on your attempt to cooperate without a government motion. There is still a big incentive for both sides to aim for some certainty. One way will be to see if you can get a binding plea agreement. Then if you go into court and the judge doesn't like it, you have some indication about what the judge thinks about your case.

MODERATOR: What is the impact of the Court's decision on your corporate clients?

NEWHOUSE: The *Booker-Fanfan* decision effectively lessens the amount of pressure the government can bring to bear on corporations to sign over their defense at the outset by saying, "We want you to do an internal investigation, to waive the attorney-client privilege, to agree up front to deliver your report to us. We don't want you to indemnify or provide these employees with counsel or enter into a joint-defense agreement."

FRECCERO: The level of uncertainty created by the Court's decision will force the government to try and achieve its objectives by relying more heavily on charge bargaining. The issue for the corporate target is whether this decision could put the brakes on this.

CLINE: I am less sanguine that *Booker-Fanfan* will help corporations, because what corporations fear most is indictment and all of its consequences, rather than the result of the criminal case and the Guidelines sentence. The government will continue to use the same factors after *Booker* to decide whether to indict a corporation. One of those factors is cooperation, which often is interpreted as surrendering privileges, refusing to indemnify employees, and so forth.

O'NEILL: Before the Holder Memorandum, the article of faith among corporate counsel defending a corporation in a criminal investigation was, if there's a bullet to be taken, we'll take it. We want our people protected. Why? Because five years from now, there's going to be a problem.

I'm in a federal antitrust case right now with a *Blakely* issue. Nobody knew what was going to happen. Some people have rolled over and paid enormous fines. I don't represent the company. I represent the guy. Do we make a deal? The most you can get without the Guidelines is $10 million, the old penalty effective up until this year. The business guys say, "We'll pay the big fine if you don't bring anybody personally down." That's a harbinger of what's to come, which is a good thing.

HOWARD: With Eliot Spitzer, the White Collar Task Force, and the Thompson Memo out there, the corporations are unnecessarily jittery. In the KPMG investigation reported in the *Wall Street Journal*, these guys just gave up the farm, quite frankly. KPMG paid for its employees' attorneys, but the employees had to agree to talk to the government investigator.

I'm not exactly sure how *Booker-Fanfan* will affect corporations, but there is a sense that momentum is swinging back to at least level playing fields.

O'NEILL: The Thompson Memo relates to the Guidelines. To get a break, you have to cooperate. If *Booker-Fanfan* says it doesn't count anymore, the corporation has to step up and do something. In the Southern district of California, federal judges come from big firms. They did corporate litigation and actually think the privilege means something. If the government says, "We deserve X because the Guidelines won't happen until sentencing. We want to whack these guys because they didn't cooperate," I don't think the judges are going to be responsive because of their background. They have been involved in cases where they respect the corporation's obligation to indemnify and protect these employees and respect the function of privilege.

KEANE: We might see a shift towards settlement conferences with federal judges. In the Northern District of California, settlement conferences with judges have been very rare. The U.S. Attorney's office generally frowns upon them because they figure the judge is going to adjust the Guidelines to get the sentence lowered. It's much more common in state court. In state court, often you walk into chambers and after hearing both sides out, the judge will try to settle the case. That's not how it's done in federal court. Under the Guidelines, you had a sense without talking to the judge what the sentence would be.

FRECCERO: The federal rules prohibit the judge hearing the case from doing that. This district has tried over the years to refer criminal cases to a settlement judge with great opposition from the government.

O'NEILL: John [Cline] had a case in New Mexico that he got mediated. I had a case in Oregon that I got mediated.

NAGLE: I wonder whether the bench is going to push for it. Some judges in the District Courts may feel a little more empowered now to suggest that counsel for the government and for the defense should meet with one of the senior judges of the court and let the senior judge tell both sides, "Well, you know Judge X, you know what he's likely to do with this." You might get some pressure from the bench.

MODERATOR: What is happening with attorney-client privilege when your corporate clients face parallel investigations by the SEC, U.S Attorney's office, or State Attorneys General?

FRECCERO: If you are representing a corporate client that is defending private litigation while at the same time is the subject of regulatory or governmental investigations, it is very difficult to properly manage your internal fact-finding and defense of litigation in state or federal court, while simultaneously discharging your responsibility to be both a good corporate citizen and to protect your shareholders.

Recent court decisions in California make clear that if a company decides it's in its interest to share otherwise privileged material with an investigating governmental body, that is, in fact, a waiver of the privilege and the company will likely have to provide that material to private plaintiffs in any parallel civil litigation. Unfortunately, nowadays the corporation is forced to make legal decisions at a time when no one really knows what the facts are regarding the particular allegation.

NAGLE: The law of waiver is very harsh. The decisions that recognize a so-called selective waiver—a disclosure to one government entity for a limited purpose that doesn't operate as an across-the-board waiver of a privilege—are extremely few and far between. In the D.C. Circuit where most of the government's regulatory agencies are headquartered, the law is quite clear that you don't get selective waivers.

In the last Congress, there was a bill introduced to allow disclosures to the SEC without collateral waiver consequences in the civil setting. That's the only effort I'm aware of to even begin to push back a little on these very significant and adverse consequences.

HOWARD: The Thompson Memorandum said that waiving privilege was allowed, not required, to show cooperation. When you are a 30-year-old prosecutor and you know that this corporation has everything you need, you know that you don't have to get them to waive privilege but you do it because you can. I would love to see a judge interpret the Guidelines now after *Booker-Fanfan* in a way that says a judge can also make a determination of what cooperation is.

NEWHOUSE: Some U.S. Attorney offices are more aggressive than others. They do not always ask or require us to waive privileges, either up front, or in many cases, at the end of the investigation. The pendulum will swing back, because eventually the Department of Justice will realize that the attorney-client privilege and work-product doctrine serve to foster important social interests, thus enhancing the pursuit of justice. They allow the corporate lawyer to do an internal investigation and find out what the facts are. True corporate compliance is more effectively facilitated when companies and corporate counsel can do investigations and correct problems without having to worry about "Big Brother" breathing down their necks.

KEANE: With such pressure to waive and to cooperate, you have less truth-finding in a corporate setting. It raises the question of whether you have to advise the employees that what they say might be turned over to the government and used in an obstruction charge against them if they lie. Given these pressures, we may be moving in the direction of internal investigations being as effective as grand juries to investigate crimes.

At a minimum, the employee has to know that what they tell us is privileged, but also that the company controls the privilege and decides whether to waive it. I don't think you need to give *Miranda*-type warnings to the employees yet.

CLINE: Prosecutors, for the reasons we've discussed, will continue to insist on corporations waiving privileges. The only solutions I see are either a legislative solution like Mark [Nagle] mentioned, or the possibility that courts will recognize the reality of the corporate world and the social benefits that George [Newhouse] has talked about of having the privilege and will take a different approach on selective waiver. In a case with the right facts, a court could easily find that disclosure under the gun to the U.S. Attorney's office doesn't mean that you have to give up everything to a private plaintiff in a class action case. ■

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