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CHAMPION

July 2007

Substantial Assistance — The Key to Freedom

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THE National Association of Criminal Defense Lawyers
CHAMPION
July 2007 Vol. XXXI No. 6

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By Mark P. Rankin and Rachel R. May

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The Champion

Publisher Norman L. Reimer
Editor Quintin Chatman
Sales and Marketing James Bergmann
Art Director Catherine Zlomek
Senior Graphics Designer James Moy
Editor Emeritus Richard Bing
1150 18th Street, NW, Suite 950, Washington, DC 20036
The Champion welcomes articles for publication. Please contact champmag@aol.com for more information.

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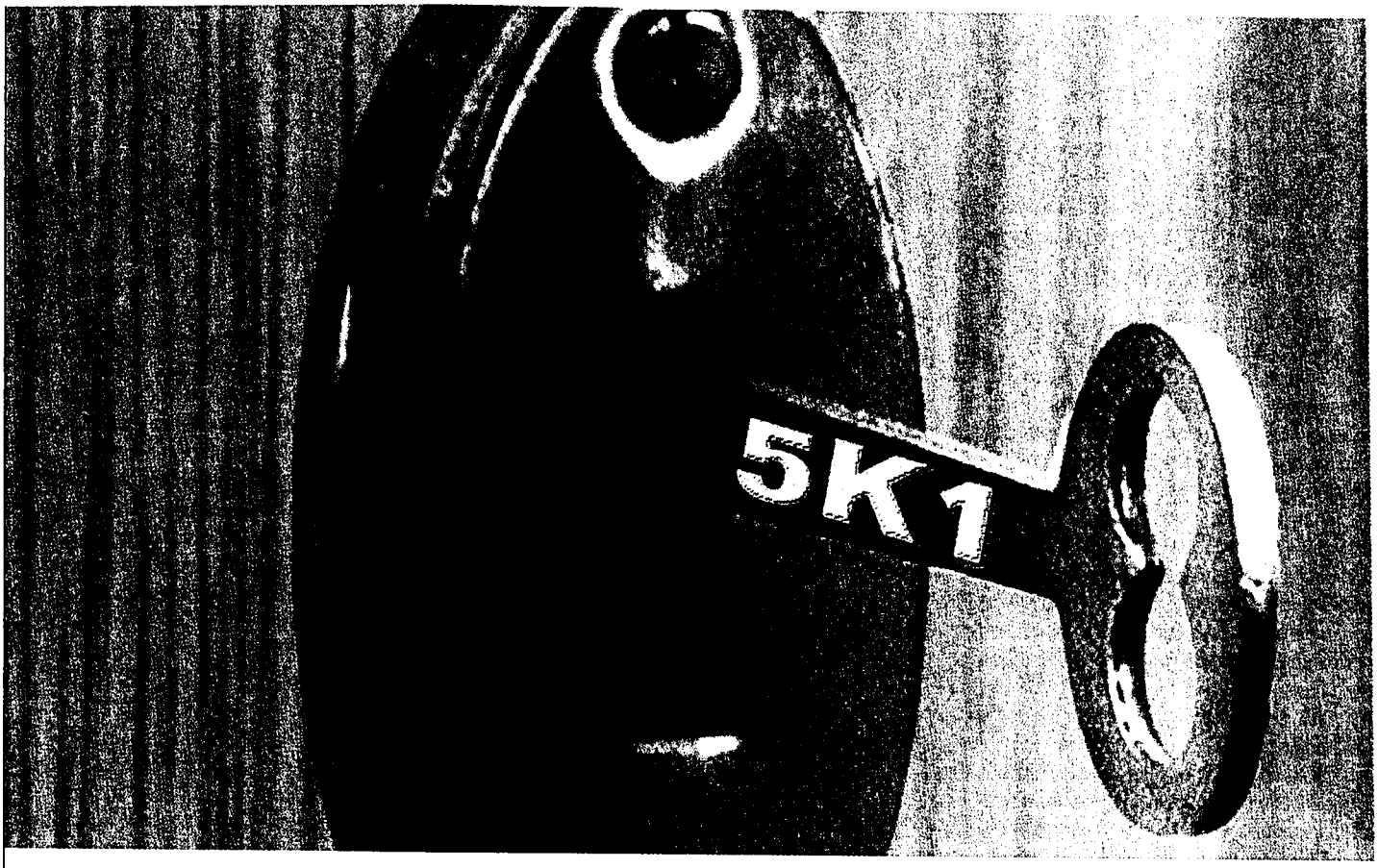
Columns



Substantial Assistance — The Key to Freedom

Representing a Cooperating Defendant in Federal Court

BY MARK P. RANKIN AND RACHEL R. MAY

Your new client, Danny, has been charged with what is, in the eyes of the Justice Department and Congress, one of the most heinous of crimes, for which he faces a mandatory minimum of 25 years in prison. Terrorism? Nope. Carjacking? Nah. *Murder?!* Not quite. He's been charged with selling 5 kilograms of powder cocaine to an undercover DEA agent. Where normally he would face a minimum 10-year stay in federal prison, a prior felony drug conviction (for which he served probation) doubles that — and since he had an unloaded gun in his pocket at the time, he faces 5 years of consecutive time.[1] Danny, a 22-year-old kid who has never spent so much as a day in county jail, now faces the prospect of tasting freedom again when he is his father's age. He is petrified and desperate.

As always, you have explored every avenue of defense. Unfortunately, the drug sale is on crystal-clear videotape — as is Danny's voluntary, post-*Miranda* confession. The prior conviction is valid, so the enhanced sentence is another unfortunate reality. A jury trial would do little more than walk this kid through the prison gate. Yet, even a *guilty plea* will result in a 25-year sentence.

While daydreaming about the prospect of doing trusts and estates work in Key West, your desk phone snaps you back to reality. It's the federal prosecutor with an offer — if Danny will set up his cocaine supplier, the government will drop the firearm charge *and* may ask the sentencing court to impose a significantly reduced sentence. Rather than face a mandatory 25 years, Danny could be out of prison before his 40th birthday.

As you are obligated to do, you inform your client of the prosecutor's offer.[2] Danny's reaction: "When do I start?!" With that, you now represent a snitch in federal court.

This article addresses the basics regarding how to handle a case in which your federal client is cooperating with law enforcement. Cooperation in the federal system is subject to its own unique body of law and procedures. Moreover, defense counsel's skills of investigation and advocacy are as important as ever. Many of the topics herein would warrant their own in-depth article; we have attempted to provide a detailed summary of the many issues at play.

Pre-Sentence Cooperation: USSG § 5K1.1 and 18 U.S.C. § 3553(e)

United States Sentencing Guidelines [hereinafter "USSG"] § 5K1.1 and 18 U.S.C. § 3553(e) govern pre-sentence substantial assistance in exchange for sentence reduction. USSG § 5K1.1 governs downward departures from a Guidelines sentence in return for providing substantial assistance to the government.[3] Pursuant to 18 U.S.C. § 3553(e), a court, upon government motion, is

permitted to sentence below the otherwise applicable mandatory minimum sentences.[4]

USSG § 5K1.1 was promulgated pursuant to 28 U.S.C. § 994(n), whereby Congress directed that the Sentencing Commission:

> assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by a statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.[5]

As such, USSG § 5K1.1 provides that the court may depart downward from a guideline sentence "upon motion of the government."[6] To determine how much credit to give to a defendant for his cooperation, the court may then consider, amongst other things, the following five factors:

- 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;
- The truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- The nature and extent of the defendant's assistance;
- Any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
- The timeliness of the defendant's assistance.[7]

At sentencing, counsel should be ready to specifically address each of these factors, as well as any other factors related to the client's substantial assistance, in order to get the maximum reduction for the client.

In Danny's situation, a § 5K1.1 motion alone would not do him much good, as it does not give the court authority to go below a mandatory minimum.[8] Rather, pursuant to 18 U.S.C. § 3553(e), "the government must in some way indicate its desire or consent that the court depart below the statutory minimum before the court may do so."[9] After the § 3553(e) motion, the court may look to a § 5K1.1 motion, and its accompanying factors, to guide it in determining just how far to go below the statutory minimum.[10] Under § 3553(e), there is no limit as to how far the court may depart, so long as that departure is "reasonable" under 18 U.S.C. § 3742(e).[11]

The Line Starts Back There . . .

By filing motions pursuant to USSG § 5K1.1 and 18 U.S.C. § 3553(e), the government empowers the district court to reduce the defendant's sentence below both a statutory minimum and the Guidelines range (see above). This begs the question: From what starting point may the district court depart for purposes of rewarding the defendant's cooperation? Where a mandatory minimum exceeds the otherwise applicable Guidelines range, this is a particularly important question. For example, where the statute requires a sentence of at least 120 months in prison, but the Guidelines would otherwise call for a range of 70-87 months, from which of these two points can the court ratchet down the sentence?

Unfortunately, the court *must* begin its § 5K1.1 analysis from the statutory mandatory minimum sentence. In *United States v. Head*, the Eleventh Circuit held that the mandatory minimum sentence, and not the otherwise applicable Guidelines range, constitutes the correct starting point for a § 5K1.1 departure.[12] The *Head* court explained that "the Guidelines do not contemplate a downward departure for substantial assistance until after the court applies Section 5G1.1(b), which establishes that the applicable guidelines sentence shall be the mandatory minimum sentence."[13] Moreover, the Guidelines make clear that Parts H and K of Chapter 5 are the final steps in calculating the correct Guidelines range.[14] As such, the mandatory minimum is the staring point.[15] Every circuit to address the question has held similarly.[16] The same rule applies where a defendant is charged with a federal crime that calls for a mandatory minimum consecutive sentence (such as Danny's original charge pursuant to § 924(c)).[17]

This analysis actually makes sense in light of 18 U.S.C. § 3553(f), the so-called Safety Valve provision of the Guidelines, which specifically provides that, for those defendants who qualify, "the court shall impose a sentence pursuant to [the] guidelines ... *without regard to any statutory minimum sentence.*"[18] By contrast, § 5K1.1 merely grants a district court "[l]imited authority to impose a sentence below a statutory minimum."[19] Two circuits have cited this difference as evidence that Congress intended a § 5K1.1 departure to start from the mandatory minimum sentence.[20] Note, however, that the opposite is therefore also true — where the mandatory *maximum* sentence is *lower* than the Guidelines range, any § 5K1.1 departure is calculated from the lower, maximum term.[21] For example, where the statutory maximum is 60 months, but the Guidelines range is 70-87 months, a departure would begin from the 60-month sentence.

Despite recent Supreme Court sentencing jurisprudence, things have likely not changed. In *United States v. Strobele*,[22] the defendant argued that, after *Booker*, the district court had discretion to deduct cooperation credit from a point below the mandatory minimum sentence. The Eleventh Circuit, relying upon its *Head* decision, rejected this argument, holding that "the district court remains obligated correctly to calculate the Guidelines range pursuant to 18 U.S.C. § 3553(f)(1)."[23] Recently, the Eleventh Circuit strictly enforced this mandate. In *United States v. Madden*,[24] the district court departed downward pursuant to § 5K1.1, stating that it "had been looking more from what the Guidelines level would have been absent the statutory minimum sentence."[25] Unimpressed with the district court's generosity, the Eleventh Circuit reversed, again citing *Head*.[26] Nevertheless, it is worth pointing out to the sentencing court where the Guidelines range is significantly lower than the applicable departure starting point, for it may subtly influence the degree of departure.

Government Refusal to File § 5K1.1 Motion

Your client's assistance to law enforcement may have been incredibly "substantial," but that's no guarantee that the government will actually file a § 5K1.1 motion. What can be done where the government has refused, despite your client's substantial cooperation, to seek a reduction in sentence? Unfortunately, in federal court the remedies are very limited because the prosecutor's discretion is almost unfettered.

"[A] prosecutor's discretion when exercising [power to file a § 5K1.1 motion] is subject to constitutional limitations that district courts can enforce."[27] In *Wade*, the Supreme Court

set forth a two-step process for evaluating a prosecutor's decision not to file a § 5K1.1 motion in light of the constitutional constraints applicable to all prosecutorial decisions. The district court should grant a remedy where it finds the refusal: (1) was based upon an unconstitutional motive; or (2) "was not rationally related to any legitimate government end."[28] That is the good news.

The bad news is that very few motives are considered unconstitutional. Obviously, a prosecutor's decision cannot be based upon the defendant's age, sex, or race.[29] Thankfully, such unconstitutional motives will rarely surface. It is more likely that the government will refuse to file the § 5K1.1 motion because your client has dared to exercise his Sixth Amendment right to a jury trial. For example, a client may successfully cooperate with law enforcement shortly after his arrest or indictment, but later go to trial and be convicted. In such cases, the government will often refuse to file a departure motion, despite the defendant's clear "substantial assistance." Such an exercise of its discretion essentially punishes the defendant for exercising his right to a jury trial, which is plainly unconstitutional.[30] Counsel should file a motion to compel the government to file the motion and request an evidentiary hearing. Where the defendant can make a "substantial showing" that the government's refusal to file the motion was based upon an unconstitutional motive, he or she is entitled to an evidentiary hearing.[31]

Moreover, *Wade* permits relief where the government's refusal to file the motion does not satisfy rational basis review.[32] As such, counsel should argue that the government has no rational basis on which to overlook the defendant's clear and documented "substantial assistance." By filing a motion to compel, counsel can force the government to articulate its reasoning in refusing to file the § 5K1.1 motion. Chances are, the government will struggle to articulate a legitimate excuse.

Even where you have secured a written plea agreement that contemplates cooperation, forcing the government to file the departure motion is an uphill battle. Generally, where "a defendant has entered into a plea agreement expressly requiring the government to make a § 5K1.1 motion, a district court has broad powers to enforce the terms of the plea contract."[33] However, most federal plea agreements contain language that makes filing a § 5K1.1 motion in the sole discretion of the prosecutor. These agreements basically say that "if defendant provides substantial assistance, the government promises to *think* about filing a motion for departure." There's not much to hang your hat on there. Some plea agreements even ask the defendant to waive any later claim that the exercise of the prosecutor's discretion was unlawful. In any event, it is rare that the government will expressly promise to file a motion. Furthermore, only a few circuits have held that plea agreements are contracts that carry an implied covenant of good faith, such that the government may simply refuse to file the motion because it has decided not to do so.[34] Other federal appeals courts have rejected a good faith requirement.[35]

After *Booker*, Is a Government Motion Still Required?

There is no question that a government motion is still required before a court may depart downward in calculating the advisory Guidelines range.[36] It is equally clear post-*Booker* that a government motion is still needed to secure a traditional downward departure pursuant to § 5K1.1.[37] However, the advisory Guidelines range is but one of the many factors to be considered pursuant to 18 U.S.C. § 3553(a). The question is therefore whether — with or without a government motion — a defendant's cooperation may warrant a downward *variance*.[38] Almost two years after *Booker* (supposedly) changed dramatically the landscape of federal sentencing, the answer to this question is still unclear. Nevertheless, counsel should always cite a client's cooperation as relevant to the sentencing analysis, whether or not the government files a motion.

This issue has been rarely litigated, in part because defense counsel have largely advocated only the losing argument that *Booker* obviated the need for a government motion under USSG § 5K1.1 and 18 U.S.C. § 3553(e). As such, only one circuit has squarely addressed the question of whether a downward *variance* for substantial assistance requires a government motion. The Tenth Circuit came close to considering the question, but a ringing cell phone conspired to prevent appellate review.[39] In any event, there is support in the post-*Booker* case law and within § 3553(a) to warrant a downward variance without a government motion.

The one federal appellate court that has directly addressed this issue held favorably for defendants. In *Unite States v. Fernandez*, the Second Circui held that, after *Booker*, "a sentencin judge may take 'non-5K cooperatior into account when considering the 3553(a) factors."[40] The district court i *Fernandez* had, in the absence of a gov ernment motion, evaluated the defen dant's cooperation, particularly "wha light it may shed on the character of th defendant."[41]

No matter whether your circuit ha held that a § 5K1.1 motion is unneces sary for a downward variance, a defen dant's cooperation is clearly relevant t at least two of the § 3553(a) factor: First, cooperation sheds light upon th "history and characteristics of the defen dant."[42] Although the district court i *Fernandez* did not cite to a specific 3553(a) section to which the defendant "non-5K cooperation" was relevant, made clear that it was pertinent to th "character of the defendant."[43] Thi makes sense, as a defendant's willingnes to cooperate with the government in th investigation and prosecution of othei certainly does reflect upon his or he "character."

Second, a defendant's cooperation undoubtedly relevant to "the need t avoid unwarranted sentencing disparitie among defendants with similar recorc who have been found guilty of simila conduct."[44] If Danny cooperates and doe not receive a downward departure c downward variance in return, he is, with out reason, treated disparately from sim larly situated defendants who do in fa receive a benefit for their cooperatioi Where such a disparity may be great, district court may even be *required* to vai downward in light of a defendant's coop eration.[45] The Sentencing Commissio itself has recognized that "substanti assistance departures contribute the grea est amount to variation in sentences," wit rates varying widely among the feder districts.[46] Counsel must convince the sen tencing court that other defendants, wh cooperate to the extent of this defendan are getting § 5K1.1 motions and creatir an unwarranted sentencing disparity th should — perhaps must — be remedie in light of § 3553(a)(6).

In sum, it is more than arguab that, after *Booker*, the government n longer holds the only set of keys to a sen tence reduction based upon substanti assistance. Rather, with respect to pr sentencing cooperation, the distri court now has discretion to consider defendant's cooperation as part of its 3553(a) analysis. Defense counsel shoul therefore make the argument where th

government refuses to file a motion for downward departure under the advisory Guidelines system.

Practical Considerations of USSG § 5K1.1 and 18 U.S.C. § 3553(e)

Danny has agreed to cooperate in hopes of earning a substantial assistance departure. What now?

First, get it in writing. There are always unattractive considerations about signing plea agreements. However, as discussed above, the scope of review in the appellate court is dependent on whether there is a plea agreement. Without a plea agreement, your only appellate hope will be a failure to file for unconstitutional purposes.

In order to later advocate your client's case at sentencing, you will need to know all that happened. Since you cannot rely upon the assistant U.S. attorney or the agent to fully inform you about your client's cooperation, you must rely on your client. Therefore, instruct your client to keep a detailed daily diary of his or her cooperation. At a minimum, he or she should write down all dates, times, locations, and individuals. In particular, it is important that the client document every conversation with a government agent, noting to the extent possible everything that was said by both sides. This diary will become a key tool in preparing your sentencing memorandum, and help you prepare for argument at sentencing.

For argument's sake, let's assume that Danny's assistance results in the prosecution of his cocaine supplier. The government agrees to make the appropriate § 5K1.1 and § 3553(e) motions. However, you are far from done. Now you must convince the judge that your client should be adequately compensated, through a reduction of time, for his service to the U.S. government.

Prior to the hearing, file a sentencing memorandum discussing each of the § 5K1.1 factors, as well as any other assistance-related factors.[47] Attach exhibits. One sure-fire way to get the court's attention, if applicable, is to tell the story of the person whom your client assisted in bringing to prosecution. Attach that person's mug shots and arrest history. If the person is known to be dangerous, emphasize the risk that your client took in order to assist the government.

Occasionally, the assistant U.S. attorney will file the motion, yet claim that the defendants did not earn a significant reduction. When you know this to be an unfair characterization, subpoena the government agent that worked with your client to testify at the sentencing hearing. Have the agent describe for the court the extent of your client's cooperation, the importance of the targets, etc. Use your client's diary and ask specific questions from it.

Documentation is also important in order to demonstrate the extent of your client's cooperation in the event of a government appeal.[48] Circuit courts have scrutinized the extent of a district court's § 5K1.1 departure and reversed where the evidence did not support the extent of reduction.[49] It is therefore necessary to make a good record for appellate review.

There have been horrific stories about the families of defendants being murdered in retribution for assistance the defendants provided to the government. Try to keep your client's cooperation out of the public domain.

Snitches Get Stitches[50]

The hip hop community has vented its frustration regarding cooperating defendants, seemingly advocating violent ends for snitches.[51] Additionally, Web sites such as www.whosarat.com publish the names, pictures, and locations of informants, and "Stop Snitchin'" t-shirts have all but become a trend.[52] It is impossible to work in federal criminal law and avoid hearing horrific stories about a cooperator or a cooperator's family being threatened or even harmed in retribution for assistance provided to law enforcement. As such, the potential danger to your client and your client's family must be carefully considered.

There are several ways to keep a client's cooperation out of the public domain. Initially, request that the prosecutor file all related pleadings under seal. This includes the plea agreement, the § 5K1.1 motion, the § 3553(e) motion, and any other cooperation-related filings. Do not be afraid to remind him or her. Prosecutors are human, and thus make mistakes. Such an accident, however, could have dire consequences.

Similarly, ensure that you file your pleadings, such as the sentencing memorandum and exhibits, under seal. Additionally, file a motion under seal for an *in camera* sentencing hearing. Outline for the judge the danger that your client faces. Needless to say, this should also demonstrate your client's commitment to cooperating with the government.

Safety Valve — A Reduction Without "Substantial Assistance"

A defendant need not necessarily assist in the prosecution of others in order to gain a sentence reduction in exchange for basic cooperation. The so-called "safety valve" statute and coinciding provision of the Guidelines provide that a defendant charged with a drug offense may get a reduced sentence below the mandatory minimum term, provided he or she meets certain criteria.[53] Pursuant to 18 U.S.C. § 3553(f)(1)-(5), a drug defendant is eligible for a sentence below the mandatory minimum if: (1) the defendant has no more than 1 criminal history point; (2) the defendant did not commit a violent act, threaten violence, or possess a weapon during the offense; (3) the offense did not result in death or serious injury; (4) the defendant was not an organizer or leader of others; and, most important to our topic, (5) "not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."[54] The Guidelines codify these conditions,[55] and provide for an additional 2 offense level reduction where the defendant qualifies.[56]

Again, one could write an entire

article on the nuts and bolts of the safety valve. But there are a few important points relating to cooperation that are worth discussing here. Most importantly, the defendant need not proactively cooperate against *others*, rather he must merely provide an account of his own involvement and knowledge of *this offense*, and any offenses that were part of the same scheme.[57] However, in providing an account of his or her involvement, "the district court can hold [the defendant] accountable for revealing the identities and participation of others involved in the offense if it could reasonably be expected he would have such information."[58]

It is also important to note that a government motion is *not* required, and the defendant bears the burden of proving that he is eligible for the safety valve.[59] Thus, the final arbiter of whether the defendant provided a complete and honest accounting of his offense is the court, not the prosecutor[60] (although the government is entitled to make a recommendation on this point).[61] Finally, the time limit is very favorable to the defense. The statute only requires the defendant to provide information no later than the time of sentencing.[62] As such, a defendant may even provide information on the day of sentencing to be eligible.[63] A defendant may also provide the required information through a letter from defense counsel to the government, though he or she must be extra careful to provide full and accurate information.[64] From the government's point of view, the information provided need not even be *new* information.[65]

The point is this: Your federal client accused of a narcotics offense can earn time off through minimal, rather than substantial, cooperation. The client can simply provide the government with an accounting of what he or she knows about the present offense and its participants. Best of all, your client can gain this relief even over the government's objection.

Post-Sentence Cooperation: Federal Rule of Criminal Procedure 35(b)

Our poor soul Danny, who was only embarking on his journey to a life of crime, is unable to render substantial assistance prior to his sentencing. As it was obligated to do, the court sentenced him to serve 25 years in federal prison. Is all hope lost? No! Pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, the court may reduce Danny's sentence for his cooperation, even after he has been sentenced.[66] Even better, the court may thereby re-sentence Danny below the mandatory minimum.[67] This could be Danny's last chance at living amongst society in his 30s. As such, counsel must be familiar with the unique mechanics and time constraints of Rule 35(b).

First, not surprisingly, the government must move the court to reduce the sentence pursuant to Rule 35(b).[68] Second, timing is important. If the government files a Rule 35(b) motion within one year of sentencing,[69] the standard is the same as pre-sentencing cooperation.[70] The court may reduce the defendant's sentence if he assisted the government in investigating or prosecuting another person.[71] However, if the government does not move the court within a year, the situation becomes slightly more complicated. After one year, the court may only reduce the defendant's sentence if: (1) the defendant did not know the information for one year or more after the sentencing;[72] (2) the defendant gave the information to the government within one year, but the government did not find the information useful until more than one year had passed;[73] or, (3) the defendant had useful information within one year, but its usefulness "could not reasonably have been anticipated by the defendant" for over a year, and the defendant promptly gave the government the information once he realized that it was useful.[74]

Third and importantly, in determining whether the client's post-sentence assistance was substantial, the court may also take pre-sentence assistance into consideration.[75] Therefore, be prepared with all of the facts and circumstances of the client's cooperation, or attempts at cooperation, both before and after sentencing.

Finally, counsel should be aware that the extent of reduction for your client's substantial assistance under Rule 35(b) is unreviewable on appeal everywhere except in the First Circuit.[76] The majority of courts of appeal have held that there is no appellate jurisdiction, pursuant to 18 U.S.C. § 3742, over the district court's discretionary sentence.[77] The First Circuit, however, has held the district court gives a concluding order over a Rule 35(b) motion; it does not render a sentence.[78] Hence, the circuit court has jurisdiction pursuant to 28 U.S.C. § 1291.[79]

Practical Considerations of Rule 35(b)

When your client is earning a Rule 35(b) motion rather than a § 5K1.1 motion, there is again the opportunity to advocate your client's case. Just as you would with a § 5K1.1 motion, you need to ensure that, prior to reducing the client's sentence, the district court is fully aware of the extent to which the client provided "substantial assistance." Such advocacy is particularly important in the Rule 35(b) context because, as noted above, the extent of the district court's reduction is unreviewable on appeal.

It sounds simple, but this can actually be a tricky proposition as a defendant may or may not be entitled to an evidentiary hearing on a Rule 35 motion. Some courts do not require a hearing, even upon the defendant's request.[80] In other jurisdictions it can be an abuse of discretion to refuse an evidentiary hearing.[81] Because this issue is unsettled, *always* request a hearing on the government's Rule 35 motion. Even where an evidentiary hearing is unnecessary, counsel should seize the opportunity to proffer the extent to which the client cooperated.

Many district courts nevertheless will not hold a new sentencing hearing to entertain a Rule 35 motion, but will rather simply grant the motion and enter a new judgment. Some particularly efficient district courts will even grant the government's motion and reduce the defendant's sentence before you get a chance to file a persuasive response (and thereby potentially convince the court to grant a larger reduction than requested by the government). One federal judge in our district (we'll call him Judge Impatient) is famous for granting Rule 35 motions and issuing new judgments literally within minutes of the government's filing.

It is therefore important to know the judges in your district. Will they conduct a hearing? If not, will they at least wait for a responsive pleading before granting the Rule 35(b) motion? If your judge will typically consider a responsive pleading, file one just as you would in a § 5K1.1 setting. If your judge is the hyper-efficient type, get ahead of the government and file under seal a "Response to Anticipated Rule 35(b) Motion." In your anticipatory response explain to the court that you expect the government to soon file a Rule 35(b) motion for a four-level reduction, then advocate and document why your client

deserves more. Such motions have worked wonders in making Judge Impatient aware of the full extent of our clients' "substantial assistance."

Thinking Creatively: Third-Party Cooperation and Cooperation With Third Parties

If all else fails, find out from your client if a close friend or family member could provide substantial assistance to the government on his behalf as a "surrogate."[82] In the case of *United States v. Doe*, the district court found that "in certain limited circumstances," a defendant could benefit from a government motion for a reduced sentence based upon another person's substantial assistance.[83] Doe was sentenced to a mandatory minimum sentence of 120 months for an importation of heroin charge.[84] While incarcerated, he enlisted the help of his son to gather details on another heroin distributor.[85] Doe's son was successful and the other heroin distributor was prosecuted.[86] The government, in turn, filed a Rule 35(b) motion to reduce Doe's sentence.[87]

In its order, the district court expressed great concern over the potential for abuse in ever allowing a surrogate to provide substantial assistance.[88] However, after debating the pros and cons, the court decided that surrogate assistance would trigger USSG § 5K1.1 and Rule 35(b) when: "(1) the defendant plays some role in instigating, requesting, providing, or directing the assistance; (2) the government would not have received the assistance but for the defendant's participation; (3) the assistance is rendered gratuitously; and (4) the court finds that no other circumstances weigh against rewarding the assistance."[89] The court found that Doe met those criteria.[90]

Since *Doe*, four other district courts have examined third-party cooperation.[91] In only one case, *United States v. Scott*, did a court object to it for public policy reasons.[92] The *Scott* court was disturbed by the FBI's belief that the third-party surrogate had been forced by gang members to cooperate for the benefit of other incarcerated gang members.[93] However, the court did not seem to reject the idea of third-party assistance outright, finding that the motion was simply inappropriate "in this case."[94]

Another fairly rare possibility, but a creative solution, is to see whether your client can assist a third party, and receive a downward departure based upon USSG § 5K2.0.[95] In *United States v. Truman*, the defendant stole several thousand pharmaceutical tablets from a laboratory where he worked.[96] Following his arrest, the defendant demonstrated how he had stolen the tablets and described the lax laboratory security.[97] As a result, the laboratory upgraded its security.[98] At his sentencing, Truman moved for a downward departure on account of his cooperation with the laboratory, rather than the government, and pursuant to USSG § 5K2.0, rather than USSG § 5K1.1.[99] The district court denied the motion on the basis that only the government could make a motion for a downward departure.[100] However, the Sixth Circuit remanded, holding that such a motion did not require government action.[101]

Conclusion

Representing a cooperating defendant in federal court presents many issues that could, in and of themselves, be analyzed more thoroughly. This article presents only a general overview of the practical and theoretical framework of the difficult, but quite arguably necessary, world of cooperation. In sum, defense counsel must understand the law and procedure of federal substantial assistance departures and variances, and be prepared to effectively advocate for the greatest sentence reduction possible.

Notes

1. *See* 21 U.S.C. § 841(b)(1)(A)(ii)(II) (2007) (imposing 10-year minimum sentence for distribution of 5 kilograms or more of cocaine); 21 U.S.C. § 841(a)(b) (2007) (doubling the mandatory minimum sentence for a second felony drug offense); 18 U.S.C. § 924(c) (2007) (imposing a consecutive 5 years in prison where a firearm was carried in relation to a drug trafficking offense).

2. *See, e.g., Griffin v. United States*, 330 F.3d 733, 738-39 (6th Cir. 2003) (attorney has duty to inform client of plea offer that was allegedly contingent upon client's cooperation with law enforcement); *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986) (criminal defense attorneys have general obligation to inform a client of any plea offer, and failure to do so constitutes ineffective assistance of counsel).

3. USSG § 5K1.1 (2006).

4. 18 U.S.C. § 3553(e) (2007).

5. 28 U.S.C. § 994(n) (2007).

6. USSG § 5K1.1.

7. *Id.*

8. *Melendez v. United States*, 518 U.S. 120, 124 (1996).

9. *Id.* at 126 n.5.

10. *Id.* at 129.

11. *See United States v. Wilson*, 896 F.2d 856, 859-860 (4th Cir. 1990).

12. *United States v. Head*, 178 F.3d 1205, 1207-08 (11th Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).

13. *Id.* at 1208.

14. *See* USSG § 1B1.1 (2006).

15. *See, e.g., Head*, 178 F.3d at 1207-1208.

16. *See, e.g., United States v. Auld*, 321 F.3d 861, 864-65 (9th Cir. 2002); *United States v. Stewart*, 306 F.3d 295, 331-32 (6th Cir. 2002); *United States v. Cordero*, 313 F.3d 161, 166 (3d Cir. 2002), *cert. denied*, 538 U.S. 990 (2003); *United States v. Li*, 206 F.3d 78, 89-90 (1st Cir. 2000); *United States v. Pillow*, 191 F.3d 403, 407 (4th Cir. 1999); *United States v. Schaffer*, 110 F.3d 530, 533-34 (8th Cir. 1997); *United States v. Hayes*, 5 F.3d 292, 295 (7th Cir. 1993).

17. *See, e.g., Schaffer*, 110 F.3d at 533-34; *United States v. Aponte*, 36 F.3d 1050, 1052 (11th Cir. 1994).

18. 18 U.S.C. § 3553(f) (emphasis added).

19. USSG § 5K1.1.

20. *See, e.g., Auld*, 321 F.3d at 865; *United States v. Ahlers*, 305 F.3d 54, 59 (1st Cir. 2002).

21. *See* USSG §5G1.1(a) ("[w]here the statutorily authorized sentence is less than the minimum guideline range, the statutorily authorized maximum sentence shall be the guideline range"); *United States v. Jones*, 233 F. Supp. 2d 1067, 1075 (E.D. Wisc. 2002) (holding statutory maximum is correct starting point for § 5K departure).

22. 199 Fed. Appx. 882, 883 (11th Cir. 2006) (unpublished opinion).

23. *Id.* at 883-84.

24. 2007 WL 1017359, at *2-3 (11th Cir., Apr. 4, 2007) (unpublished opinion).

25. *Id.* at *3.

26. *Id.*

27. *Wade v. United States*, 504 U.S. 181, 185 (1992). *See also, e.g., United States v. Nealy*, 232 F.3d 825, 831 (11th Cir. 2000) ("In *Wade*, the Supreme Court limited [the government's discretion in filing or not filing a § 5K motion] only to the extent that the government cannot exercise that power, or fail to exercise that power, for an unconstitutional motive.").

28. 504 U.S. at 185-86.

29. *Id.* at 185.

30. *See, e.g., United States v. Paramo*, 998 F.2d 1212, 1219-20 (3rd Cir. 1993) (defendant's exercise of constitutional right to jury trial is improper basis for government to withhold § 5K motion); *United States v. Easter*, 981 F.2d 1549, 1555 (10th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 2448

(1993); *see also United States v. Meyer*, 810 F.2d 1242, 1246-47 (D.C. Cir.) (prosecutor violates due process clause by taking any action with vindictive purpose of punishing defendant for exercising right to jury trial), *vacated*, 816 F.2d 695 (D.C. Cir.), *and reinstated sub nom. Bartlett on Behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

31. *Wade*, 504 U.S. at 186-187 (defense counsel merely explaining the extent of defendant's assistance and generally alleging improper motive is not a "substantial threshold showing" that "warrant[s] judicial enquiry").

32. *See id.* at 185. *See also United States v. Wilson*, 390 F.3d 1003, 1009-1010 (7th Cir. 2004) (finding government's decision not to file Rule 35(b) motion "irrational").

33. *United States v. Isaac*, 141 F.3d 477, 481 (3d Cir. 1998). *See also generally Santobello v. New York*, 404 U.S. 257 (1971) (plea agreement reached with government is enforceable against the government).

34. *See, e.g., Isaac*, 141 F.3d at 484 ("a district court has jurisdiction to determine whether the government's refusal to file a § 5K1.1 motion ... is attributable to bad faith and, accordingly, in violation of the plea agreement"); *United States v. Lee*, 989 F.2d 377, 380 (10th Cir. 1993) (adopting the analysis of *Rexach, infra*); *United States v. Rexach*, 896 F.2d 710, 714 (2nd Cir. 1990) (contract principles apply to plea agreements, but review of refusal to file § 5K1.1 motion is "limited to deciding whether the prosecutor has made its determination in good faith").

35. *See, e.g., United States v. Forney*, 9 F.3d 1492, 1501-02 (11th Cir. 1993) (where plea agreement grants government discretion to file § 5K1.1 motion, such decision is not reviewable for "good faith," but rather only subject to analysis pursuant to *Wade*); *United States v. Burrell*, 963 F.2d 976, 985 (7th Cir.) ("to make or withhold a § 5K1.1 motion is a form of prosecutorial discretion" that "is not reviewable for arbitrariness or bad faith"), *cert. denied*, 113 S. Ct. 357 (1992).

36. *See* USSG § 5K1.1(a) (authorizing a downward departure only "[u]pon motion of the government." *See also, e.g., United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (government motion still required for § 5K1.1 departure after *Booker*); *United States v. Robinson*, 404 F.3d 850, 862 (4th Cir. 2005) ("*Booker* did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence ... [e]xcept upon government motion").

37. *See, e.g., United States v. Rivera*, 170 Fed.Appx. 209, 211 (2nd Cir. 2006) (after *Booker*, government motion still required for downward departure based upon substantial assistance) (unpublished opinion); *Crawford*, 407 F.3d at 1182 (same).

38. For purposes of this article, a "variance" constitutes a sentence below the advisory Guidelines range that is based not upon any provision of the Guidelines, but rather upon other factors set forth at § 3553(a).

39. In *United States v. Doe*, 2007 WL 603058, at *3 (10th Cir., Feb. 28, 2007) (unpublished opinion), the "district court proceeded to inquire whether a variance from the guidelines range was appropriate in light of appellant's assistance to the government. At this point, a cell phone began ringing. ..." Thereafter, neither the district court nor defense counsel ever addressed the issue.

40. 443 F.3d 19, 35 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006).

41. *Id.* at 34.

42. 18 U.S.C. § 3553(a)(1).

43. *Fernandez*, 443 F.3d at 34.

44. 18 U.S.C. § 3553(a)(6).

45. *See* Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker, August 2006, at 18 (available at http://www.fd.org/pdf_lib/EvansStruggle.pdf) (citing *United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006), and *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006)).

46. U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 102, 141 (2004) (available at http://www.ussc.gov/15_year/15year.htm).

47. The majority of the circuits hold that, in determining the extent of a § 5K1.1 departure, the court may only consider additional factors if such factors are related to a defendant's substantial assistance. *See United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006) (citing *United States v. Pepper*, 412 F.3d 995, 998 (8th Cir. 2005); *United States v. Davis*, 407 F.3d 1269, 1271 (11th Cir. 2005); *United States v. Bullard*, 390 F.3d 413, 416 (6th Cir. 2004); *United States v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003); *United States v. Pearce*, 191 F.3d 488, 492 (4th Cir. 1999); *United States v. Thomas*, 11 F.3d 732, 737 (7th Cir. 1994); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1993); *United States v. Mariano*, 983 F.2d 1150, 1156 (1st Cir. 1993)). *See also In re Sealed Case*, 449 F.3d 118, 125 (D.C. Cir. 2006) (courts may *not* look at factors unrelated to the defendant's cooperation when deciding to increase a substantial assistance departure, but *may* look at factors unrelated to the defendant's cooperation, such as the defendant's "dangerousness," when deciding to *limit* the amount of departure).

48. *See, e.g., United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005) (discussing specific instances of defendant's substantial assistance in affirming sentence 75 percent below guideline range following government appeal that departure was too extensive).

49. *See, e.g., United States v. McVay*, 447 F.3d 1348, 1354 (11th Cir. 2006) (reversing extent of district court's departure as abuse of discretion and stating, "it is clear the Guidelines contemplate a substantial-assistance determination that is individualized to the defendant based on the relevant factors and more specific than a simple statement that the reduction is based on the defendant's substantial assistance.").

50. *See* www.urbandictionary.com (defining "snitches get stitches" as "an old piece of advice that still rings true today, indicating that somebody who snitches on somebody else shall reap the fit punishment.") (available at http://www.urbandictionary.com/define.php?term=snitches+get+stitches!).

51. *See, e.g.*, Master P and Snoop Dogg, *Snitches*, on MP Da Last Don (Priority Records 1998) ("Snitches snitches snitches, I got a slug for y'all muthafu—ing snitches").

52. *See* www.stopsnitchin.com.

53. 18 U.S.C. § 3553(f); USSG § 5C1.2.

54. 18 U.S.C. § 3553(f).

55. USSG § 5C1.2.

56. USSG § 2D1.1(b)(9).

57. 18 U.S.C. § 3553(f)(5);USSG § 5C1.2(a)(5).

58. *United States v. Guerra-Cabrera*, 477 F.3d 1021, 1025 (8th Cir. 2007) (to qualify for safety valve, a defendant "must disclose whatever information he has about his offense, and the district court can hold him accountable for revealing the identities and participation of others involved in the offense if it could reasonably be expected he would have such information.").

59. *See, e.g., United States v. Milkintas*, 470 F.3d 1339, 1345-1346 (11th Cir. 2006) (the defendant bears the burden of both going to the government with information and proving eligibility for safety valve relief).

60. *See, e.g., United States v. Feliz*, 453 F.3d 33, 36 (1st Cir. 2006) ("it [is] for the district judge to assess the credibility of the varying accounts").

61. USSG § 5C1.2, cmt. (n.8).

62. 18 U.S.C. § 3553(f)(5).

63. *See, e.g., United States v. Mejia-Pimental*, 477 F.3d 1100, 1104 (9th Cir. 2007)

("the [statute] provides no basis for distinguishing among defendants who make full disclosure immediately upon contact with the government, defendants who disclose piecemeal as the proceedings unfold, and defendants who wait for the statutory deadline by disclosing 'not later than' sentencing.") (quoting *United States v. Schreiber*, 191 F.3d 103, 106 (2nd Cir. 1999)).

64. *See United States v. Stephenson*, 452 F.3d 1173 (10th Cir. 2006) (affirming denial of safety valve relief where defendant submitted proffer letter containing some information and offering to provide more); *but see United States v. Brack*, 188 F.3d 748, 762-763 (7th Cir. 1999) (finding that defendant's proffer letter combined with his invitation to the government to interview him satisfied the fifth prong of the safety valve eligibility test).

65. *See* 18 U.S.C. § 3553(f)(5) ("[T]he fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement."); USSG § 5C1.2(a)(5) (same).

66. Fed. R. Crim. P. 35(b) (2007).

67. Fed. R. Crim. P. 35(b)(4).

68. Fed. R. Crim. P. 35(b).

69. Pursuant to Fed. R. Crim. P. 35(c), the clock begins to run at the "oral announcement of the sentence."

70. Fed. R. Crim. P. 35(b)(1)(A).

71. *Id.*

72. Fed. R. Crim. P. 35(b)(2)(A).

73. Fed. R. Crim. P. 35(b)(2)(B).

74. Fed. R. Crim. P. 35(b)(2)(C).

75. Fed. R. Crim. P. 35(b)(3).

76. *See United States v. McKnight*, 448 F.3d 237 (3d Cir. 2006); *United States v. Moran*, 325 F.3d 790 (6th Cir. 2003); *United States v. Coppedge*, 135 F.3d 598 (8th Cir. 1998) (citing *United States v. McDowell*, 117 F.3d 974 (7th Cir. 1997) (citing *United States v. McMillan*, 106 F.3d 322 (10th Cir. 1997); *United States v. Doe*, 93 F.3d 67 (2nd Cir. 1996); *United States v. Manella*, 86 F.3d 201 (11th Cir. 1996); *United States v. Arishi*, 54 F.3d 596 (9th Cir. 1995); *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1995). *But see United States v. McAndrews*, 12 F.3d 273, 277-278 (1st Cir. 1993).

77. *See id.*

78. *McAndrews*, 12 F.3d at 277-278.

79. *Id.*

80. *See, e.g., United States v. Pridgen*, 64 F.3d 147, 150 (4th Cir. 1995) (evidentiary hearing on Rule 35(b) motion only required where government did not make extent of a defendant's cooperation known to the district court in its motion; otherwise, whether to hold a hearing left to discretion of district court).

81. *See, e.g., United States v. Gangi*, 45 F.3d 28, 31-32 (2nd Cir. 1995) ("fairness requires that a defendant at least be allowed to comment on the government's [Rule 35(b)] motion"); *United States v. Rueda*, 19 F.3d 3, 3 (11th Cir. 1994) (abuse of discretion for district court to grant Rule 35(b) motion and reduce defendants' sentences by five weeks while denying request for evidentiary hearing regarding the same). The *Gangi* court correctly noted that "the potential for the government and the defendant to hold different views of the nature and impact of a defendant's assistance is no less likely after sentencing than before sentencing," and that denying an opportunity to be heard would "raise grave due process issues." 45 F.3d at 32.

82. *See United States v. Doe*, 870 F. Supp. 702 (E.D. Va. 1994).

83. *Id.* at 704-705.

84. *Id.* at 705.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 707-708 (expressing, as an example, concern over the possibility of allowing someone to pay a surrogate to provide substantial assistance and stating, "someone with the financial resources of Ross Perot or Donald Trump could provide the government with an abundance of assistance simply by opening his wallet. Indeed, to take the hypothetical to the extreme, small businesses might spring up to develop and provide substantial assistance on behalf of a defendant-client for a price.").

89. *Id.* at 708.

90. *Id.*

91. *See United States v. Prokos*, 441 F. Supp. 2d 887 (N.D. Ill. 2006) (granting the government's motion to credit defendant for third-party substantial assistance); *United States v. Scott*, 2005 WL 741910 (D. Minn. March 31, 2005) (unpublished opinion) (finding that it was inappropriate to grant the 35(b) motion "in this case" due to concerns that the third party was intimidated into cooperating by gang members); *United States v. Abercrombie*, 59 F. Supp. 2d 585 (S.D.W.Va. 1999) (confirming that defendants could benefit from surrogate assistance, but adopting a stricter test and applying USSG 5K2.0); *United States v. Bush*, 896 F. Supp. 424 (E.D. Pa. 1995) (applying *Doe* test but denying motion for reduced sentence due to defendant's limited role in the cooperation).

92. *Scott*, 2005 WL 741910 at *3.

93. *Id.*

94. *Id.* at *2.

95. *See United States v. Truman*, 304 F.3d 586 (6th Cir. 2002) (assistance in improving security at pharmaceutical laboratory); *see also, United States v. Stoffberg*, 782 F. Supp. 17 (cooperation with congressional committee).

96. *See Truman*, 304 F.3d 586.

97. *Id.* at 587.

98. *Id.* at 588.

99. *Id.*

100. *Id.*

101. *Id.* at 592.

About the Authors

Mark P. Rankin is a senior associate at Carlton Fields, where he is a member of the firm's White Collar Crime and Government Investigations Practice Group. He is also an adjunct professor at Stetson University College of Law in Gulfport, Fla. Prior to entering private practice, he was an assistant federal public defender.

Mark P. Rankin
Carlton Fields
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607
813-229-4313
Fax 813-229-4133
E-MAIL mrankin@carltonfields.com

Rachel R. May is an associate at Carlton Fields, where she is a member of the firm's White Collar Crime and Government Investigations Practice Group. Before joining the firm, she was an attorney in the Office of the Federal Public Defender for the Middle District of Florida.

Rachel R. May
Carlton Fields
4221 W. Boy Scout Blvd., Suite 1000
Tampa, FL 33607
813-229-4316
Fax 813-229-4133
E-MAIL rmay@carltonfields.com