

POAG Minutes
USSC – Washington, DC
July 25-26, 2017

I. Opening: 8:42 a.m.

Chairman Richard Bohlken called to order the summer 2017 meeting of the Probation Officers Advisory Group (POAG) at the Thurgood Marshall Building in Washington, DC.

Welcome to Gwendolyn Drews, 5th Circuit, from SD/TX, Houston office.

II. Attendees

Richard Bohlken (Chair – 10th Circuit); John Bendzunas (Vice Chair – 2nd Circuit); Sean Buckley (1st Circuit); Beth Neugass (3rd Circuit); Gwendolyn Drews (5th Circuit); Tracy Gearon (6th Circuit); Lori Baker (7th Circuit); Jill Bushaw (8th Circuit); Jaime Delgado (9th Circuit); Joshua Luria (11th Circuit); Renee Moses-Gregory (DC Circuit); Craig Penet (FPPOA); Carrie Kent (PPSO).

Also present: Raquel Wilson, Director of the Office of Education and Sentencing Practices (OESP)

Absent: Kristi Benfield (4th Circuit)

III. Welcome

Director Wilson welcomed the group and gave an overview of the USSC's Priorities. New member, Gwendolyn Drews, 5th Circuit, Houston office, was introduced.

IV. Review of Minutes from February 2017 Meeting

The Minutes were unanimously approved and adopted.

V. Succession Plans for POAG

John Bendzunas will be taking over as Chair and will lead the next meeting in February 2018; Jill Bushaw will be taking over as Vice Chair. Four members are coming to the end of their terms. Beth Neugass will be leaving in January 2018. This is Beth's last meeting. A new 3rd Circuit representative will be selected in January. Sean Buckley and Kristi Benfield's last meeting will be in February 2018. Richard Bohlken's last meeting will be in July 2018.

Director Wilson gave a summary on the selection process of new circuit representatives. Representatives will serve full five-year terms no matter what month they are selected. USSC sends letters to all Chiefs in open circuits explaining POAG's role and the potential representative's commitment to two meetings a year plus additional duties as needed. The letter notes expected qualifications for representatives. USSC generally gets applications from every district. It is possible that a new representative is selected from the same district as the representative leaving POAG. Director Wilson prepares information for Commissioners regarding applicants' qualifications, etc. including recommendations for selection. The written information sent to Commissioners becomes part of the record.

VI. Amending the POAG Charter

The current Charter indicates a representative must be assigned to the Presentence Division or be a Guideline Specialist. POAG members discussed whether Deputy Chiefs are too removed from the guidelines to be productive members of POAG, and what to do, if anything, with members who are promoted to Deputy Chiefs during their POAG terms. POAG members suggested the promoted member staying on for one additional year to allow for a smooth transition to a replacement member. Director Wilson suggested that when a member is promoted the Chair has an informal discussion with that member about staying on with POAG or not. This doesn't necessarily have to be changed formally in the Charter. POAG decided to mull it over and table this issue for the next meeting.

POAG members discussed changing the five-year term; Agreed to keep the term as is.

VII. Discussion on 2017 National Seminar in Baltimore and USPO Forum

Director Wilson told POAG that having the two conferences this year was an experiment. It was a lot of work, especially planning for the judges' training too. Next year will be one program, not two. The feedback on USPO Forum was very positive. Denver training will have same Forum. Those that were in Baltimore believed most were engaged in conversation and participants felt happy to have a voice. Members who were there explained to those not there how the session worked. (Three 20-minute blocks then HelpLine live). The consensus was to skip the HelpLine as it was going on continually, and simultaneously, in the lobby. POAG members discussed whether or not to move the Forum to an earlier session in the program. The majority want to keep it as is at the end of the conference.

Director Wilson discussed marketing early for next year's conference in San Antonio, which will be in May 2018. Contracted with Hyatt on the Riverwalk, which is a very big hotel that can accommodate 1,000+ attendees.

Possible topics for San Antonio: A member mentioned in Emerging Technologies sessions, a focus could be on computer monitoring/ban in sex offender cases and how to enunciate risks and explain to the court our justification for these special conditions. Speakers on Emerging Technologies in Baltimore were well received. Director Wilson

mentioned a possible session on synthetic drugs. Members discussed a possible session on supervision trends and current practices with relation to PCRA 2.0 (especially the violence segment and its scoring), Sex Offender Treatment monograph, STARR, etc. (“Bridge the Gap”).

VIII. Proposed Priorities for Amendment Cycle

(6) Bipartisan Budget Act

No comment by POAG.

(8) Criminal History—Prior State and Federal Convictions Resulting From Same Criminal Conduct; Offenses Committed Prior to Age 18; Treatment of Revocation Sentences; Possible Amendment to § 4A1.3, for Time Actually Served Rather than Length of Sentence Imposed

(A) POAG believes a defendant having prior federal and state convictions resulting from the same conduct happens only rarely and single sentence rules shouldn’t be changed for the rare case.

(B) POAG wrote about the treatment of juvenile offenses in its February 2017 paper. POAG members agree juvenile offenses should still be counted. Section 4A1.2(d)(1) led to much discussion on how a juvenile, convicted as an adult, should be accounted for in guidelines. (3-point convictions). Should the window be 10 years and not 15 from release to sentence date? It was noted that decisions to prosecute juveniles as adults vary by state and this can lead to disparity. A juvenile committing the same violent offense in one district can receive a juvenile adjudication with only a 5-year window, while a juvenile committing the same crime in another state can get the same sentence, prosecuted as an adult and therefore be subject to the 10 or 15-year window. We agree the USSC should continue to examine and study this issue.

(C) POAG members noted it is difficult sometimes to ascertain the reasons for revocation, i.e., new arrest or technical violation. POAG’s position is it does not matter whether a violation is for new criminal activity or technical violation(s) and there should be no change to the application of § 4A1.2(k).

(D) POAG’s position was unanimous that actual time served should not be a factor for criminal history scoring or in the realm of departure under § 4A1.3. Many reasons for a defendant receiving early release have nothing to do with a defendant’s behavior, it has more to do with jail overcrowding, etc. It also does not address the issue of recidivism which is the purpose of the criminal history guidelines. There is already broad room in § 4A1.3 for extreme examples where defense can make an “overstatement of criminal history” argument.

(1) & (9) Continuation of its Multi-Year Examination of the Overall Structure of the Guidelines post-Booker & Alternatives to Incarceration

POAG members discussed condensing the Sentencing Table. In its last paper, POAG focused on the “why” not the “how” of what a two-zone sentencing scheme would look like in the Guidelines Manual. Title 28 U.S.C. Section 994, sets for the “25% rule” regarding the span of the ranges. Director Wilson explained this rule. The alternatives to incarceration in Zones B & C are not mandated by statute, but if the alternatives to incarceration required by those Zones are removed, it essentially creates a divergence from the 25% rule. POAG members agreed that over six months of location monitoring is not effective, cost-efficient, or practical on many levels.

A POAG member noted that since Booker the Sentencing Table is not operating in the way it was intended since the inception of the guidelines. The courts are varying or departing in the majority of cases which reflects guidelines aren’t working as envisioned. POAG members discussed encouraging USSC to suggest to Congress it relooks at the 25% rule in an effort to loosen up the Sentencing Table options. Alternatively, POAG will suggest to USSC to create guideline departure language to reflect when probation as a sentence would be appropriate and/or encouraged. POAG hopes to encourage USSC to build in flexibility to a typically rigid system.

(5) First-Time Offenders

POAG believes this is an important issue and the USSC should continue its study on recidivism and how it relates to defendants with no convictions, defendants with no prior arrests, etc. POAG members had an extensive discussion on the definition of “first-offender” and whether it should just be limited to those with no contact whatsoever with law enforcement. POAG believes that may be too restrictive. Conversely, there was dialogue on a first offender being defined as one who has no prior convictions that would be scored based on the rules set forth in § 4A1.2(c)(1).

POAG members considered how any change in alternatives to incarceration, such as departure language in Chapter 5, may as a side effect capture how the guidelines treat first offenders.

(11) Acceptance of Responsibility & Denial of Relevant Conduct

Feedback from USSC Conference Probation Officers’ Forum seems to suggest that most defendants have Acceptance of Responsibility liberally applied. Discussion ensued on whether questioning or objecting to relevant conduct should preclude an adjustment for Acceptance of Responsibility. It varies by district how this is treated by the court. But the Forum responses indicate most courts around the country do not deny Acceptance of Responsibility when defendants argue relevant conduct. POAG members had an extensive conversation on whether Acceptance of Responsibility should be assessed based simply on a defendant’s plea of guilty with no later denial of the elements of the offense. The majority were against this as it could result in prolonged hearings on Specific Offense Characteristics. POAG agrees this should remain a priority.

POAG members discussed interplay between Acceptance of Responsibility and Obstruction of Justice. Courts will give both Obstruction of Justice and Acceptance of Responsibility when the obstruction occurs pre-plea, or even pre-arrest, if the defendant is aware of the investigation. Conversation ensued on § 3E1.1, App. Note 4, that says there may be “extraordinary” cases in which both adjustments for Obstruction of Justice and Acceptance of Responsibility may apply. A suggestion was made to add examples to § 3E1.1, App. Note 4, to illustrate when both adjustments may apply. Director Wilson suggested POAG possibly coming up with our own “examples” for USSC. POAG members agree that the timing of the obstruction is an important factor and should be referenced in § 3E1.1, application notes.

(4) “Safety Valve” and “Stacking” of Penalties Under 18 U.S.C. § 924(c)

As noted in POAG’s July 2016 paper, POAG welcomes the USSC’s consideration of expanding the “safety valve” and continued work with Congress on this issue. POAG members discussed the stacking of penalties under 18 U.S.C. § 924(c), and all agree that there is great disparity around the country, and even within district, with how the government charges and prosecutes these cases. POAG encourages USSC to continue its work with Congress on this subject.

(3) Crime of Violence/Career Offender

POAG has written on this several times. Members agree that the definition of “crime of violence” is still an issue. Defendants convicted of drug-related offenses are being treated more harshly as their predicates are easy to prove. Potential Career Offenders, whose predicates are seemingly “violent” offenses are falling through the cracks on technicalities in the crime of violence definition. Director Wilson reiterated that in the USSC Career Offender report, drug offenders who are found to be Career Offenders are in a different class than those defendants found to be Career Offenders based on violent offenses. POAG members debated whether or not we all agree that Career Offender should not be based solely on drug priors; however agree with USSC that if the instant offense is a violent offense, the two predicates can be two drug priors. POAG encourages the USSC to continue to focus on a definition of “crime of violence” that works in practice.

Comment on Issues Related to MDMA/Ecstasy and Methylone

In MDMA cases, where there is a stated ratio of one gram of MDMA equalling 500 gm of marijuana, there is still disparity as some courts do not agree with this conversion and use a lower number of grams. POAG encourages the USSC to explore what the ratio should be based on expert input. A separate publication by the USSC on how ratios were calculated would be a good resource for judges.

The majority of POAG members have rarely, if ever, seen a synthetic cathinone (such as Methylone) case in their districts, although members are cognizant of the fact that there will likely be an increase in these cases, and in other cases involving drugs, such as Fentanyl, where there is no stated conversion ratio listed at § 2D1.1. Members noted that calculating the guidelines in these cases is difficult, especially when the presentence writer may have little to no experience in this area. There are lengthy sentencing hearings to ascertain the base offense level in these cases, with the three-step process delineated at § 2D1.1, App. Note 6. POAG encourages USSC to simplify the method in which the weight of a substance is calculated.

POAG members discussed the dramatic differences between these synthetic drugs and marijuana. Coated plant material can have a variety of impacts on nervous system. Certain chemicals are in marijuana to mellow the effects of THC. Something different happens with synthetic cathinones and cannabinoids that does not happen with marijuana. Users frequently hallucinate with synthetics but not with marijuana. These cases are hard to investigate due to the untraceable transactions between buyer and seller. POAG recommends the USSC examines this level of sophistication as it relates to possible enhancements.

POAG encourages the USSC to further study and examine synthetic drugs and how they are captured by the guidelines.

IX. Other Business

POAG photo taken

Written Assignments:

Rough drafts relating to general Proposed Priorities due close of business Friday, July 28;
Rough draft on specific drug issues due close of business Thursday, August 3.