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## CHAPTER 19

### THE FEDERAL BUREAU OF PRISONS

by

Todd Bussert<sup>1</sup>  
Henry Martin<sup>2</sup>

#### 19.01 INTRODUCTION

In 2003, the federal Bureau of Prisons (Bureau or BOP) surpassed Texas to become the country's largest correctional system. As of 2009, approximately 200,000 prisoners are under its supervision.<sup>3</sup> That figure represents not only 8.6 percent of the entire U.S. prison/jail population but also a four-fold increase in the federal prison population since 1987, when the federal sentencing guidelines system was implemented. Because Sentencing Commission data shows that nearly 90 percent of all convicted defendants are sentenced to some term of imprisonment, the need to understand BOP policies and practices is essential to effective representation.

A full listing of the Bureau's institutions and offices, with contact information, can be found on the agency's website: <http://www.bop.gov>. On the home page is a map, divided between the various regions, which can be clicked to display the institutions and offices within the region. Clicking on the individual institutions brings up the home page for each. Also on the BOP website are program statements<sup>4</sup> (hereinafter "P.S."), operating memoranda, and the Inmate Locator, which is also accessible

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<sup>1</sup> The former Associate Director of Client Services for the National Center on Institutions and Alternatives (NCIA) and the former co-chair of NACDL's Corrections Committee, Todd Bussert ([tbussert@bussertlaw.com](mailto:tbussert@bussertlaw.com)) is a criminal defense attorney and CJA panel member in New Haven, Connecticut. Portions of this chapter are drawn from articles Mr. Bussert wrote for the *CHAMPION* (©NACDL 2002, 2005).

<sup>2</sup> Henry Martin is the Federal Defender for the Middle District of Tennessee. The authors welcome feedback to ensure that the information herein remains relevant and current.

<sup>3</sup> A February 2009 Pew Research Center study shows that 40 percent of the federal prison population is Latino, a direct result of an increase in immigration prosecutions. The BOP reports that 39.5 percent of federal prisoners are Black.

<sup>4</sup> Program statements applicable to the topics addressed herein are cited within section headings.

at (202) 307-3126.<sup>5</sup> This chapter addresses BOP policies and practices with the needs of defendants and defense counsel in mind.

## 19.02 ORGANIZATIONAL STRUCTURE

The Bureau's Director and Office of General Counsel are situated at the Central Office in Washington, D.C., as are the Health Services Division, the Correctional Programs Division and the Information, Policy and Public Affairs Division. Analogous sections/officials can be found within each of the regional offices: Western - Dublin, CA; North Central - Kansas City, KS; South Central - Dallas, TX; Southeast - Atlanta, GA; Mid Atlantic - Annapolis Junction, MD; and Northeast - Philadelphia, PA. Executive staff (i.e., the Director, Assistant Directors, and Regional Directors) meet quarterly to review major issues and determine agency policy. The regional offices supervise the agency's 180 facilities at 92 sites across the country plus 14 privately-managed secure facilities.<sup>6</sup> Regions are further subdivided by Community Corrections Offices (CCMs), which oversee contract community-based institutions (halfway houses) and prisoners on prerelease home confinement. Although no longer tasked with designation responsibilities, which are now handled from Texas (see below), CCM staff can be an accessible source of information on policies and procedures that may impact how and where a client is housed.

Federal prisons are identifiable by the security-level of the populations they house and the corresponding degrees of freedom afforded. Federal Prison Camps (FPCs or camps)<sup>7</sup> house minimum-security inmates, essentially nonviolent offenders with limited criminal histories and less than ten (10) years remaining to serve. Roughly 18 percent of federal prisoners reside in camps, and, of that population, approximately 70 percent are drug offenders.

Federal Correctional Institutions (FCIs) are divided into two categories: Low and Medium, connoting the respective security levels of their populations. Barbed-wire perimeter fencing, higher staff-to-inmate ratios, and more restrictive movement characterize life at an FCI. About 40 percent of federal prisoners are classified Low-security, while approximately 27 percent are Medium-security. Nearly 80 percent of Medium-security prisoners have a history of violence.

The balance of the federal prison population is divided between High-security institutions (a.k.a., United States Penitentiaries (USPs)) and administrative institutions. Nearly 90 percent of the High-security population has a history of violence, more than 60 percent have been sanctioned for violating prison rules, and 14 percent have been convicted of murder, aggravated assault or kidnapping. Numerous facilities fall under the "administrative" umbrella. For instance, ADX Florence, Colorado, a Supermax, is administrative. So too are Medical Referral Centers (MRCs), the Federal Transfer Center

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<sup>5</sup> To use the web version of the Inmate Locator, one needs the inmate's full name or his register, DCDC, FBI, *or* INS Number. The result will provide the inmate's age, race, sex, projected release date, and location, with facility phone number. The locator service does not provide the current location of inmates in transit.

<sup>6</sup> Recent efforts to lower administrative costs have resulted in construction centered on Federal Correctional Complex (FCC) sites that house facilities of several security levels. Also, 37 BOP institutions are over 50 years old.

<sup>7</sup> Prison camps are often referred to as "Club Fed" or, in the case of Martha Stewart's placement at FPC Alderson (WV), "Camp Cupcake." This misnomer ignores that these institutions provide security commensurate with the negligible risk of violence or escape posed by the populations they house.

(FTC) in Oklahoma City, and federal detention centers in major metropolitan areas. Finally, the BOP contracts with state correctional systems and private providers, such as for community-based facilities (i.e., Residential Reentry Centers (RRCs or halfway houses)) and for prisons to house non-U.S. citizens subject to removal. Contract facilities house approximately 17 percent of the total BOP population.

The federal prison population has increased steadily since the late 1980s, and the BOP has operated consistently over rated capacity (i.e., institutions house more than the maximum number prisoners they are designed to handle). Estimates place BOP as operating at around 42 percent over rated capacity system-wide in 2009, an increase from historic numbers (around 30%-35%). Overcrowding is thus effectively unavoidable no matter where your client is housed, a situation that presents significant safety concerns. In its FY 2009 budget, the Bureau acknowledges that “[c]rowding is a very real danger in prisons -- causing frustration and anger for inmates whose access to basic necessities like toilets, showers, and meals becomes very limited and who face hours of idleness resulting from a limited availability of productive work and program opportunities.” Additionally, the budget references an unnamed BOP study which “indicated that a one percentage point increase in a Federal prison’s crowding (inmate population as a percent of the prison’s rated capacity) corresponds with an increase in the prison’s annual serious assault rate by 4.09 assaults per 5,000 inmates.” In appropriate circumstances, these points may merit reference at sentencing. So, too, might the continuing rise in per capita costs of incarceration, which are \$72.44 daily for all security levels in FY 2009 -- a three percent increase from FY 2008 that annualizes at \$26,440 per prisoner.

### **19.03 DESIGNATION AND CLASSIFICATION (P.S. 5100.08)**

Congress directs the BOP to designate “the place of the prisoner’s imprisonment” and authorizes the Bureau to select “any available penal or correctional facility that meets [agency-established] minimum standards for health and habitability.” 18 U.S.C. § 3621(b). The enabling statute specifically requires that in placing any prisoner, the BOP account for facility resources, the nature and circumstances of the offense, each prisoner’s history and characteristics, statements from the court, and pertinent Sentencing Commission policy statements. *Id.*; see *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005). Since the 1970s, the BOP has adhered to a formal designation process driven by a scored security classification system. Designation determinations are made at a central location by staff relying on information contained in the presentence investigation report (PSI or PSR) and the judgment order.

#### **19.03.01 Importance of Presentence Report**

To the BOP, a client’s PSI is quite literally “the Bible”. It impacts every aspect of time in federal custody. See *United States v. Brown*, 715 F.2d 387, 389 n.2 (5th Cir. 1983). Because information placed in the PSI is seldom removed, counsel must work to prevent the inclusion of potentially damaging information in the first instance and review carefully the draft PSI not only for errors and omissions that might adversely impact sentencing but also for information, or the lack thereof, that might serve to prejudice a client once incarcerated. Counsel should request the wholesale removal of objectionable references -- not merely a notation in PSI’s addendum -- with citation to BOP policy that is the basis for concern. Should Probation refuse revision, ask the Court to order deletion/modification before the PSI is forwarded to the BOP. See FED. R. CRIM. P. 32(i)(3); *Id.*-Advisory Committee Notes re: 2002 Amendments (counsel may wish to point out matters in PSI that impact designation). Moreover, counsel should strive to provide Probation with documentation pertinent to a client’s incarceration, such as

medical records or evaluations related to an anticipated accommodation or programming need, and ask that it be appended to the report.

### 19.03.02 Designation and Sentence Computation Center

Primary responsibility for prisoner placement rests with officials at the Designation and Sentence Computation Center (DSCC) in Texas [Grand Prairie Office Complex U.S. Armed Forces Reserve Complex 346 Marine Forces Drive Grand Prairie, Texas 75051; (972) 352-4400; BOP-CPD/DSCC@bop.gov]. The DSCC consists of 17 designation teams comprised of staff who compute sentences and custody classification scores for inmates. These teams are organized by the federal district in which the inmate is sentenced.<sup>8</sup>

<u>Alpha</u> District of Columbia D.C. Superior Court  <u>Bravo</u> Maryland Tennessee (all districts) Texas-Eastern West Virginia (all districts)  <u>Charlie</u> Arkansas (all districts) Kentucky (all districts) North Carolina (all districts) Oklahoma (all districts)  <u>Delta</u> Delaware Idaho Maine New Hampshire New York (all districts) Vermont  <u>Echo</u> New Jersey North Dakota Pennsylvania (all districts) South Carolina	<u>Foxtrot</u> Connecticut Ohio (all districts) Rhode Island South Dakota Virginia (all districts)  <u>India</u> Texas-Southern  <u>Juliet</u> Texas-Western  <u>Kilo</u> Georgia (all districts) Louisiana (all districts) Mississippi (all districts) Texas-Northern  <u>Lima</u> Florida (all districts) Guam Northern Marianna Islands Virgin Islands  <u>November</u> Alabama (all districts) California-Central New Mexico  <u>Oscar</u> Arizona	<u>Papa</u> California-Eastern & Southern  <u>Quebec</u> Massachusetts Montana Nevada Oregon Utah Washington (all districts)  <u>Romeo</u> Hawaii Illinois (all districts) Michigan (all districts) Puerto Rico  <u>Sierra</u> California-Northern Iowa (all districts) Kansas Nebraska Wisconsin (all districts) Wyoming  <u>Tango</u> Alaska Colorado Indiana (all districts) Minnesota Missouri (all districts)
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A team of seven senior designators (Hotel Team) make the actual designations.<sup>9</sup> The DSCC is also responsible for sentence computation. The designation of individuals presenting with serious or chronic medical or mental health issues are referred to the Central Office's Medical Designator (*see infra* 19.03.04).

<sup>8</sup> These DSCC teams are up-to-date as of the time of this printing. They are, of course, subject to change at any time by the BOP.

<sup>9</sup> Senior designators also handle disciplinary transfers; designators handle routine transfers.

### 19.03.03 Security and Custody Classification Level<sup>10</sup>

The placement process begins when the U.S. Marshal's Service (USM) receives a copy of the judgment order from the Clerk's Office and makes a formal request for designation. Before the DSCC will act, it must receive, via the e-Designate (electronic) system, the judgment, including the Statement of Reasons, the PSI and the Marshal's Individual Custody and Detention Report. The Statement of Reasons section is the appropriate place for the court to record findings regarded disputed matters. *See* FED. R. CRIM. P. 32(c)(1).

To ensure prompt designation, counsel may follow up with the Marshal's Service to determine whether it received necessary materials. Counsel can also contact DSCC staff directly to advocate for clients or present information that might otherwise not be considered. Useful materials to share include things that reflect the court's consideration of issues that bear on placement, programming or time credits, such as responses to PSI objections or its position regarding conditions of confinement (e.g., sentencing transcript excerpts). Also helpful are physicians' letters or records addressing medical or mental health needs not captured in the PSI. The best way to ensure that correspondence or materials reach appropriate team personnel is to have the court direct Probation to forward them via e-Designate. Records to be placed in a client's "central file," the physical file that follows the inmate to each designated institution, should be sent to the warden at the client's designated (parent) institution -- not to the DSCC.

DSCC designation staff determines an individual's security level according to an Inmate Load and Security Designation Form in the BOP's computerized prisoner management and tracking system (SENTRY), which produces a score that corresponds to a classification level. The DSCC also considers proximity to a prisoner's legal residence (within 500 miles), population levels at prospective institutions, judicial recommendations, and placement of other inmates with adverse interests (separates). Once loaded into SENTRY, the matter is assigned randomly to a senior designator, who selects the place of imprisonment and notifies the Marshal's Office and the facility but not the prisoner or counsel.

The Marshal's Service or Probation Office (varies by district) typically notify individuals allowed to self-surrender where to report. Sentencing courts must set a specific reporting date and time. Counsel with clients permitted to self-surrender should note that recent data shows designation takes approximately four-to-six weeks, on average, from the date of sentencing. To the extent that designation is slow in coming or issues arise post-judgment, such as a significant change in health or a family emergency, the sentencing court alone has the power to authorize an extension of time within which to surrender; the BOP has no legal authority to modify surrender dates. If a client is unable to report to the designated institution within the time prescribed and the court has not granted an extension, it is advisable to surrender to the nearest U.S. Marshal's Office. Although Marshal's transport carries its own unique problems (i.e., diesel therapy), better that than risk being declared a fugitive.

Program Statement 5100.08, the *Security Designation and Custody Classification Manual*, establishes BOP policy regarding prisoner classification. The *Manual* is an assessment tool that assigns numerical values to ostensibly objective criteria measuring an individual's risk to public safety and institutional security. A higher score, on a scale of zero to 45 points, signifies a higher classification

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<sup>10</sup> Portions of this section are taken from attorney Peter Goldberger's (Ardmore, PA) contribution to S. Sady and L. Deffebach, *Update on BOP Issues Affecting Clients Before and After Sentencing* (Feb. 2007). *See* Note 25 *infra*.

level and a more restrictive institution [for males, ordinarily 0-11 = minimum, 12-15 = low, 16-23 = medium, 24+ = high; for females, 0-15 = minimum, 16-30 = low, and 31+ = high]. The following are the key security point factors:

- *Age:* A person age 24 or younger receives eight points; 25-35 year-olds receive four points, 36-54 year-olds receive two points; and those 55 or older receive no points.
- *Education:* Two points are assigned to those without a *verified* (in the PSI) high school diploma or GED certificate. One point is assigned to those enrolled in a GED program, and zero if a diploma or certificate has been verified.
- *Drug Use:* One point for abuse of drugs or alcohol in the last five years. Although the issue arises infrequently, prudence suggests assessing the impact that this point may have on classification level relative to a client's ability and interest in participating in the 500-hour drug program (*infra*).
- *Detainers:* A PSI's mention of detainers, pending charges or outstanding warrants results in points being assigned based on their respective severity. Points are not ordinarily applied for immigration detainers, but a public safety factor (*see infra*) will result in at least low-security placement. Detainers also serve as program disqualifiers, such as for Residential Drug Abuse Treatment Program (RDAP) and halfway house. Consider resolving such matters before sentencing, but be aware of the impact new convictions may have on the criminal history score.
- *Criminal History:* Criminal history is measured using the Sentencing Guidelines' criminal history score, as determined by the sentencing court. Accordingly, the criminal history section merits even closer scrutiny, with errors corrected before the PSI is sent to the BOP. BOP uses the original criminal history score notwithstanding a judicial finding that it is over-representative. The best course in such instances is for the Judgment and Commitment Order (J&C) to reflect the court's determination, with a separate judicial recommendation that BOP consider a lesser score.
- *Current Offense Severity:* Appendix A to the *Manual* contains the Offense Severity Scale, which ranges from Greatest to Lowest. Severity points are based not on the offense of conviction but on the "most severe documented instant offense behavior." (For example, if the conviction is for simple assault but the PSI's offense conduct section reflects an aggravated assault, BOP scores the more serious conduct.).
- *Pre-Commitment Status:* Three points are deducted for voluntary surrender, either to the institution or to the USM (other than on the day of sentencing).
- *Prior Violence:* One to seven points, based on seriousness and recency, are applied for prior violent acts where there has been a finding of guilt (looking at the actual behavior as set forth in the PSI). "Minor" violence is aggressive or intimidating but unlikely to cause serious bodily harm or death, while "serious" violence is likely to cause serious bodily harm or death.

- *Escapes*: One to three points are applied for prior escapes from custody, including halfway house walkaways, based on seriousness and recency. Although points are not assigned for absconding, eluding arrest and failure to appear, such actions may result in application of a “greater security” management variable (*see infra*).

By following the application directions set forth in Chapter 4 of the *Manual*, counsel can approximate a client’s security point total. Some factors are straightforward (e.g., age, education level). Others involve a degree of subjectivity that require a conservative, educated guess. Beyond providing a sense of the institutional security-level for which a client will qualify, engaging in the scoring process prior to sentencing alerts counsel to problematic issues and needed advocacy. For instance, whether a drug offender meets the Bureau’s definition of “Organizer/Leader,” *see* P.S. 5100.08, App. A, p. 5, can mean the difference between the offense of conviction being labeled “high” as opposed to “greatest” severity, the latter resulting in two more points and application of a Public Safety Factor (see below). Inasmuch as designation personnel view defendants as the person portrayed in the PSI, the best, if not only, opportunity a client may have to resolve a role-related dispute, or similar point of factual contention, is during the sentencing phase. A particular danger is a PSI’s failure to distinguish clearly between “instant offense behavior” and other conduct, namely co-conspirators’ conduct, in which a client was not implicated. Whenever possible, have the Court direct Probation to “clean up” or at least clarify the PSI in these or similar regards before it is transmitted to BOP. Likewise, ensure that the J&C and Statement of Reasons reflect favorable rulings on guidelines enhancement issues (e.g., rejection of proposed two-point gun bump, lesser quantity attribution).

Beyond a prisoner’s scored security level, DSCC staff consider application of overriding factors: Public Safety Factors (PSFs) and Management Variables. P.S. 5100.08, Ch. 5. PSFs are intended to address information suggesting a need for greater precautions in classification. PSFs are not confined to evidence of convictions; the BOP often relies on the PSI’s description of current and prior offense behavior. It is thus critical that offending or incorrect material be stricken from a PSI even though it does not affect sentencing. There are 11 PSFs, application of any of which bars placement at a prison camp:

- *Disruptive group* (males only): Essentially gang affiliation (e.g., Jamaican Mafia, Crips, Bloods, Latin Kings, MI6, etc.). Counsel should ensure that any gang or organized crime affiliation listed in the PSI is substantiated and request removal of reference to prior affiliations. Results in High placement, unless waived.
- *Greatest severity offense* (males only): Refers to offense underlying present term of confinement and, as set forth in Appendix A to the *Manual*, includes serious assaults, organizing/ownership in large-scale drug crimes, espionage, extortion through violent means, homicide, kidnapping, robbery, violent sexual offenses, and firearms distribution. Results in at least Low placement.
- *Sex offender*: Assigned when there is any evidence of sexual misconduct in an inmate’s background, including prior conduct and notwithstanding the offense of conviction. If the PSI indicates questionable or borderline behavior, seek a finding it was not “aggressive or abusive.” Results in at least Low placement and triggers the sex offender notification requirement.



- *Threat to government official*: Results in at least a Low placement.
- *Deportable alien*: Applies to all non-citizens absent a finding by Immigration and Customs Enforcement or the Executive Office for Immigration Review that removal is not warranted. Results in at least Low placement.
- *Sentence length* (males only): Looks at projected release date (sentence length less anticipated good time credit). Those with more than ten years remaining to serve must be housed in at least Low; more than 20 years, Medium; and more than 30 years, High -- all unless waived.
- *Violent behavior* (females only): Two convictions for, or findings of, serious violence within the last five years. Results in placement at Carswell (TX) Administrative Unit, unless waived.
- *Serious escape*: For incident within preceding ten years. Unless waived, results in placement of females at Carswell Administrative Unit, and males in at least Medium.
- *Prison disturbance*: Involvement in a serious incident of violence within an institution that produces a finding (in conjunction with a period of simultaneous institution disruptions) of engaging, encouraging or acting in furtherance of a riot. Results in High placement for males, and placement at Carswell Administrative Unit for females.
- *Juvenile violence* (juveniles only): Applies if history of even one serious violent conviction.
- *Serious telephone abuse*: Where, as reflected in the PSI, inmate used or attempted to use a telephone to “further criminal activities or promote illicit organizations,” *but only if*: (i) “leader/organizer” or “primary motivator”; *or* (ii) used phone to communicate threats of death or bodily injury; *or* (iii) used phone to conduct or attempt significant fraudulent activity while incarcerated; *or* (iv) leader/organizer of significant fraudulent activity in the community; *or* (v) used phone to arrange introduction of drugs while incarcerated. Also applies if monitoring of inmate calls is needed in response to “significant concern” communicated by federal law enforcement, if an inmate has telephone disciplinary violation, or if the BOP “has reasonable suspicion and/or documented intelligence supporting telephone abuse.” In addition to affecting placement, this PSF may cause reduction in monthly telephone minute allotment.

Management Variables are grounded in the “professional judgment of bureau staff” and include more nebulous considerations, like population management, the need for medical or psychiatric treatment, circumstances wherein an inmate poses either a greater or lesser security risk than his assigned security level denotes, and judicial recommendations. The last of these is the most frequently encountered by defense counsel.

The BOP receives judicial recommendations in approximately 50 percent of cases. It works to comply with recommendations so long as they are consistent with agency policy. *See* P.S. 5100.08, Ch. 5, p.3. It reports honoring approximately 62 percent of recommendations completely and 11 percent

partially. When requesting placement at a particular institution or class of institution, opportunities for program participation, less restrictive pre-release status while in halfway houses, waiver of fine repayment while in custody, or any other consideration the facts indicate would be appropriate, counsel should emphasize the court's role in the designation process as well as the BOP's willingness to abide by recommendations. See 18 U.S.C. § 3621(b)(4). If nothing else, a judicial recommendation indicates the court's perspective as to the appropriate handling of a defendant and to the applicability of security enhancements. Recommendations for the 500-hour drug program are unnecessary and may prove detrimental. In terms of placement at a given facility, the more specific (e.g., name of institution(s), rationale) the better; recommendations like "close to home" can have unintended, adverse consequences. For those clients who might be appropriate for direct designation to a halfway house (e.g., minimum-security, less than 13 months remaining to serve), the BOP *requires* a judicial recommendation.<sup>11</sup>

An inmate's security classification and designation will be reviewed periodically throughout the term of incarceration for continued appropriateness. Requests for waiver of either a PSF or a Management Variable can be made to the DSCC Administrator. Note that where efforts to correct factual errors fail during the sentencing phase or upon referral to the DSCC, a prisoner can pursue relief through the administrative remedy process and, ultimately, review by the district court in the district in which he is housed. Prisoners maintain certain due process rights in the designation context, as well as a Privacy Act right to insist that fact-bound determinations not be based upon erroneous information subject to verification. See *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Sellers v. Bureau of Prisons*, 959 F.2d 307 (D.C. Cir. 1992); see also *Perry v. Bureau of Prisons*, 371 F.3d 1304 (11th Cir. 2004).

#### 19.03.04 Medical Classification Level

Defense counsel often (justifiably) highlight a client's poor health or mental state as a form of sentencing mitigation, and, just as often, this information finds its way into the presentence report. The BOP purports to treat most every medical condition and to provide a level of care commensurate with prevailing community standards. See *United States v. Cutler*, 520 F.3d 136, 172-75 (2d Cir. 2008). *But see* GAO, BUREAU OF PRISONS HEALTH CARE: INMATES' ACCESS TO HEALTH CARE IS LIMITED BY LACK OF CLINICAL STAFF (1994); *cf.* BUR. JUST. STAT., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (Sept. 2006) (by midyear 2005, 45 percent of federal inmates had mental health problems). Although some courts do question the BOP's ability to provide appropriate treatment, see, e.g., *United States v. Pineyro*, 372 F. Supp. 2d 133 (D. Mass. 2005), most impose sentence fully expecting BOP will meet individual prisoner medical and/or mental health needs.

The BOP seeks to identify and manage medical needs by assigning CARE Level classifications to all inmates and federal facilities that are designed to match prisoners with institutional and community resources. Prisoners fall within one of four categories:

- Level 1-under 70 and healthy generally but may have limited needs that can be managed by medication and clinical evaluations every six months (e.g., mild asthma, diet-controlled diabetes, stable HIV patients not needing medication);

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<sup>11</sup> The BOP has abandoned restrictions on direct halfway house designations instituted in early 2003. See Joyce K. Conley and Kathleen M. Kenney, *Review of Inmates for Initial Designation to Residential Reentry Centers*, 1 (Feb. 2, 2009).

- Level 2-stable outpatients requiring quarterly evaluations who can be managed in chronic care clinics but not needing regular enhanced resources (e.g., medication-controlled diabetics, epilepsy, emphysema);
- Level 3-fragile outpatients who require frequent clinical contact and possible assistance with daily living activities (e.g., cancer in remission less than one year, advanced HIV, severe mental illness in remission through medication); and
- Level 4-inpatients with severely impaired functioning needing 24-hour nursing care (e.g., cancer in treatment, dialysis, quadriplegia, stroke/head injury, major surgery, acute psychiatric illness).

As for the corresponding facility considerations: Level 1-located approximately one hour or more from community medical centers (i.e., remote); Level 2-no special capabilities beyond those that Health Services staff ordinarily provide but within about one hour of major regional treatment centers, therein permitting more immediate attention to medical emergencies; Level 3-adjacent to Level 4 institutions; Level 4-Medical Referral Centers.<sup>12</sup>

Care Level 1

USP Atwater  
 FCI Bennettsville  
 USP Big Sandy  
 FCI Herlong  
 USP Lee  
 FCI Manchester  
 FCI McKean  
 FCI Oxford  
 USP Pollock  
 FCI Ray Brook  
 FCI Safford  
 FCI Sandstone  
 FCI Three Rivers  
 FCI Williamsburg  
 FCC Yazoo City

Care Level 2

All BOP facilities that are not Care Level 1 or 3, or Medical Referral Centers.

Care Level 3

FCC Butner (not FMC)  
 FCI Forth Worth-Low  
 FCI Terminal Island-Low  
 USP Terre Haute-  
 Minimum, Medium and  
 High  
 USP Tucson-High

Care Level 4

FMC Butner  
 FMC Carswell  
 FMC Devens  
 FMC Fort Worth  
 FMC Lexington  
 FMC Rochester  
 USMCFP Springfield

When a newly sentenced prisoner's PSR presents an apparent need for medical or mental health accommodation, that is, the individual scores out as a Care Level 3 or 4, the DSCC refers the designation to the Bureau's Medical Designator. Uncertainty concerning the level of requisite care may result in initial designation to a Medical Referral Center for closer assessment before a final designation is made. For a client expecting a camp or FCI-Low placement, such news may be unwelcome and a cause for anxiety. Most judges do not realize that a medical referral can mean a heightened security classification, as the MRCs and FMCs are Low-Medium, not Minimum.

<sup>12</sup> Anecdotal evidence suggests that BOP is designating those with persistent mental health issues (e.g., anxiety) to at least low security institutions based on a supposed need for closer monitoring and the higher staff-to-inmate ratios at FCIs.

### **19.03.05 Sentence Computation**

Inmate sentence computation issues -- credit for time served and time remaining to serve -- are made by staff at the DSCC. The relevant data is captured on a Sentence Monitoring Computation Data form, which inmates can obtain from staff. The form is typically reviewed during intake and then during program reviews. Based on the BOP's time credit matrix, which the Courts of Appeals have uniformly upheld, most federal prisoners can expect to serve 87.14 percent of the sentence imposed, as opposed to the commonly-assumed eighty-five percent. *See Sash v. Zenk*, 428 F.3d 132, 136-37 (2d Cir. 2005) (collecting cases).

Inmates frequently complain that they are not receiving credit due for time served or based on concurrent state sentences. It is a complex, fact-specific area for which bright-line guidance is difficult. That said, two common scenarios counsel confront provide considerations that should be weighed.

#### **19.03.05.01 Client Is In State Custody on Pending Charges at Time of Federal Arrest**

This highlights the concept of "primary jurisdiction." Clients who are brought into custody by a given jurisdiction remain under that jurisdiction's primary custody and control until formally discharged (e.g., released on bond, dismissal of case, completion of sentence, etc.). Being produced in another jurisdiction via writ does not extinguish the original jurisdiction's primacy; the defendant is merely "on loan."

A defendant who is found guilty and sentenced first in state court must complete whatever sentence is imposed before the BOP will assume custody. Although a state conviction/sentence can affect adversely a client's criminal history score, the federal court is able to reduce a defendant's federal sentence to reflect time served in state custody (U.S.S.G. § 5G1.3 and 18 U.S.C. § 3553(a)) as well as to order the federal sentence to run concurrent to undischarged portion of the state sentence. Where the federal court directs that the federal sentence run concurrent to another undischarged term of imprisonment, the BOP treats it as an order that the state prison be designated as the individual's place of federal imprisonment (until such time as the state sentence is completed and the person is handed over to the BOP). *See* P.S. 5160.05 (describing this policy and offering express language the federal sentencing court should use to make clear its intent that federal sentence run concurrently to undischarged state sentence). Absent the federal court expressly ordering the federal sentence to run concurrently, the BOP will treat the federal sentence as running consecutive to any undischarged term of imprisonment since the BOP does not readily afford "double credit" for time served on another sentence. *See* 18 U.S.C. § 3585(b).

Resolution in state court first is not desirable to those looking to serve their time in federal custody. Because it is the rare case where a state is willing to allow a pre-trial detainee to discharge to a federal warrant or detainer, counsel might look to determine whether the state is amenable to dropping its case or agreeing to a non-prison sentence should the federal sentence be deemed sufficient punishment. In such instances, the client would be sentenced first in federal court and then, once the state case resolves, discharged to the outstanding federal detainer. To ensure that the client receive full consideration from the BOP for time served in state custody, it is essential that counsel obtain certified, written verification that none of the time served in state custody was credited toward another sentence (e.g., certified disposition from the state court that the case was dropped or the sentence imposed carried

no term of imprisonment, even time served) and forward that verification to BOP Inmate Systems Management officials at the DSCC.

Where a client is sentenced first in federal court and then in state court, there is a strong likelihood that he will serve the sentences consecutively. Even where the federal court orders that the federal sentence run concurrently, the BOP is reticent to accept the idea of federal courts' ability to run a federal sentence concurrent to an as yet imposed state sentence.

#### **19.03.05.02 Client is in Federal Custody on Pending Charges When Charged in the State**

From a federal perspective, this is usually seen as the most desirous scenario because "primary jurisdiction" means that the individual is in federal custody and that the federal sentence can and should control. Under this scenario, it is often best to have the federal sentence resolve first so as to avoid any confusion about whether the state Department of Correction has credited any time served in federal custody against a state sentence. Note, however, that the BOP shall treat any state matter -- regardless of whether the client is convicted and sentenced, or the charges remain pending -- as producing a detainer even if none is lodged. This impacts a client's security level (at least Low) and pre-release placement (halfway house) eligibility. In jurisdictions requiring that a prisoner must appear in front of the paroling authority before a sentence is terminated, it is likely that the client will serve his entire federal sentence at an FCI (or higher) and then be returned to the state to tend to outstanding matters.

Again, these issues are complicated and, frankly, not capable of full and fair exposition here. A memorandum from BOP's Northeast Regional Counsel, Henry Sadowski, Esq. -- *Interaction of Federal and State Sentences*, available at <http://www.bop.gov/news/ifss.pdf> -- is an excellent resource that captures *the Bureau's* approach. Counsel should be wary of making any assurances to clients about credit for time served. Additionally, to the extent that time credit considerations are fundamental to the rationale for the sentence, counsel should incorporate them formally into the record in order to provide a possible basis for relief via 28 U.S.C. § 2255 should it later be determined the Court misapprehended material factors when imposing sentence.

### **19.04 INSTITUTIONAL LIFE**

The best advice counsel can offer the client facing his first term of imprisonment is, "You will learn more in the first few weeks than I or any guide book can tell you." Thus, while this section touches upon most frequently asked questions, one of the best ways to assist clients is to put them in contact with former federal prisoners, particularly those who served time at a client's designated institution. This can be accomplished by inquiring on criminal defense listserves. Former clients are surprisingly receptive to sharing their experiences.

#### **19.04.01 Receiving and Orientation**

Intake practices vary by institution. Generally, new prisoners are accepted weekdays during business hours (9:00 a.m. until 4:00 p.m.). Those approved for voluntary surrender should arrive no later than 10:00 a.m. to help avoid processing delays or other unexpected problems, such as placement overnight in the Special Housing Unit (SHU or the hole).

Receiving and Discharge (R&D) staff conduct the first part of the intake. It is akin to a police booking and can last anywhere from 30 minutes to three hours. Inmates are strip-searched, photographed and fingerprinted before submitting to social, medical, and psychological evaluations. The social evaluation entails a brief social history/security screening meant to ensure each prisoner is an appropriate candidate for the institution (not requiring additional supervision or unavailable services). The medical evaluation includes a physical exam, a screening for tuberculosis and other contagious diseases, and the taking of history of current and prior conditions. The psychological evaluation assesses mental status and suicide risk.

It is during R&D that unauthorized personal property is taken and packaged for return to the prisoner's home address (at the Bureau's expense). Medication in an individual's possession not prescribed by the BOP is prohibited and will be confiscated and destroyed. Items that one can bring ordinarily include prescription eyeglasses, a plain wedding band (no stones), a religious medallion, and a money order. Clients should call the designated institution before reporting to confirm what the facility allows.

At the completion of R&D, institutional clothing is presented and, assuming a bed is available, a housing unit assigned. Lack of bed space results in SHU placement until population pressures ease. Admission and Orientation (A&O) usually occurs within four-to-five days of R&D. It entails meeting with the Unit Team that will supervise the inmate. Prisoners are also introduced to the heads of the various departments, review the institution's policies and standard operating procedure contained in a handbook that each inmate should receive, and assigned a job.

#### **19.04.02 Staff**

The BOP has more than 35,000 full-time employees. Over 60 percent are white (non-Hispanic) and over 70 percent are male. On the whole, they tend to be conservative-minded and bureaucratic. An array of counselors, correctional officers, medical personnel, and administrators staff each institution. Because one of the Bureau's stated goals is for staff to serve as "law-abiding role models," they are compelled to interact regularly with prisoner populations. Staff supervise all facets of prisoner life: living, dining, visiting, etc. They also conduct regularly scheduled counts to monitor prisoner whereabouts (five on weekdays, six on weekends).

An inmate's primary interaction is with the Unit Team located in his housing unit: unit officer, counselor, case manager, and unit manager. Concerns, requests, grievances, etc. are addressed to the Team, often in writing (a.k.a., a cop-out), and can be appealed to the warden. Wardens, who are vested with tremendous discretion in their respective institutions' daily operations, invariably uphold team decisions, therein restricting opportunity for meaningful review. Additional appeals can be made to the regional and central offices, with exhaustion of the administrative remedy process positioning one for potential redress through the District Court in which a prisoner's institution is seated. *See* 28 U.S.C. § 2241.<sup>13</sup> Ultimately though, wardens are the frontline of the BOP's senior administration, and, absent clear abuses of discretion, their decisions stand.

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<sup>13</sup> Further information concerning the BOP's administrative remedy process can be found in P.S. 1330.13. *See* 28 C.F.R. §§ 542.10 - 542.15.

### **19.04.03 Visitation (P.S. 5267.07)**

Each institution's visiting regulations can be found on its home page on the Bureau's website, <http://www.bop.gov>. Although institutions might have unique procedures, all require that a prisoner's visitors be pre-approved. The approval process requires the prisoner to mail a standardized form to the prospective visitor, who then must return the completed form to the Unit Team, which conducts a background check. This process may be waived if a prospective visitor is identified as family or a friend in the PSI. An individual slated for self-surrender can help expedite the approval process by mailing a letter to herself at the institution a few days before reporting that contains the names, addresses and dates of birth of prospective visitors -- such letters should have "Scheduled to Report [DATE]" written on the envelope.

At most institutions, the approval process holds equally for legal visitors, though exceptions are made for exigent circumstances. Also, institutions prohibit visitors from wearing khaki-colored clothing because it matches prison uniforms (a security risk).

### **19.04.04 Telephone Use (P.S. 5264.07)**

Inmates may use institution telephones when off duty from work assignments. They may call individuals on their approved telephone lists. In order to add names to the list, an inmate must provide a person's pertinent contact information, which staff then reviews before authorizing and entering it into the institution's computer. Each inmate must establish a phone account and purchase phone credits before placing calls. Inmates are provided with a personal pin number that automatically deducts credits from their account.

Telephone calls last up to 15 minutes, with 300 minutes being the maximum allowable per month (400 in November and December). The allotted number of monthly minutes is a substantial hardship to many, especially those with close family ties and large families. One result is abuse of the BOP's phone system. Caution clients strongly against violating institution telephone rules because it can and does result in placement in the hole (both during investigation and as punishment), loss of good time credits and/or lengthy suspension of telephone and visiting privileges. The most common abuses are three-way calls, when the party on the other end joined another into the call (regardless if the third party is on the inmate's approved list); conducting 'business' over the telephone; having another inmate call a family member at one's behest; and use of a cellular phone (smuggled into the institution).

All non-legal calls begin with a recorded announcement that the call originates from a federal correctional institution, which is repeated midway through the call. Non-legal calls are recorded and subject to monitoring. In certain circumstances, individuals whose use of telephone facilitated their offense conduct or who committed an institutional infraction involving the use of a telephone are subject to a Serious Telephone Abuse PSF (*see supra* Section 19.03.03). In addition to Low placement, such persons can expect their calls to be more closely monitored.

### **19.04.05 Mail (P.S. 5265.11)**

All mail should be addressed using an inmate's committed name (as listed by the BOP) and register number (e.g., John Doe, Reg. No. XXXXX-XXX). Each institution's address for prisoner mail can be found on its home page on the Bureau's website, <http://www.bop.gov>. Personal mail is subject

to inspection by staff outside of an inmate's presence. Unless labeled correctly (*see infra* § 19.06), legal mail is handled like personal mail.

Prisoners may only receive hardcover publications and newspapers directly from the publisher, a book club or a bookstore. Minimum and Low prisoners can receive soft cover publications (excluding newspapers) from any source, while those at Medium, High and administrative facilities must receive them from the publisher, a book club or a bookstore. Other restrictions on incoming publications, such as concerning content, can be found in Program Statement 5266.10. *See* 28 C.F.R. § 540.70, *et seq.*

#### **19.04.06 Electronic Mail (P.S. 5265.12)**

A growing number of institutions permit inmate communication via electronic mail known as the Trust Fund Limited Inmate Communication System (TRULINCS). TRULINCS is expected to be available in all facilities by mid-2011. The program is run through CorrLinks, a Web based electronic mail service (<http://www.corrlinks.com>) that requires registration, though no fee(s). The program allows inmates to send e-mails of up to 13,000 characters, without attachments, to individuals on their approved contact list. TRULINCS is intended “[t]o provide the Bureau with a more efficient, cost-effective, and secure method of managing and monitoring inmate communication services.” Messages are, like the telephone system, subject to monitoring (and retention), and thus not confidential -- there is no confidential attorney-client e-mail system. Two classes of offenders are precluded from accessing TRULINCS: sex offenders and those whose offense of conviction involved use of the Internet.

#### **19.04.07 Commissary Account and Privileges**

The BOP allows prisoners to maintain commissary accounts through which they can both purchase approved items at allotted times from an institution's commissary (e.g., food, cigarettes, clothing, personal hygiene products, hand held radios, watches, fans, etc.) and pay for telephone calls. Self-surrender prisoners should be encouraged to bring a U.S. Postal Service money order made out in their name and including their federal register number. Although there are no limits on the balance one may keep, it is recommended that accounts not be excessive since others invariably learn such information and it invites unwelcome attention (i.e., pressure or threats).

Once funds are deposited in a prisoner's account they are considered his property regardless of the source (e.g., a gift from family). Consequently, at the warden's discretion they may be used to satisfy financial obligations, like court-ordered restitution, via the Inmate Financial Responsibility Program (IFRP). *See United States v. Lemoine*, 546 F.3d 1042 (9th Cir. 2008) (upholding BOP's ability to require inmates pay restitution under IFRP at a higher or faster rate the specified by the sentencing court); 28 C.F.R. 545.10, *et seq.*; P.S. 5380.08.

For prisoners in BOP custody, third parties should send funds for deposit to:

Federal Bureau of Prisons  
First Name Last Name  
Reg. No. XXXXX-XXX  
Post Office Box 474701  
Des Moines, Iowa 50947-0001



Deposits should be money orders made out to “First Name Last Name” and include the register number. The sender’s name and return address must appear on the upper left hand corner of the envelope in case of return. The BOP destroys anything else included in the envelope (e.g., personal items). The sender must trace funds not deposited into a prisoner’s account.

Another option to send money is Western Union’s Quick Collect Program, which, for a fee, posts funds to a prisoner’s account within two-to-four hours when sent between 7:00 a.m. and 9:00 p.m. EST (seven days per week, including holidays). Funds received after 9:00 pm EST are posted by 7:00 am EST the following day. The Quick Collect Program can be accessed: (1) by completing a Quick Collect Form and providing it to an agent, which can be located by calling (800) 325-6000 or through [www.westernunion.com](http://www.westernunion.com); (2) by using a credit or debit card and calling (800) 634-3422, selecting option 2; or (3) by using a credit or debit card and selecting “Quick Collect” at [www.westernunion.com](http://www.westernunion.com). Any Quick Collect transaction must include the prisoner’s register number, the prisoner’s committed name, a Code City of “FBOP” and a State Code of “DC.” Senders are solely responsible for information given and for funds -- funds posted incorrectly to a prisoner’s account may not be returned.

Information concerning specific deposits can be obtained from the BOP by calling (202) 307-2712 between 8:00 a.m. and 4:30 p.m. EST.

#### **19.04.08 Employment and Education**

Most federal prisoners must work, albeit in mundane, menial positions for which wages are minimal (12-to-40 cents per hour). For instance, approximately 12 percent of the population is responsible for food preparation. The best opportunity for meaningful employment exists within Federal Prison Industries (a.k.a., UNICOR), which pays 23 cents to \$1.15 per hour. Be advised, however, that UNICOR positions tend to be reserved for those with longer sentences, and the program was down-sized in mid-2009 due to external economic pressures. There has also been litigation and criticism concerning health-risks associated with such jobs. *See Smith v. United States*, Case. No. 5:08-cv-00084-RS/AK (N.D. Fla.). Many institutions also offer vocational training through work assignments. Vo-Tech programs include HVAC, plumbing, motor vehicle maintenance, welding, dental assistant, carpentry, culinary arts and electrician.

Inmates who have not graduated high school or earned a General Equivalency Diploma (G.E.D.) are required to enter a literacy program, which progress from basic literacy to attaining one’s G.E.D. This requirement affects approximately 40 percent of the inmate population, and failure to participate can result in loss of good time credits. Similarly, non-English speaking prisoners must participate in English-as-a-Second Language (ESL) courses until able to function at an eighth-grade level. Aside from prisoner-taught adult education courses, academic opportunities are otherwise limited to correspondence courses, the cost of which is borne by the inmate.

#### **19.04.09 Medical and Mental Health Care**

Notwithstanding the questionable quality of prison medical care (*see supra* section 19.03.04, ), it is important for counsel to document legitimate health problems. A client is better served when the BOP has a true appreciation for his condition(s). Prior to a client entering federal custody, counsel can take several steps to help ensure that needs are understood and, hopefully, met. The most obvious is to ensure the PSI documents conditions and prescribed treatments completely, to include appending reports

and evaluations. Where a client is taking medication, counsel should also provide the prescribing physician a copy of the BOP's national formulary to confirm that the medication is available or, if not, to facilitate a possible transition to another medication. See <http://www.bop.gov/news/PDFs/formulary.pdf>. Additionally, counsel should obtain written verification from a client's treating physician concerning any necessary medical-related accommodation, which can be presented to institution staff upon arrival (i.e., during R&D) and sent to the warden for inclusion in the central file.

**19.04.10 Transfers, Including Halfway House and Home Confinement (P.S. 5100.08, Ch. 7; P.S. 7310.04; P.S. 7320.01)**

Once placed at his designated institution, a federal inmate is generally ineligible for transfer (re-designation) for 18 months, during which time he must maintain infraction-free conduct. Even then, transfers are usually limited to compelling reasons, such as change in classification level, necessary medical treatment, or distance between the inmate and family. Counsel is most frequently contacted regarding the latter.

Unless told otherwise, the BOP considers an inmate's "legal address," as listed in the PSI, as his "release residence," that is, the address to which he intends to return upon release. This address is used when implementing the 500-Mile Rule (*see supra* Section 19.03.03, "Security and Custody Classification Level"). Assuming no separate issues, an individual seeking to move closer to home needs to demonstrate why the move is necessary and appropriate. This can include a letter from an immediate family member explaining difficulties in visitation related to distance, cost or medical considerations, or confirming a new release residence. A new residence is also significant because it implicates potential transfer of supervision issues (i.e., different Probation Offices) that must be addressed as part of the BOP's pre-release planning.

Except for changes in classification, transfers are between institutions of equal security (e.g., Low to Low). Where escorted transfers are called for, the process can be long and arduous, involving shackled transport from one local jail to the next, extended placement in SHU at high-security institutions and/or prolonged placement at the Federal Transfer Center in Oklahoma City. For those inmates classified "out" or "community" custody transferring from a Low to Minimum or between Minimums, Bureau policy allows for unescorted transfers (furlough transfers). Family members on an inmate's approved visiting list can provide transportation to the receiving institution subject to warden approval.

Pre-release transfers are those made either to a Residential Reentry Center (RRC or halfway house),<sup>14</sup> a place of imprisonment under 18 U.S.C. § 3621(b), or to home confinement, which can serve as a place of imprisonment for the final ten percent of a prisoner's sentence not to exceed six months (18 U.S.C. § 3624(c)(2)). Through the Second Chance Act of 2007 (Public Law 110-199, Apr. 9, 2008), Congress directed the BOP to ensure that each federal prisoner serve a portion of his term of imprisonment, not to exceed one year, "under conditions that will afford that prisoner a reasonable

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<sup>14</sup> RRCs were formerly known as Community Corrections Centers (CCCs), and they are still so referred to in controlling policy, P.S. 7310.04.

opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.” 18 U.S.C. § 3624(c)(1).<sup>15</sup>

Notwithstanding this directive, the Bureau limits pre-release programming, that is, both halfway house and home confinement opportunities, to the final six months of one’s sentence except in “extraordinary” circumstances approved by a Regional Director. One suggested method to assist a client in receiving the maximum allowable pre-release placement time is to have the court expressly recommend it in the judgment order. The BOP is statutorily obliged to weigh such recommendations when making designation decisions. 18 U.S.C. § 3621(b). In this regard, it is useful to raise Oregon AFD Steve Sady’s excellent perspective on pre-release placement: where the law has long allowed any prisoner to serve up to six months on home confinement, the Second Chance Act must be viewed as directing the BOP to maximize use of halfway houses as pre-release placement facilities in addition to home confinement (for up to one year total).

An inmate’s release plan, including a decision regarding halfway house or home confinement referral, is to be completed 17-to-19 months prior to his projected release date. Issues that can delay the referral process include the receiving district’s Probation Office’s inspection of the release residence, the inability to secure a promise to pay for medical care for those inmates lacking health insurance, and resolution of outstanding charges. While policy permits direct placement on home confinement, the BOP typically requires that prisoners serve at least a few days at a halfway house before so transitioning. Direct home confinement placement is usually reserved for inmates unlikely to be employed in the community (e.g., retired, disability).

## 19.05 PROGRAMS & RELEASE MECHANISMS

### 19.05.01 Drug and Alcohol Treatment Programs (P.S. 5330.11; P.S. 5331.02, 18 U.S.C. § 3621(e); 28 C.F.R. §§ 550.50, *et seq.*)

The BOP estimates that 40 percent of federal inmates have diagnosable, moderate-to-severe substance abuse problems. *See* Stmt. of BOP National Drug Abuse Coordinator Beth Weinman at the U.S. Sentencing Commission’s Symposium of Alternatives to Incarceration, *Prison Programs Resulting in Reduced Sentences* (July 14, 2008), available at [http://www.uscc.gov/SYMPO2008/NSATI\\_0.htm](http://www.uscc.gov/SYMPO2008/NSATI_0.htm). Some form of drug treatment is *mandatory* where drug use contributed to the commission of the offense, where it was the basis for revocation of supervised release or community placement, or where the sentencing court so recommends. Sanctions for failure to complete include pay reduction and community program ineligibility. Accordingly, and because judicial recommendations are not necessary for Residential Drug Abuse Treatment Program (RDAP) participation, it is suggested that counsel not request recommendations concerning courts’ views as to the propriety of treatment.

The BOP operates three drug abuse programs. The first is the 12-15 hour voluntary Drug Abuse Education Course offered at all institutions and designed to teach the prisoner about the consequences of drug/alcohol abuse and addiction by reviewing their personal drug use and the cycle of drug use and crime. 28 C.F.R. § 550.51. The second is the 12-24 week (90-120 minutes per week) Non-residential Drug Abuse Treatment (NR DAP), which is targeted to, *inter alia*, those awaiting RDAP, those who do

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<sup>15</sup> For a discussion of the BOP’s historic halfway house practices, see Todd Bussert, Peter Goldberger, and Mary Price, *New Time Limits on Federal Halfway Houses: A shift in correctional policy*, 21 CRIMINAL JUSTICE 1, 20 (ABA Spring 2006).

not meet RDAP admission criteria, and those found guilty of an incident report for use of drugs or alcohol. 28 C.F.R. § 550.52. Wardens are encouraged to consider NR DAP graduates for maximum RRC placement. The third program is the nine-plus month, 500-hour RDAP for prisoners with a diagnosable and verifiable substance abuse disorder. 28 C.F.R. § 550.53.

The BOP developed the “inpatient” RDAP in 1988 to lower recidivism rates. According to empirical evidence from its Office of Research and Evaluations, the program has met that objective. Male inmates who successfully complete RDAP are 16 percent less likely to be re-arrested or revoked than cohorts who went untreated, and male RDAP graduates are 15 percent less likely to use drugs. See Pelissier, et al., *Triad Drug Treatment Evaluation*, 65 FEDERAL PROBATION 3, 6 (Dec. 2001) (female graduates 18 percent less likely to re-offend or use drugs). Through the 1994 Crime Bill, Congress created an incentive for participation in the inpatient program: those *nonviolent* offenders who successfully complete the program while incarcerated (and who have not previously received early release via RDAP) are eligible for release up to one year prior to the expiration of sentence. 18 U.S.C. § 3621(e).<sup>16</sup>

Congress’s action had its desired result, particularly with the closure of the Intensive Confinement Center (boot camp) program in 2005. Each year, an increasing number of inmates seek admission into RDAP, with more than 17,000 participating in 2008. See Weinman Stmt., *supra* (approximately 7,000 inmates on waiting list).<sup>17</sup> However, in 2009, BOP implemented a sliding scale for § 3621(e) reductions tied to sentence length: those serving 30 months or less are ineligible for more than a six-month reduction; those serving 31-36 months are ineligible for more than a nine-month reduction; and those serving 37 months or longer are eligible for the full 12 months.

RDAP participation is voluntary. Interested prisoners within 36 months of release may apply by requesting an eligibility interview via a “cop-out” (informal request from a staff member) or a BP-8

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<sup>16</sup> The determination as to whether an inmate is ineligible for early release due to the commission of a crime of violence is controversial. After much litigation, the BOP modified the criteria for eligibility for early release from a sentence for successful completion of a drug treatment program. 28 C.F.R. § 550.58. This change, reflected in P.S. 5331.02 and P.S. 5162.05, was intended to exclude violent offenders by the exercise of the implicit discretion placed in BOP by the statute, 18 U.S.C. § 3621(e)(2)(B), rather than by definition of the statutory language “nonviolent offense.” Bureau policy, which the Supreme Court has upheld, denies early release to persons who have been convicted of a crime of violence -- homicide, forcible rape, robbery, aggravated assault, child sexual offense (but *not* possession of child pornography), arson or kidnapping) -- or a felony offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another; that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device); that by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; and that by its nature or conduct involves sexual abuse offenses committed upon children. *Lopez v. Davis*, 531 U.S. 230 (2001); *but cf. Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005) (program statement violated the Administrative Procedures Act). In *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009), the Ninth Circuit invalidated Bureau policy that disqualifies categorically RDAP participants from § 3621(e) sentence reduction eligibility based on prior convictions. However, because the government is not subject to the doctrine of non-mutual collateral estoppel, *Crickon* applies only to those prisoners housed in the Ninth Circuit; prisoners housed elsewhere will need to challenge the policy through the administrative remedy process and, likely litigation.

<sup>17</sup> In 2008, BOP for the first time did not offer RDAP to 100 percent of eligible prisoners prior to release from custody.

(formal request for resolution). The written request serves to initiate the RDAP application and should prompt an interview with either the institution's RDAP Coordinator or a drug treatment specialist (DTS), or, if a prisoner is housed at a facility that does not offer the RDAP, a member of the Psychology Services staff.

An applicant's chemical dependency need not be linked to his offense conduct, nor does one's eligibility for early release (§ 3621(e) credit) affect RDAP eligibility. To be eligible for the RDAP, one must, *inter alia*, have 24 months or more remaining to serve<sup>18</sup>, present a verifiable, documented pattern of substance abuse or dependence within the 12-month period preceding arrest on the underlying offense<sup>19</sup>, have no serious mental or cognitive impairment precluding full program participation, be halfway house eligible (therein precluding participation by non-U.S. citizens and prisoners with detainees), and sign acknowledgment of program responsibilities. As to a substance abuse, staff review the PSI before scheduling an interview to ascertain whether an applicant meets the diagnostic criteria for abuse or dependence indicated in the *Diagnostic and Statistical Manual of the Mental Disorders, Fourth Edition, (DSM-IV)*. There is some debate over how much drug or alcohol use rises to this level. Compare P.S. 5330.11 § 2.5.8(2)-NOTE ("recreational, social, or occasional use of alcohol and/or other drugs that does not rise to the level of excessive or abusive drinking does not provide the required verification of a substance abuse disorder"), with *Kuna v. Daniels*, 234 F. Supp. 2d 1168 (D. Or. 2002) (social use of alcohol sufficient to warrant RDAP admission). With this in mind, counsel should discuss substance abuse histories with clients prior to presentence interviews and, when possible, provide PSI writers with independent information documenting the existence and degree of a client's dependence (e.g., medical records and clinical assessments). Should the BOP deem a PSI factually insufficient, a client might well be found ineligible for services and refused an interview. In that instance, counsel and/or the client may supply documentation subsequent to incarceration.

Given the § 3621(e) incentive, and to assure inmate veracity, RDAP eligibility interviews entail difficult questions designed to determine whether admission is sought in good faith to obtain treatment or simply to secure a quicker return home. Applicants can expect to be asked when they learned about the program and the § 3621(e) credit, whether attorneys advised them to exaggerate treatment needs when meeting with Probation, and details of their drug or alcohol use (e.g., when, how often, where, with

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<sup>18</sup> The 24 months remaining to serve rationale is unclear and possibly an area ripe for litigation since the program can be completed within 15 months (nine months at the institution and six months at a halfway house). Accounting for ordinary Good Time credit, someone sentenced to 18 months could complete the program with approximately three weeks to spare on his sentence, though obviously receiving little to no § 3621(e) credit. Accordingly, the 24-month figure appears an arbitrary cut-off.

<sup>19</sup> The 12-month parameter derives from the premise that 12 months consecutive sobriety reflects "sustained full remission" for which treatment services are unnecessary. See Weinman Stmt., *supra*. In other words, prisoners with lifelong addiction problems, even if confirmed by prior arrests or treatment efforts, are ineligible for RDAP participation unless BOP staff confirms drug abuse or dependence during the last 12 months before arrest. Although a practice ripe for legal challenge, it nonetheless compels counsel to verify the time frame surrounding a client's substance abuse. See *Mitchell v. Andrews*, 235 F. Supp. 2d 1085, 1090 (E.D. Cal. 2001) ("The DSM-IV does not require documentation of substance abuse or dependency during the 12-month period *immediately preceding either a diagnostic interview, arrest, or incarceration.*") (emphasis in original); see also *Smith v. Vazquez*, 491 F. Supp. 2d 1165 (S.D. Ga. 2007) ("Though the BOP has presented arguably valid reasoning behind the 'twelve months preceding' rule, Respondent has not shown a consistent source for the rule or even a consistent definition of the rule."; collecting cases) (decided before 2009 program statement amendments that codified the 12-month rule).

whom, others' awareness, etc.). Counsel should thus advise clients not to mangle or to overstate their problems, either during the presentence interview or when seeking entrance into the program.

Once deemed RDAP-eligible, an inmate is placed on a wait list that is ordered by projected release date (i.e., time remaining to serve, accounting for anticipated good time credit). If housed at an institution not offering the RDAP, a prisoner will be transferred to one of the 58 programs (49 male, nine female – see below<sup>20</sup>) at or around the time of expected entrance into a treatment class, usually within 20-to-24 months of release. There is a potential that movement may delay admission. For RDAP-eligible inmates at an institution offering the program, it is not uncommon to be bumped from a class at the last minute when new prisoners arrive with less time remaining to serve. Displacement from a class, which is generally 24-to-27 persons in size, can postpone program participation for several months.

<u>North Central Region</u>	<u>South Central Region</u>	<u>Northeast Region</u>	<u>Mid-Atlantic Region</u>
FPC Duluth-Min.	FCI Bastrop-Low <sup>^</sup>	FCI Danbury-Low*	FPC Alderson-Min.*
FPC Englewood-Min.	FPC Beaumont-Min.	FCI Elkton-Low	FPC Beckley-Min.
FPC Florence-Min.	FCI Beaumont-Low	FCI Fairton-Medium	FCI Beckley-Medium
FCI Florence-Medium	FPC Bryan-Min.*	FCI Fort Dix-Low	FCI Butner-Medium <sup>■</sup>
FPC Greenville-Min.*	FMC Carswell* <sup>●</sup>	FPC Lewisburg-Min.	FPC Cumberland-Min.
FPC Leavenworth-Min.	FSL El Paso-Low	FPC McKean-Min.	FCI Cumberland-Medium
USP Leavenworth-Med.	FCI El Reno-Medium		FMC Lexington <sup>●</sup>
FCI Milan-Low	FCI Forrest City-Low	<u>Southeast Region</u>	FCI Morgantown-Min.
FCI Oxford-Medium	FCI Forrest City-Medium	FCI Coleman-Low <sup>^</sup>	FCI Petersburg-Medium
FCI Sandstone-Low	FCI Fort Worth-Low	FPC Edgefield-Min.	
FMC Springfield <sup>●</sup>	FCI La Tuna-Low <sup>^</sup>	FCI Jesup-Low	<u>Western Region</u>
FCI Waseca-Low	FCI Seagoville-Low	FCI Marianna-Medium	FPC Dublin-Min.*
FPC Yankton-Min.	FPC Texarkana-Min.	FPC Miami-Min. <sup>^</sup>	FCI Dublin-Low* <sup>^</sup>
		FPC Montgomery-Min. <sup>^</sup>	FPC Lompoc-Min.
*Female facility		FPC Pensacola-Min.	FPC Phoenix-Min.*
<sup>^</sup> Spanish available		FPC Talladega-Min.	FCI Phoenix-Medium
<sup>●</sup> Co-occurring disorder program		FCI Tallahassee-Low*	FPC Sheridan-Min.
<sup>■</sup> Also accepts Low		FCI Yazoo City-Low	FCI Sheridan-Medium
		RCI Rivers-Contract	FCI Terminal Island-Low

RDAP has two distinct components that must both be completed: the 500-hour “in custody” treatment phase and the Community Transitional Drug Abuse Treatment Program (TDAT) phase at halfway houses and while on home confinement. The residential phase is designed for participants to reconcile their individual substance abuse issues. To this end, they are placed in a segregated housing unit, and institutional assignments (work/school) become part-time and secondary to treatment, recovery and reentry preparation. RDAP participants attend both daily, 3.5-hour classes, which track course workbooks and include homework, and regular group therapy sessions. Counseling strategies are intended to compel inmates “to identify, confront, and alter the attitudes, values, and thinking patterns that lead to criminal and drug-using behavior.” *Triad Drug Treatment Evaluation*, 65 FEDERAL PROBATION at 3.

<sup>20</sup> Given the vagaries of budgeting and staffing, the authors recommend confirming the existence of an RDAP program before requesting a judicial placement recommendation to help facilitate clients' program participation. This can be done by contacting either the Regional Drug Abuse Coordinator or the institution directly.

Anecdotal evidence suggests that approximately one-third of RDAP participants fail to complete the program. Tardiness, incomplete assignments, and institutional rules violations can all result in expulsion from the program and the loss of any anticipated time credit. Those who reach TDAT are expected to work and prepare for reentry while being subject to added conditions, like group counseling, random urinalysis, and a lower violation threshold than other halfway house residents. These demands continue throughout the period of pre-release confinement, including home confinement. As at the institution, a rules violation can result in loss of § 3621(e) credit, as well as transfer back to a prisoner's parent institution for the remaining sentence.

### **19.05.02 Sex Offender Management and Treatment Programs**

Pursuant to the Adam Walsh Act, the BOP is obliged to house a sex offender management program (SOMP) and a sex offender treatment program (SOTP) at an institution within each of its six Regions. SOMP's must provide "appropriate treatment, monitoring, and supervision of sex offenders" while the SOTPs "provide treatment to sex offender[s] . . . deemed by the Bureau of Prisons to be in need of and suitable for residential treatment." *See* 18 U.S.C. § 3621(f).

Placement in an SOMP can be compelled, though not all prisoners with sex offense convictions are designated to one. Rather, the BOP's announced design is to fill SOMP's with individuals identified as the most serious sexual offenders or having the most serious histories.<sup>21</sup> The goals of the program are: (1) to pre-screen releasing sex offenders to determine civil commitment applicability; (2) to control sex offenders' risk of inappropriate sexual conduct during confinement; and (3) to provide non-residential sex offender treatment. SOMP's are located at FMC Devens in Ayer, Massachusetts; the Federal Correctional Institutions in Petersburg, Virginia (Medium), Marianna, Florida (Medium), Marion, Illinois (Medium), Seagoville, Texas (Low); and at the United States Penitentiary in Tucson, Arizona (High). "Assignment is made in accordance with the security level of the individual." BOP, *LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS* at 29 (Nov. 2008). SOMP's are managed like administrative institutions, that is, they house individuals of varying security levels (for instance, low- and medium-security inmates).

Participation in SOTPs is voluntary, with FMC Devens operating the only program as of 2009. The SOTP "is a therapeutic community, housed in a 112-bed specialized unit. The program employs a wide range of cognitive-behavioral and relapse prevention techniques to help the sex offender manage his sexual deviance both within the institution and in preparation for release." *LEGAL RESOURCE GUIDE* at 29. Given the BOP's approach to 'treatment' and the possibility of civil commitment, Fifth Amendment considerations argue strongly against clients' participation. A decision addressing a BOP 'study' of prisoners participating in the SOTP at FCI Butner, North Carolina (since disbanded) highlights the myriad criticisms:

As [Dan L. Rogers, PhD] testified, the program is 'highly coercive.' Unless offenders continue to admit to further sexual crimes, whether or not they actually committed those crimes, the offenders are discharged from the program. Consequently, the subjects in this Study had an incentive to lie, despite the fact that participation in the program would not

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<sup>21</sup> When SOMP's were first brought on-line, filling beds took precedent over the need to segregate serious sexual offenders from the general prisoner population. Moving forward, less serious offenders (e.g., possession of child pornography cases) will be transitioned out of SOMP's into FCI general populations, or not placed in the program at all.

shorten their sentences. Rogers testified that the Study's 'whole approach' is rejected by the treatment and scientific community.

*United States v. Johnson*, 588 F. Supp. 2d 997 (S.D. Iowa 2008) (citations omitted).

The Adam Walsh Act also provided for the civil commitment of sex offenders upon completion of their federal terms of imprisonment. Information disclosed through treatment within the BOP is weighed in determining whether an individual prisoner should be committed. The United States Court of Appeals for the Fourth Circuit struck down 18 U.S.C. § 4248's civil commitment provisions as unconstitutional. *United States v. Comstock*, 551 F.3d 274 (4th Cir.) ("forcible, indefinite civil commitment . . . cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution"), *cert. granted*, 129 S. Ct. 2828 (2009); *but see* *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009). Nonetheless, counsel should remind clients that participation in a SOMP or a SOTP could affect them negatively at any future civil commitment proceeding, that they have a Fifth Amendment right to refuse to discuss their sexual histories, and that any institutional penalty (e.g., loss of privileges) for failure to participate may well be minor compared to the risk of lifetime civil commitment. For more discussion of the Adam Walsh Act and its implications, see Chapter 25.

### **19.05.03 Challenge/BRAVE Programs (P.S. 5330.11)**

The Challenge Program is an intensive, co-occurring disorders program for high security male inmates that targets drug use (there are no High-security RDAPs), mental illness and antisocial attitudes and behaviors. The residential program is located at USP Allenwood (PA), USP Atwater (CA), USP Beaumont (TX), USP Big Sandy (KY), USP Coleman (FL), USP Coleman I (FL), USP Florence (CO), USP Lee (VA), USP Pollock (LA), USP Terre Haute (IN), and USP Victorville (CA). It offers a 500-hour drug abuse track and a mental illness track based on a clinical case management model, with hours based on need. There is a 1:20 staff-to-prisoner ratio.

The Bureau Rehabilitation and Values Enhancement (BRAVE) Program, located at FCI Beckley (WV) is designed for young male offenders (less than 32 years old) serving their first federal commitment and sentences of 60 months or more. It is intended to address institutional adjustment, antisocial attitudes and behaviors, and motivation to change. Participants in the six-month, 350-hour program are segregated from other prisoners.

Both programs use interventions that are reportedly supported empirically, including cognitive behavioral techniques delivered in a modified therapeutic community environment. The BOP claims that these programs have been demonstrated to reduce participant misconduct by more than 50 percent.

### **19.05.04 Resolve Program (P.S. 5330.11)**

The Resolve Program is a trauma treatment program for female prisoners provided at all female institutions excluding FTCs, FDCs, and MDCs (transfer and metropolitan detention facilities). It consists of both a Trauma in Life Workshop and a non-residential treatment program that employs evidence-based, cognitive-behavioral treatment. The Workshop, which is designed for those within the first 12 months of their sentences and is structured around a journal/guide entitled *Trauma in Life*, targets those with traumatic life event histories (e.g., childhood abuse or neglect, rape, domestic violence), those suffering from Axis I or Axis II disorders associated with a traumatic life event, and those seeking to



learn more about trauma and its potential impact (e.g., effect of physical abuse of children). Workshop graduates who suffer from an Axis I or Axis II disorder associated with a traumatic life event are encouraged to participate in the non-residential program, which has two phases. Phase I entails 12 weeks of one-hour group sessions. Phase II is specialized and works with individuals within one of three groups: Maintenance Skills Group, Cognitive Processing Therapy Group, and Dialectical Behavior Therapy Skills Training Group.

#### **19.05.05 Life Connections**

Established in 2002, the Life Connections Program is an offshoot of President George H.W. Bush's Faith Based and Community Initiative. Operating at FMC Carswell (TX), USP Leavenworth (KS), FCI Milan (MI), FCI Petersburg (VA), and USP Terre Haute (IN) under the direction of the BOP's Religious Services Branch, the multi-phase, multi-faith program strives to reduce recidivism by instilling values and character through a curriculum of personal, social and moral development focused on prisoners' faith commitment. Participants, who must volunteer for the program and be approved by the referring institution's chaplain and the warden, are placed in same-faith study and prayer groups led by contracted spiritual guides. Over the course of the 18-month program, inmates learn about reentry-related and other subjects (e.g., ethical decision-making, anger management, victim restitution, responsible parenting, budgeting, marriage enrichment, religious tolerance, respect) from the perspective of the group's sacred text (e.g., Bible, Torah, Quran) and philosophical perspective. Participants are further required to complete 500 hours' community service; partake in victim impact programs; complete 150 hours' addiction programming; provide financial and emotional support to their families through weekly correspondence; maintain a regular journal; and establish re-entry goals and action steps. Given the program demands, participants may be unable to participate as fully in general population activities, such as work.

#### **19.05.06 Mothers and Infants Nurturing Together (MINT)**

At the discretion of the Unit Team, female prisoners who are pregnant at the time of commitment can participate in MINT, a halfway house-based program, subject to satisfying eligibility criteria: in the last three months of pregnancy, less than five years remaining to serve and furlough eligible (*see supra*). In addition to pre- and post-natal programs, such as childbirth, parenting and coping skills classes, MINT offers substance abuse treatment, physical and sexual abuse counseling, self-esteem building programs, life skills training, and educational and vocational programs. MINT is managed by private social service agencies under contract with BOP.

Either the expectant mother or a guardian must assume financial responsibility for the child's medical care while residing at a MINT facility. Additionally, prior to birth, the mother must arrange for a custodian to assume care of the child. Staff and outside social service agencies are available to aid with placement. Once the child is born, the mother has three months to bond before being returned to her referring institution to complete her sentence, though certain program locations can authorize an extended bonding period.

#### **19.05.07 Communication Management Unit (CMU)**

Established in 2006 at FCI Terre Haute (IN), the Communication Management Unit is a self-contained housing unit (i.e., separate from the main institution's general population) intended to provide

increased monitoring of prisoner communication (mail/telephone). The CMU is purportedly for those convicted of, or associated with, international or domestic terrorism; sex offenders who attempt repeatedly to contact their victims; those who attempt to coordinate illegal activities while incarcerated through approved communication methods; and those with extensive disciplinary histories related to the misuse/abuse of approved communication methods. However, given the reportedly disproportionate number of Arab-speaking and Muslim prisoners in the CMU, there is significant concern about profiling as well as the program's legality.

**19.05.08 Early Release for Extraordinary and Compelling Circumstances (P.S. 5050.46; 18 U.S.C. §§ 3582(c)(1)(A), 4205(g); U.S.S.G. § 1B1.13)**

Upon motion of the Director of the Bureau of Prisons, a sentencing court may reduce a term of imprisonment, after considering 18 U.S.C. § 3553(a), if it finds, *inter alia*, extraordinary and compelling reasons that are consistent with Sentencing Commission policy statements. 18 U.S.C. § 3582(c)(1)(A). The Commission has determined that reductions may be appropriate where a prisoner poses no danger to public safety and “is suffering from a terminal illness; is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes [his ability] to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement”; “[t]he death or incapacitation of the [prisoner]’s only family member capable of caring for [his] minor child or minor children”; or some combination of factors, as determined by the BOP Director -- individual rehabilitation, standing alone, is insufficient. U.S.S.G. § 1B1.13. Notwithstanding this clear statutory mandate and far-reaching Commission policy, as a practical matter the BOP files § 3582(c)(1)(A) (a.k.a., compassionate release) motions only when a prisoner is on his death bed, and not always then. *See* P.S. 5050.46, Compassionate Release; Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) & 4205(g).

**19.05.09 Furloughs (P.S. 5280.07)**

A furlough is an authorized, unescorted absence from an institution intended to advance recognized correctional goals. There are two kinds of furloughs: day and overnight. A day furlough consists of a trip to a location within 100 miles of the granting institution that lasts no more than 16 hours and ends before midnight. Because the stated purpose for day furloughs is “to strengthen family ties and to enrich specific institution program experiences,” they are typically granted to inmates wishing to attend a momentous family event (e.g., a child’s wedding) or to engage in institution-sponsored activities within the community. Technically, overnight furloughs *can* extend to 30 days when unique circumstances present themselves, but they ordinarily last three-to-seven days. Unlike day furloughs, there are no stated restrictions on the proximity of an inmate’s overnight furlough destination from her designated federal facility.

Before an inmate is considered for a furlough, he must generally: (a) be listed as community custody; (b) be deemed physically and mentally capable; (c) have demonstrated “sufficient responsibility” so as to assure compliance with furlough requirements; and (d) (1) within two years of anticipated release for a day furlough, or (2) within 18 months of anticipated release for an overnight furlough to a location within the institution’s “commuting area,” or (3) within 12 months of anticipated release for an overnight furlough outside of the commuting area. Furthermore, furloughs are generally unavailable to inmates convicted of serious crimes against the person or those “whose presence in the

community could attract undue public attention, create unusual concern, or depreciate the seriousness of the offense.” One notable exception is the “Emergency Furlough,” which permits attendance to a certifiable “family crisis or other urgent situation” and are available to an inmate confined at his initially designated institution for less than 90 days as well as to those with more than two years remaining to serve.

No matter the furlough type, an inmate remains under BOP custody even when away from the institution. This means: (a) that he is expected to adhere to prescribed rules; (b) that sanctions can be imposed for rules violations committed away from the institution; (c) that failure to timely return to the institution makes one an “escapee”; and (d) that time spent on furlough is credited towards one’s sentence. Additionally, the cost of a furlough (i.e., transportation, lodging, food) is the inmate’s and/or his family’s responsibility. There is no known provision for indigent inmates.

The involvement of counsel in a furlough request both expedites a decision and improves the chances that the request will be granted.

#### **19.05.10 Elderly Offender Home Detention Pilot Program**

Pursuant to the Second Chance Act, on February 5, 2009, the BOP created a two-year pilot program to determine the effectiveness of placing certain elderly offenders on home detention, to include a nursing home or residential long-term care facility, earlier than the law otherwise allows. *See* 18 U.S.C. § 3624(c)(2). To be eligible, a prisoner must be at least 65 years old as of September 30, 2010 and have “served the greater of 10 years or 75 percent of the term of imprisonment to which the offender was sentenced,” with multiple terms aggregated. In other words, the individual must have served at least ten years and whatever time served must be greater than 75 percent of the sentence imposed (not counting good conduct time reductions).<sup>22</sup> Those sentenced to life imprisonment are ineligible. Other eligibility criteria include that the individual have no escape history and not be serving time for a “crime of violence” (18 U.S.C. § 16), a sex offense, an act of terrorism transcending national boundaries, espionage, or censorship. The operations memorandum includes an appendix listing disqualifying offenses.

### **19.06 ATTORNEY-CLIENT INTERACTION**

The BOP purports to recognize the right to confidential and private communication between attorney and client, but such communications are not automatically afforded protected status. Telephone calls between attorney and client are only assured confidentiality if the call originates from the institution and is placed by institution staff on secured lines at the inmate’s request. Even then, it is common for inmates to call from a staff member’s office, with one or more persons in the room. Unless counsel

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<sup>22</sup> Assuming one earns all good time credit, to serve ten years or more one must have been sentenced to at least 138 months’ imprisonment. Note, however, that because the law allows for a prisoner to serve the final ten percent of his sentence under home confinement, up to six months, the pilot program has no true benefit for such individuals. Rather, counsel must identify otherwise eligible clients sentenced to more than 138 months and work to maximize their placement in the program. For instance, someone sentenced to 140 months’ imprisonment can expect to serve about 122 months in federal custody (assuming no RDAP reduction). Inasmuch as that individual would otherwise be eligible for home confinement around 116 months, the position should be taken that BOP consider pilot program participation at 114 months despite having not yet served ten years.

knows that she is speaking with her client privately, on an unmonitored line, do not assume that the call is protected communication. *See, e.g., United States v. Hatcher*, 323 F.3d 666 (8th Cir. 2003) (privilege implicitly waived by knowledge of recording device used to monitor calls).

Written communication between attorney and client is opened only in the presence of the inmate to insure the absence of contraband -- the contents are not to be read. *Cf. Sallier v. Brooks*, 343 F.3d 868 (6th Cir. 2003). However, this protection is offered only when the outside of the envelope is marked "SPECIAL MAIL - OPEN ONLY IN THE PRESENCE OF THE INMATE" and counsel's first and last names appear followed by "Attorney at Law"; a return address showing only the name and address of the office or law firm is insufficient, as is "Jane Doe, Esquire." *See* 28 C.F.R. § 540.19(b). An extra measure to protect communication is the inclusion of a privacy warning cover sheet. As an example, the author includes a cover sheet in all correspondence to incarcerated clients which reads:

IMPORTANT  
PRIVILEGED ATTORNEY-CLIENT COMMUNICATION  
IF YOU ARE NOT THE ADDRESSEE,  
DO NOT READ THE CONTENTS OF THIS MAIL

This is legal mail. If the envelope was properly marked 'Special Mail: Open Only In Presence of Inmate' and if your attorney's name was on the outside of the envelope, it should have been opened in your presence so you could see it opened. If this letter came to you already opened, and if you did not see the institution staff open it in your presence, please report it to your lawyer immediately. The institution staff is permitted to open legal mail to look for contraband, but that must be done in your presence and the contents of the letter must not be read by the officer.

Federal inmates are prohibited from possessing their presentence reports and the Statement of Reasons section of their judgment orders.<sup>23</sup> There are practical limits on the volume of legal materials inmates can maintain in their direct possession (i.e., bunk area). Many institutions issue "legal lockers" to inmates during the pendency of appeals or post-conviction proceedings. When case information exceeds capacity, the institution will most often store it in the library under staff control, where it is available to the client for review. Counsel should contact the institution before forwarding a substantial amount of legal materials or any item stored electronically (i.e., on disk) to confirm arrangements for storage and client access.

Finally, counsel should be aware that unlike other administrative agencies, the BOP does not copy attorneys on correspondence sent to their clients or generally acknowledge counsel's existence. Said another way, while the BOP will generally respond to your direct inquiries (subject to the client-prisoner signing necessary release forms), it will not allow you to interject yourself into the disciplinary hearing process or send you copies of responses to administrative remedy appeals that you have filed on your client's behalf.

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<sup>23</sup> To the extent an inmate needs to review these documents, the Unit Team must allow the inmate to see them and take notes on them.

## 19.07 RESOURCES

There are a plethora of prison guidebooks available today. Alan Ellis's is the most ubiquitous. Few, however, offer any more than what is freely available on the Bureau's website, <http://www.bop.gov>, elsewhere on the Internet, from other counsel, or former clients. One book of note is Professor Mary Bosworth's *THE U.S. FEDERAL PRISON SYSTEM* (Sage Publications 2002), which offers a sociological perspective on many aspects of BOP programs and practices, blending official positions with views from prisoners and their family members. Another useful tool is <http://www.MichaelSantos.net>, the website of a federal prisoner currently serving a 45-year sentence that contains articles providing first-person insight into the correctional experience. Finally, there are blogs, such as the Ninth Circuit Blog (<http://circuit9.blogspot.com/>), to which Chief Deputy Federal Public Defender Steve Sady regularly contributes;<sup>24</sup> as well as listservs, like BOPWatch (available at <http://groups.yahoo.com/group/BOPWatch/>) and that run by FedCURE (available at <http://groups.yahoo.com/group/FedCURE-org/>); and discussion forums, like PrisonTalk.com. A number of attorneys subscribe to BOPWatch, many of whom are able and willing to respond to questions concerning BOP policy and practice. FedCURE and PrisonTalk are 'places' where many family members of the incarcerated congregate and share information.

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<sup>24</sup> Those interested in prison-related litigation should read Steve Sady and Lynne Deffebach's excellent articles: Stephen R. Sady & Lynn Deffebach, *The Sentencing Commission, The Bureau of Prisons, And The Need For Full Implementation Of Existing Ameliorative Statutes To Address Unwarranted And Unauthorized Over-Incarceration*, June 2008, <http://or.fed.org/symp2.final%20for%20pdf.pdf> and Stephen R. Sady & Lynn Deffebach, *Update on BOP Issues Affecting Clients Before and After Sentencing*, February 2007, <http://or.fed.org/BOPNotesOnIssuesJan07.pdf>.