

The Fine Print: Strategies for Avoiding Restrictive Conditions of Supervised Release

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I. Introduction

As criminal defense attorneys, we spend countless hours trying to obtain the lowest possible sentences for our clients. Our advice to our clients, negotiations with prosecutors, interactions with probation officers, and arguments to the judge are all informed by an elusive magic number. While looking at the big picture, however, we sometimes forget to read the fine print. That print usually includes a long list of conditions which will govern our client's period of supervised release. For sex offenders who face a lifetime of supervision, the terms of supervised release can be as confining as a jail cell.

The information that follows invites you to extend your advocacy efforts to the entire sentence, including the years on supervised release that can all-too-easily become an afterthought. These materials set forth the statutory framework governing supervised release, the types of conditions sex offenders typically face, and the arguments you can make to eliminate these conditions and give your clients a fighting chance to succeed after incarceration.

II. The Development of Supervised Release

The Sentencing Reform Act of 1984 abolished parole in the federal system and in its place created supervised release, a new type of sentence which could be added following a prison term. Johnson v. United States, 529 U.S. 694, 696-97 (2000). Unlike other forms of community supervision, supervised release was not intended as an additional means of punishing or incapacitating a defendant for a crime. See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromise Upon Which They Rest, 17 Hofstra L.Rev. 1, 125 (1988). In fact, revocation was never contemplated. Instead, the primary goal of a term of supervised release was "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training after release." S.Rep. No. 225, 98th Cong., 1st Sess. 124 (1983).

Just a short time later, the political climate changed. Beginning with the Anti-Drug Abuse Act of 1986, Pub. L. No. 100-690, §7303, 102 Stat. 4464 (1986), the concept of deterrence became a major component of all sentences. As a result of this shift in policy, Congress amended the supervised release statute to authorize revocation and reimprisonment for violations of supervised release conditions. 18 U.S.C. § 3583(e). It also developed mandatory terms of supervised release for controlled substance offenses and mandatory revocation for

possession of controlled substances. 18 U.S.C. § 3583(g). The length of a term of supervised release was to be based on the classification of the original offense, not on the particular person's need to readjust to non-prison life. 18 U.S.C. § 3583(b). Through these and other amendments emphasizing deterrence, the original rehabilitative purposes of supervised release have been almost completely obscured. Paula Kei Biderman & Jon M. Sands, A Prescribed Failure: The Lost Potential of Supervised Release, Fed.Sent.Rep. Vol. 6, No. 4 (Jan./Feb. 1994).

III. Law Governing Supervised Release Conditions

Consistent with the increasingly punitive nature of supervised release, offenders are often subject to a long list of supervised release conditions. Although only a small portion of supervised release conditions are actually mandated, courts have adopted the “more is more” approach in imposing conditions of release.

A. Mandatory Conditions: 18 U.S.C. § 3583(d), U.S.S.G. § 5D1.3(a)

Conditions mandated by Congress appear at 18 U.S.C. § 3583(d) and U.S.S.G. §5D1.3(a). These mandatory conditions provide, among other things, that a defendant: 1) is not to commit another offense while on supervision; 2) is to refrain from unlawful use of controlled substances and submit to drug testing; 3) is to make restitution to the victim of the offense; and 4) is to submit to the collection of a DNA sample. Congress has enacted only one mandatory condition of release pertaining specifically to sex offenders. That condition provides that, if the offender is required to register under the Sex Offender Registration and Notification Act (“SORNA”), the court shall order, as a condition of supervised release, that the defendant comply with the requirements of that Act. 18 U.S.C. § 3583(d); U.S.S.G. §§ 5D1.3(a)(7)(A) & (B).

B. Discretionary Conditions: 18 U.S.C. § 3583(d); U.S.S.G. § 5D1.3(b) - (d)

In addition to the mandatory conditions of supervised release, a district court will normally impose discretionary conditions of supervised release. A discretionary condition may be imposed only to the extent that it:

- (1) is “reasonably related” to the statutory sentencing factors in 18 U.S.C. §§ 3553(a)(1) and 3553(a)(2)(B) - (D), which include the nature and circumstances of the offense, the history and characteristics of the defendant, the need to protect the public from further crimes of the defendant, and the need to provide needed educational or vocational training, medical care, or other correctional treatment;

AND

- (2) involves “no greater deprivation of liberty than is reasonably necessary” to serve the purposes of deterrence, protection of the public, and training and treatment.

18 U.S.C. § 3583(d). Courts have emphasized that both of these requirements must be satisfied in order to impose a special condition. *See, e.g., United States v. Bender*, 566 F.3d 78 (8th Cir. 2009); *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009); *United States v. Pruden*, 398 F.3d 241, 249 (3d Cir. 2005). Moreover, in the event of an objection, it is the government's burden to show that the condition is justified. *United States v. Weber*, 451 F.3d 553 (9th Cir. 2006). As the Ninth Circuit explained in *Weber*:

We have long held that a term of supervised release is part of a defendant's sentence. . . and, like imprisonment, restricts a defendant's liberty and fundamental rights. . . . As a result, when the government seeks to restrict a defendant's liberty through a term of supervised release, it shoulders the burden of proving that a particular condition of supervised release involves no greater deprivation of liberty than is reasonably necessary to serve the goals of supervised release.

Id.

Though the district court retains the power to craft discretionary conditions of supervised release, the Sentencing Commission recommends that the court impose in every case the "standard" conditions of supervised release set forth in U.S.S.G. § 5D1.3(c). These standard conditions, which the Commission labels "expansions" of the conditions required by statute, include now-familiar conditions requiring the defendant to work at a lawful occupation, refrain from excessive alcohol, avoid associations with convicted felons, and notify third parties of risks occasioned by the defendant's criminal record. The Commission also recommends "special" conditions for particular kinds of cases. If the instant offense of conviction is a sex offense, the court is to consider: 1) a condition requiring the defendant to participate in a program for the treatment and monitoring of sex offenders; 2) a condition limiting the use of a computer or interactive computer services in cases in which the defendant used such items; and 3) a condition requiring the defendant to submit to random, warrantless searches of the defendant's person, residence, and computers. U.S.S.G. § 5D1.3(d).

IV. Supervised Release Conditions Convicted Sex Offenders

Nowhere is the shift in favor of deterrence more pronounced than in sentences for sex offenders. In 2003, the PROTECT Act altered the supervised release statute as it pertains to a host of sex offenses against minors, including possessing and receiving child pornography. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act "PROTECT Act" of 2003, Pub. L. No.108-21, 117 Stat. 650, 650-95 (2003) (codified as amended in scattered sections of 18 U.S.C.). Under 18 U.S.C. § 3583(k), these offenders are subject to a minimum of five years' imprisonment and up to a lifetime of supervised release.

In addition to imposing lengthy terms of supervision, federal judges (at the urging of United States Probation) routinely impose on convicted sex offenders a host of special conditions of supervised release. The use of these conditions has become so routine that courts

have begun to refer to them as “sex offender conditions.” *Be forewarned that probation officers and judges resort to their lists of “sex offender conditions” even when the crime for which the defendant is being sentenced is not a sex offense.* See, e.g., United States v. Mike, 632 F.3d 686 (10th Cir. 2011) (assault case); United States v. Kelly, 625 F.3d 516 (8th Cir. 2010) (felon-in-possession of a firearm); United States v. Ross, 475 F.3d 871 (7th Cir. 2007) (false statements to FBI); see also Guide to Judiciary Policy, Vol. 8, Pt. I, § 160 (Rev. 2011) (http://jnet.ao.dcn/Guide/Vol_8_Probation_and_Pretrial_Services.html). The Courts of Appeals have validated this practice, holding that courts can impose special conditions of supervised release not directly related to the offense for which the defendant is being sentenced where “the special conditions are related to another offense that the defendant previously committed.” United States v. Smart, 472 F.3d 556, 559 (8th Cir. 2006); see also United States v. Prochner, 417 F.3d 54 (1st Cir. 2005).

“Sex offender conditions” differ slightly among jurisdictions and judges. However, most convicted sex offenders are subject to some variation of the following conditions:

A. Restrictions on Internet Use

- Example 1: The defendant shall not possess or use a computer with access to the internet or any online service at any location.
- Example 2: The defendant shall not use a computer with access to the internet or any on-line computer service without the prior written approval of the probation officer.

B. Residence and Contact Restrictions

- Example 1: The defendant shall have no contact, nor reside with children under the age of 18, including his own children, unless approved in advance and in writing by the probation officer in consultation with the treatment providers. The defendant must report all incidental contact with children to the probation officer and treatment provider.

C. Movement Restrictions

- Example 1: The defendant shall not frequent or loiter in places where minor children under the age of 18 congregate, such as residences, parks, beaches, pools, daycare centers, playgrounds, and schools, without prior written consent of his probation officer.
- Example 2: The defendant shall not access or come within 500 feet of schools, school yards, parks, arcades, playgrounds, amusement parks, or other places used primarily by children under the age of 18, unless approved in advance and in writing by the probation officer.

D. Employment/Occupational Restrictions

- Example 1: The defendant shall not affiliate with, own, control, and/or be employed in any capacity by a business, organization, and/or any volunteer activity that causes him to regularly contact persons under the age of 18.5
- Example 2: The defendant shall not be employed in any capacity or participate in any volunteer activity that involves contact with minors under the age of 18, except under circumstances approved in advance and in writing by the Court.

E. Search Conditions

- Example 1: The defendant shall submit to a search of his person, property, vehicles, business, computers, and residence, to be conducted in a reasonable manner and at a reasonable time, for the purpose of detecting sexually explicit materials.

F. Treatment Conditions, Often Requiring the Use of Polygraph and/or Penile Plethysmograph Testing

- Example 1: The defendant shall immediately undergo a psychosexual evaluation upon release and begin participating in sex offender treatment, consistent with the recommendations of the psychosexual evaluation, and furthermore, the defendant shall submit to clinical polygraph testing and any other specific sex offender testing, as directed by the probation officer.
- Example 2: The defendant must participate in a specialized sex offender treatment program that may include the use of plethysmograph or polygraph testing.

G. Tracking Condition (An Eighth Circuit Special!)

- Example 1: The defendant must submit to any means utilized by the probation office to track his whereabouts.

H. Restrictions on Possession of Materials

- Example 1: The defendant shall not have in his possession any form of pornography, including legal adult pornography.

- Example 2: The defendant shall not possess any materials, including pictures, photographs, books, writings, drawings, videos or video games depicting and/or describing sexually explicit conduct as defined at Title 18, United States Code, Section 2256(2).
- Example 3: The defendant shall not possess pornographic, sexually stimulating materials.
- Example 4: The defendant shall not possess or have under his control any material, legal or illegal, that contains nudity or that depicts or alludes to sexual activity or depicts sexually arousing material. This includes, but is not limited to, any material obtained through access to any computer, including a computer for employment purposes, or any other material linked to computer access or use.

V. Fighting Special Conditions of Supervised Release

Although it is difficult to fight off restrictions on sex offenders, it is not impossible. Opportunities for creative lawyering are abundant in this area, both in the district court level and on appeal, where an objectionable condition might present the best opportunity for an appellate win. Like any other area of sentencing, the key to success lies in sweating the details, and following some basic rules.

A. Anticipate the Likely Conditions

The scout's motto to "be prepared" is a wise one to employ when combating restrictive conditions of supervised release. However, in order to properly arm yourself, you must first know what you are fighting. Supervised release conditions are not included in the list of information that must be disclosed in a Presentence Investigation Report. Fed.R.Crim.P. 32(d). In fact, suggested release conditions are sometimes kept confidential by practice of the court. See Fed.R.Crim.P. 32(e)(3) ("by local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence"). Therefore, defense counsel may have to do some investigative work to find out what conditions are likely to be proposed. A good place to start is on your district court's website, where standard conditions for sex offenders are sometimes published under the court's "Standing Orders." Conditions can also be discovered by calling your local federal public defender's office and talking with an attorney who has recently handled a child pornography case.

B. Know your client

As in all cases, it is important to know your client and the circumstances that s/he brings to sentencing. In fact, because the judge is often on auto-pilot by the time it comes to imposing supervised release conditions, a push back with detailed reasons as to why they do not fit your client's case will often result in modification. If not, the dialogue can at least prompt comments

that can be helpful to your case on appeal.

If the instant offense is a sex offense or child pornography offense, share with the court any treatment records you may have compiled that indicate a low risk of recidivism. In addition, do not forget to ask the obvious questions about your client's residence, family relationships, and employment. When a restriction on computers or internet is contemplated, you should be armed with information regarding exactly how your client uses computers in his employment and other aspects of his daily life. When a condition threatens to interfere with a defendant's ability to have contact with his own children, be ready to explain how he currently interacts with those children. If those relationships are stabilizing ones, an open-minded judge may at least make modifications to exclude his own family from the restrictions.

In cases in which restrictive conditions are proposed as the result of a prior sex offense, it is important to obtain the records of the prior offense to understand the details of its commission. The details may not prove helpful, but those are the records on which the probation office will undoubtedly rely in urging the court to impose special conditions of supervised release.

C. Understand the Psychological Research

One helpful side-effect of the increased attention on sex offenders is the growing body of academic and legal literature that is beginning to emerge in this area. Understanding at least the broad outline of these studies is particularly useful in child pornography cases, where high statutory and guideline sentences have given even the toughest judges pause. Courts have been operating for years under the assumption that child pornography viewers are at high risk to molest children, and have therefore required that they be supervised in the same manner as "contact" sex offenders. However, according to Michael Seto, a prominent researcher in the field of child sexual offenders, the empirical evidence does not support this assumption. Michael Seto, Pedophilia and Sexual Offending Against Children: Theory, Assessment, and Intervention, American Psychological Association, 2008 at xi, xii. In 2005, Seto and his colleagues followed 201 child pornography offenders for a period of years after their release from prison with the goal of determining what factors predict the likelihood that child pornography offenders will later commit a contact sexual offense. See Michael C. Seto and Angela W. Eke, The Criminal Histories and Later Offending of Child Pornography Offenders, Sexual Abuse: Journal of Research and Treatment, Vol. 17, No.2 (April 2005). Their study found that only one of the offenders committed a contact sexual offense in the follow-up period—a finding that contradicts the assumption that all child pornography offenders are at high risk to commit contact sexual offenses involving children. Id. at 202, 208. It further found that the valid indicators for later commission of a contact offense were: 1) prior criminal history; and 2) prior instances of contact sexual abuse. Id.

Seto's analysis is supported by other studies that have been done on the characteristics of sexual offenders. These studies indicate that child pornography offenders score higher in victim empathy and lower in impression management than contact offenders while at the same time scoring higher in sexual deviance. Kelly M. Babchishin, et. al, The Characteristics of Online Sex

Offenders: A Meta-Analysis, *Sexual Abuse: A Journal of Research and Treatment*, Vol. 23, No.1 (March 2011). The implication is that online offenders, compared to contact sexual offenders, have a greater ability to refrain from acting on their deviant sexual interests. *Id.* at 107-108.

It is difficult to pitch arguments in this area, where repulsion for child pornography often overwhelms the fine distinctions. Moreover, none of this research is helpful when your client is a contact offender. However, distinctions between types of offenders are starting to gain acceptance in legal circles. Judges are now accustomed to hearing arguments that the guidelines for child pornography offense are not the product of empirical study or national experience and therefore do not satisfy § 3553(a)'s objectives. See Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (Jan. 1, 2009), avail. at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf. Some have even embraced these arguments in published opinions criticizing the guidelines. United States v. Henderson, No. 09-50544, __ F.3d __, 2011 WL 1613411 (9th Cir. Apr. 29, 2011); United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010). Other judges have begun to balk at the idea of lifetime supervised release for mere possessors of child pornography. United States v. Apodaca, No. 09-50372 (9th Cir. April 12, 2001). The arguments that have led to these inroads apply equally in the supervised release context. Since most of the conditions of release are motivated by the courts' desire to protect the public, reading an article or two about the risk that these offenders actually present will only strengthen your arguments against the restrictions.

D. Object Early and Often, With Specificity

Once you've gathered the information to effectively advocate, you need to actually object to the proposed discretionary conditions of supervised release. Unfortunately, caselaw on "sex offender conditions" of supervised release is replete with missed opportunities. Special conditions of supervised release are routinely affirmed under "plain error" appellate review, which applies when an attorney fails to appropriately object to the condition in the court below. These affirmances are often accompanied by statements that the court of appeals might have ruled differently under the less-deferential "abuse of discretion" standard. See, e.g., United States v. Mike, 632 F.3d 686 (10th Cir. 2011) (upholding ban on possession of "sexually explicit" materials because, while the term appears overbroad, a split in the circuits over the question prevents reversal for plain error); United States v. Prochner, 417 F.3d 54 (1st Cir. 2005) (though condition prohibiting defendant from engaging in an occupation requiring direct supervision of children is likely an impermissible occupational restriction, error did not rise to the level of "plain error"); United States v. Phipps, 319 F.3d 177 (5th Cir. 2003) (court acknowledges that prohibiting possession of "sexually oriented or sexually stimulating materials" is somewhat vague, but affirms because of lack of objection below). It is never a good thing to be on the receiving end of one of those opinions.

It is important that your objections identify all of the ways in which the condition is improper. The courts also apply plain error review when counsel objected to a condition only generally, and did not cite the precise basis for the argument pressed on appeal. United States v. Simons, 614 F.3d 475 (8th Cir. 2010); United States v. Stults, 575 F.3d 834 (8th Cir. 2009);

United States v. Love, 593 F.3d 1 (D.C. Cir. 2010).

The fact that enforcement of a disputed condition will not occur until years in the future should not inhibit an objection at sentencing. Courts have generally held that disputes over supervised release conditions are ripe for resolution when those conditions are imposed even though a defendant's supervised release may not commence for several years. *See, e.g., United States v. Johnson*, 446 F.3d 272, 279 (2d Cir. 2006) (ripeness is satisfied by a "direct threat of personal detriment," such that litigants "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *United States v. Zinn*, 321 F.3d 1084 (11th Cir.2003). Exceptions to this rule are limited, and should not deter defense counsel from litigating supervised release conditions at sentencing. *See, e.g., United States v. Lee*, 502 F.3d 447 (6thCir. 2007) (challenge to the possible use of penile plethysmograph during sex offender treatment not yet ripe, as it is unclear whether, by the year 2021, the testing procedure will still be used); *United States v. Balon*, 384 F.3d 38 (2d Cir. 2004) (court defers consideration of condition authorizing probation officer "to install any application as necessary on computer(s) or connected device(s) owned or operated" and "randomly monitor the defendant's computer(s), connected device(s), and/or storage media" because "the technology that holds the key to whether the special condition in this case involves a greater deprivation of liberty than reasonably necessary is constantly and rapidly changing").

VI. Objections to Common Sex Offender Conditions

A typical discretionary condition of supervised release is subject to more than one objection. What follows is a list of general objections, which will apply to many of the sex offender conditions, and a list of specific objections to raise for particular conditions. Helpful cases to support these objections are also listed, with the caveat that the courts are far from unanimous in their approach to these conditions.

A. General Objections

1. Not reasonably related / involves greater deprivation of liberty than reasonably necessary

In nearly every case, counsel can object to a special supervised release condition on the grounds that it is "not reasonably related" to your client's history or offense, or, if it is, that it involves a greater deprivation of liberty than necessary to meet sentencing purposes. This objection forces both the prosecutor and the district court to articulate case-specific reasons for the condition rather than rely on categorical stereotypes. If you've done your homework in investigating your client's particular circumstances, this objection gives you a jumping-off point for explaining why your client is not in need of the restriction the court is proposing.

2. Lack of Notice

As noted above, the Federal Rules of Criminal Procedure do not mandate that proposed

conditions appear in the Presentence Investigation Report, and jurisdictions are entitled to make their own rules regarding probation officer recommendations. Fed.R.Crim.P. 32. Nevertheless, some courts have held that notice is required before a court may impose any condition not on the Sentencing Guidelines' list of mandatory or discretionary conditions. See, e.g., United States v. Cope, 527 F.3d 944 (9th Cir. 2008); United States v. Scott, 316 F.3d 733 (7th Cir. 2003). In these jurisdictions, defendants are entitled to know about contemplated conditions far enough in advance to be prepared to refute them and offer alternatives at sentencing. Admittedly, not all courts agree that notice is required. United States v. Moran, 573 F.3d 1132 (11th Cir. 2009)(noting conflict but deciding that notice was not required prior to imposition of special conditions of supervised release). Nevertheless, be prepared to object to lack of notice whenever a court attempts to impose a special condition about which you had no warning.

3. Improper delegation

Special conditions of supervised release often prohibit certain activities unless they are approved in advance by the probation officer. When a defendant's liberty is contingent on the discretion of someone other than the judge, the condition may constitute an impermissible delegation of judicial power. United States v. Kieffer, 257 F3d.App. 378 (2d Cir. 2007).

In determining whether a particular delegation is an improper one, "courts distinguish between those delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and those that allow the officer to decide the nature or extent of the defendant's punishment." United States v. Mike, 632 F.3d 686 (10th Cir. 2011). Under these standards, the most frequent victories have come in the context of treatment conditions. If the court orders the defendant to "enroll, participate, and complete a sex offender treatment program *if directed to do so by the probation officer*," that condition will constitute an impermissible delegation. See United States v. Nash, 438 F.3d 1302 (11th Cir.2006). Such a condition essentially allows the probation officer to determine the nature or extent of the defendant's punishment. If, on the other hand, the condition simply dictates that the defendant enroll in and complete a sex offender treatment program "approved by the probation officer," a delegation objection will typically be unsuccessful. Courts interpret the latter type of condition as one which delegates only ministerial details such as schedule and selection of the program. See, e.g., United States v. Genovese, 311 Fed.Appx. 465 (2d Cir. 2009).

A second area in which courts have found improper delegation is in the area of familial relationships. In United States v. Voelker, 489 F.3d 139 (3d Cir. 2007), the court struck down a condition prohibiting contact with children below the age of 18 without prior approval of the probation officer and, in the event of such approval, requiring that the contact take place in the presence of an adult familiar with Voelker's criminal background. In striking down the delegation, the court was influenced by the fact that Voelker's supervised release was to last for his lifetime. According to the court, entrusting to a probation officer the sole authority for deciding whether Voelker would *ever* have unsupervised contact with a minor was the kind of "unbridled delegation of authority" that the constitution does not tolerate.

4. Prior sex offense too remote

If the instant offense is not a sex-related offense, and sex offender conditions are being proposed due to a prior sex offense that is several years old, counsel should argue that the prior conviction is too remote to justify the contemplated restrictions. Courts have been receptive to these arguments provided there is no evidence of sexual misconduct following the prior sex offense. See United States v. Carter, 463 F.3d 526 (6th Cir. 2006) (17-year gap between prior sex offense and current felon-in-possession offense made proposed sex offender treatment condition unnecessary); United States v. T.M., 330 F.3d 1235 (9th Cir. 2003) (sex offender-related supervised release conditions predicated upon twenty-year-old incidents, without more, do not promote the goals of public protection and deterrence); United States v. Scott, 270 F.3d 632 (8th Cir. 2001) (sex offender conditions invalidated in a bank robbery case because Scott's sexually inappropriate conduct occurred 15 years ago and obviously has ceased).

B. Specific objections

1. Internet Restrictions (e.g., "Defendant shall not possess or use a computer with access to the internet or any on-line computer service.")

a. Potential Objections

- Condition is overbroad and violates of the First Amendment, as it denies access to benign and protected speech without significant benefit to the public
- Condition creates an unlawful employment restriction in violation of U.S.S.G. § 5F1.5, which provides that occupational restrictions can only be imposed if a "reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction"
- Condition is unconstitutionally vague under the due process clause, as it is unclear whether it applies to PADS, cellular telephones, & electronic games, for example.

b. Factors bearing on success

- Length of supervised release: the longer the period of supervised release, the closer the scrutiny for the condition. United States v. Voelker, 489 F.3d 139 (3d Cir. 2007)
- Whether/how defendant used the internet to facilitate the offense: complete internet bans typically require some

outbound use of the internet to victimize children, rather than simply seeking out and storing child pornography. United States v. Wiedower, 634 F.3d 490 (8th Cir. 2011); United States v. Holm, 326 F.3d 872 (7th Cir. 2003).

- Availability of monitoring technology: courts may be receptive to filtering technology or unannounced hard drive inspections in lieu of internet bans. See, e.g., United States v. Miller, 594 F.3d 172 (3d Cir. 2010)

c. Helpful cases

- United States v. Perazza-Mercado, 553 F.3d 65 (1st Cir. 2009) (internet ban improper in absence of information that internet facilitated defendant's offense of sexual contact with a minor)
- United States v. Voelker, 489 F.3d 139 (3d Cir. 2007) (seminal case on restriction of internet access in possession of child pornography case)
- United States v. Peterson, 248 F.3d 79 (2d Cir. 2006) (striking down internet ban as occupational restriction)
- United States v. Miller, 594 F.3d 172 93d Cir. 2010)(striking down lifetime ban on use of the internet without probation officer's permission)
- United States v. Holm, 326 F.3d 872 (7th Cir. 2003) (total ban on internet use after conviction for possessing child porn does not meet narrow tailoring requirement)
- United States v. Bender, 566 F.3d 748 (8th Cir. 2009) (mere possession of child pornography isn't enough to justify internet ban)
- United States v. Burroughs, 613 F.3d 233 (D.C. Cir. 2010) (fact that an offense is sometimes committed with the help of a computer does not mean that the district court can restrict the Internet access of anyone convicted of that offense)

d. Less restrictive alternatives

- “The defendant is permitted to possess a computer with internet access; however, he shall not access any child pornography sites or images. The defendant shall be subject to unannounced inspections by his probation officer of material stored on the hard drive of any computer he possesses.” United States v. Miller, No. 4:04-CR-27 in the United States District Court for the Middle District of Pennsylvania, Docket # 258 (April 29, 2010)
- “The defendant is permitted to possess a computer and computer-related devices with internet access. Computers and computer-related devices include, but are not limited to, personal computers, personal data assistants (PDAs), internet appliances, electronic games, and cellular phones that can access, or can be modified to access, the internet, electronic bulletin boards, other computers, or similar media. All such computers and computer-related devices used by the defendant shall be subject to the installation of filtering and monitoring software and/or hardware, and subject to unannounced inspection. The defendant shall not hide or encrypt files or data without the prior written approval of the Probation Officer. United States v. Holm, No. 1:01CR10011 (C.D. Ill.) (Revocation Judgment of July 28, 2006); United States v. Stoterau, No. 8:06CR190 (C.D. Cal.) (Amended Judgment Jan. 5, 2009)

2. **Residence and Contact Restrictions** (e.g. “The defendant shall have no contact, nor reside with children under the age of 18, including his own children, unless approved in advance and in writing by the probation officer in consultation with the treatment providers. The defendant must report all incidental contact with children to the probation officer and treatment provider.”)

a. Potential objections

- Condition violates a parent’s due process liberty interest in family integrity and maintaining child/parent relationship
- Condition violates First Amendment right of association

b. Factors bearing on success

- Does your client have children? The fact that the defendant is childless may be an excuse for a court to “punt,” and

suggest that the defendant seek modification in the future. United States v. Kerr, 472 F.3d 517, 523 (8th Cir. 2006)

- Length of supervised release term (again, longer terms require more justification for the condition). United States v. Voelker, 489 F.3d 139 (3d Cir. 2007)
- Prior inappropriate contacts with family members

c. Helpful cases

- United States v. Myers, 426 F.3d 117 (2d Cir. 2005) (because of liberty interest in maintaining relationship with child, condition restricting contact must be narrowly tailored to a compelling governmental interest)
- United States v. Voelker, 489 F.3d 139 (3d Cir. 2007)
- United States v. Bender, 566 F.3d 748 (8th Cir. 2009) (invalidating condition which prohibited contact with minors without prior approval, and then only “in the presence and supervision of a responsible adult”)

d. Less restrictive alternative

- “With the exception of brief, unanticipated, and incidental contacts, the defendant shall not associate with children under the age of 18, except for family members, unless approved by the United States Probation officer.” United States v. Miller, No. 4:04-CR-27 in the United States District Court for the Middle District of Pennsylvania, Docket # 258 (April 29, 2010) (modified)

3. Movement Restrictions (e.g. “The defendant shall not access or come within 500 feet of schools, school yards, parks, arcades, playgrounds, amusement parks, or other places used primarily by children under the age of 18 unless approved in advance and in writing by the probation officer.”)

a. Potential objections:

- Condition is unconstitutionally vague under the due process clause because persons of common intelligence must guess at its meaning and can differ as to its application

- Condition is overbroad, as it unconstitutionally impinges on First Amendment right of association
- b. Factors bearing on success**
- Definition of the restriction: does it cover areas where children can congregate (excessively broad) or areas primarily used by children (typically upheld)?
- c. Helpful cases**
- United States v. Peterson, 248 F.3d 79 (2d Cir. 2001)(condition permissible only if limited to areas where minors typically congregate)
 - Carswell v. State, 721 N.E.2d 1255, 1260 (Ind.Ct.App.1999) (condition prohibiting the defendant from residing within two blocks of “any area where children congregate” is impermissibly vague)
- d. Less restrictive alternative**
- “The defendant shall not access or loiter near schools, school yards, parks, arcades, playgrounds, or amusement parks. This condition shall not be interpreted to prohibit the defendant from attending school activities, sporting events, or similar youth functions involving his own children, provided he obtains prior written approval from his probation officer.” (Condition proposed in United States v. Blinkinsop, No CR 08-117 (D. Mont. 2011), on remand from United States v. Blinkinsop, 606 F.3d 1110 (9th Cir. 2010))
- 4. Employment/Occupational Restrictions** (e.g. “The defendant shall not affiliate with, own, control, and/or be employed in any capacity by a business, organization, and/or any volunteer activity that causes him to regularly contact persons under the age of 18.”)
- a. Potential objections**
- Condition constitutes an unlawful employment restriction under **U.S.S.G. § 5F1.5(a)**, which provides that an occupational restriction may be imposed only if the court

determines that: 1) a “reasonably direct relationship existed between the defendant’s occupation and the conduct relevant to the offense of conviction;” and 2) the imposition of such a restriction is “reasonably necessary to protect the public.”

- Condition is overbroad, impinging on the First Amendment right of association and, potentially, the right to free exercise of religion.

b. Factors bearing on success

- Client’s work history: if the defendant had a specific prior occupation that now falls under the restriction, your case is at its strongest. See United States v. Emerson, 231 Fed.Appx. 349 (5th Cir. 2007).
- Client’s job prospects: are his skills such that jobs in retail or fast food—which would likely cause regular contact with minors—are his only options?
- Client’s prior volunteer or church activities.

c. Helpful cases

- United States v. Prochner, 417 F.3d 54 (1st Cir. 2005) (though defendant did not object, court surmises that condition prohibiting him from engaging in any occupation that would require supervision of children is an impermissible occupational restriction, as most of the defendant’s work history involved jobs with children)
- United States v. Mike, 632 F.3d 686 (10th Cir. 2011)(invalidating condition prohibiting defendant from engaging in occupation involving access to children)
- United States v. Peterson, 248 F.3d 79 (2d Cir. 2001)(under U.S.S.G. § 5F1.5, occupational restriction must be based on offense of conviction, not criminal history)

d. Less restrictive alternatives:

- “Defendant shall not be employed in [name occupation involving children that contributed to offense of

conviction] unless the Court determines, upon a motion for modification of conditions lodged by the defendant, that such restriction is no longer necessary to protect the public.” U.S.S.G. § 5F1.5(a),

5. Treatment Conditions Requiring Use of Polygraph and/or Penile Plethysmograph Testing (e.g. “The defendant must participate in a specialized sex offender treatment program that may include the use of plethysmograph or polygraph testing.”)

a. Potential objections

- Polygraph conditions violate the defendant’s Fifth Amendment right against self-incrimination
- Polygraph results are unreliable and inadmissible in court, and therefore should not be used to gauge a defendant’s performance on supervised release
- Penile plethysmograph testing is highly intrusive, embarrassing, and unreliable; results of such tests are inadmissible in nearly every jurisdiction to have considered them

b. Factors bearing on success

- Ripeness: Particularly in cases in which the defendant received a long sentence of incarceration, courts have held that questions over penile plethysmographs are not ripe because it is unclear whether such tests will be used in the future. United States v. Lee, 502 F.3d 447 (6th Cir. 2007); United States v. Rhodes, 552 F.3d 624 (7th Cir. 2009).
- Scope of polygraph questions: Conditions that limit the types of questions that the probation officer may ask and/or eliminate the power to revoke on the basis of a failed polygraph examination are typically approved.

c. Helpful cases

- United States v. York, 357 F.3d 14 (1st Cir. 2004) (authorizing polygraph conditions only if related to compliance with treatment)

- United States v. Lee, 502 F.3d 447 (6th Cir. 2007) (questioning reliability of penile plethysmograph testing)
- United States v. Weber, 451 F.3d 553 (9th Cir. 2006) (because plethysmograph testing implicates a particularly significant liberty interest of the defendant, district court must support the condition on the record with specific findings as to its necessity)

d. Less restrictive alternatives

- “The defendant shall submit to periodic polygraph testing by a certified polygraph examiner. Polygraph questions shall be limited to inquiries designed to ensure compliance with, and gauge the effectiveness of, the defendant’s therapeutic treatment program. In no event shall a failed polygraph examination form the basis for any revocation proceeding.” See United States v. York, 357 F.3d 14 (1st Cir. 2004).

5. Restrictions on Possession of Materials (e.g., “Defendant shall not possess or have under his control any pornographic, sexually explicit, sexually oriented, or sexually arousing materials.”)

a. Potential objections

- Condition is unconstitutionally vague under the due process clause because persons of common intelligence must guess at its meaning and can differ as to its application
- Condition is overbroad under the First Amendment because it prohibits a wide variety of constitutionally-protected material
- Condition improperly delegates to the probation officer the unfettered power of interpretation

b. Factors bearing on success

- The amount of benign materials that can fall within the condition’s sweep: the more examples you can provide the more receptive courts are to at least narrowing the scope of the condition.

c. Helpful cases

- United States v. Loy, 237 F.3d 251 (3d Cir. 2001) (ban on possessing “pornography” struck down on vagueness grounds, with court noting that “without a more definite standard to guide the probation officer’s discretion, there is a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating.”)
- United States v. Kelly, 625 F.3d 516 (8th Cir. 2010)(striking down as overbroad a prohibition on possession of sexually arousing materials, and providing good examples—including Bible passage—of benign materials that would fall within its scope)
- United States v. Stoterau, 524 F.3d 988 (9th Cir. 2008)(reasonable minds can differ greatly about what is encompassed by the term “pornography”)
- United States v. Kestig, 339 Fed.Appx. 206 (3d Cir. 2009)(in order to limit access to sexually-oriented materials, the record must suggest at a minimum that sexually explicit material involving only adults contributed to the offense or that viewing such material would cause defendant to reoffend)

d. Less restrictive alternatives

- “The defendant shall not possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games, depicting or describing "child pornography" as defined in 18 U.S.C. § 2256(8).”

VII. Court & Probation Tricks

- A. Categorical Policies:** It is not uncommon for a court to state at sentencing that it is imposing sex offender conditions because that is what it does in every sex offense case. Alternatively, a judge may say something like, “I think a sex offender doesn’t have any business looking at a *Playboy* magazine.” United States v. Bender, 566 F.3d 748, 752 (8th Cir. 2009). Such comments betray a procedural error. In the supervised release context, and indeed in all sentencing decisions, a “one size fits all” approach is prohibited. When imposing special

conditions, “inquiry must take place on an individualized basis; a court may not impose a special condition on all those found guilty of a particular offense.” United States v. Davis, 452 F.3d 991, 995 (8th Cir.2006); see also United States v. Burroughs, 613 F.3d 233 (D.C. Cir. 2010) (if internet restrictions were appropriate for every defendant convicted of a sexual offense against a minor, the Sentencing Commission would have said so). Therefore, look out for any evidence that the district court is imposing a condition on the basis of the defendant’s membership in a class, rather than on the basis of facts specific to the defendant’s case

- B. Burden shifting:** Also be on the lookout for statements like, “You haven’t shown why I shouldn’t impose these conditions” or “You can always come back at a later time to challenge this if it’s too much.” Statements like these constitute burden shifting. In the supervised release context, the burden is on the government to demonstrate that the condition is necessary and that no less restrictive condition would suffice to serve the sentencing purposes. United States v. Weber, 451 F.3d 553 (9th Cir. 2006). Burden shifting is a basis for an objection and, if necessary, an appeal.

- C. Modifying conditions of release:** It is not uncommon during a period of supervision for a probation officer to ask a defendant to waive his right to an attorney and submit to a modification of his supervised release conditions. See, e.g., United States v. Begay, 631 F.3d 1168 (10th Cir. 2011); United States v. Emerson, 231 F3d.app.x. 349 (5th Cir. 2007). Although you cannot always head off these tactics, you should always try to warn your client about this possibility as you meet with him during the original proceedings, and advise him to invoke his right to counsel instead. As long as your client does not consent, modifications of supervised release require the same justification as conditions imposed during the original sentencing hearing.

VIII. Conclusion

As long as federal sentences remain unjustifiably severe, defense attorneys will be tempted to treat supervised release as a footnote in the long chapter on sentencing. Unfortunately, our clients’ battles continue long after incarceration. Attacking restrictive conditions of supervised release can relieve the oppressive threat of revocation and help our clients regain some semblance of a normal life after prison. So read the fine print, and help your clients remain free upon release