

Views From The Bench On Sentencing Representation: Part 4

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Judge Cynthia A. Bashant of the Southern District of California in San Diego and Judge Jon D. Levy of the District of Maine in Portland were both appointed by President Obama in 2014 and confirmed at the same time. They preside literally on opposite sides of the country, but have kept in touch exchanging ideas on judging, including sentencing. Judge Bashant was formerly a state court judge who handled both juvenile and criminal matters, and Judge Levy was formerly a state trial judge and an associate justice on the Supreme Court of Maine. Lawyers consistently describe both as “right down the middle” at sentencing. Like many judges, these two jurists come out on bench with tentative guideline rulings and sentences in mind.



Alan Ellis

Before the Proceedings Begin



U.S. District Judge Jon D. Levy

In Maine, the judges convene a presentence conference in chambers several weeks before the sentencing, which Judge Levy finds extremely helpful. At the meeting, the lawyers are expected to discuss any objections to the presentence report that they intend to raise at the sentencing, any remaining documents or information that should be exchanged prior to the sentencing, the nature of any testimony or other evidence that will be required to resolve objections to the presentence report, and whether there are any questions regarding the Guidelines or the applicable law that deserve briefing. A schedule for the submission of sentencing memos and exhibits is established, as are the time, date and length of the sentencing hearing. This allows the lawyers to schedule the sentencing around the availability of the witnesses, victims, and family members who will attend.

The presentence conference is a critical first step, says Judge Levy, because it provides him insight as to the issues that the lawyers feel are most consequential. This, in turn, influences how he prepares for the sentencing. “Effective defense presentation at this stage can be very important to the ultimate outcome of the case. It is an opportunity for the lawyer to direct my attention to the key sentencing issues. The information I receive at the conference should be solid.”



U.S. District Judge Cynthia A. Bashant

Judge Bashant comes out on the bench and begins by announcing her tentative sentence, including how she intends to rule on disputed guideline issues. Therefore, it is very important that counsel provide her with a sentencing memorandum at least one week in advance of the sentencing hearing. Judge Bashant says, "A lawyer should get me a sentencing memorandum at least one week in advance because that is when I am going to start reading the presentence report, any addendum and the parties' sentencing memoranda. This is when I will first start developing my tentative sentence. If the prosecution already has submitted a sentencing memorandum, a late filing by defense counsel puts the defendant 'behind the eight ball.'"

Credible Sentencing Recommendations Welcomed

Like all judges I have interviewed so far, Judges Bashant and Levy don't like boilerplate citations to Booker, its progeny or 18 U.S.C. §3553 factors in sentencing memoranda. Judge Bashant also doesn't like cut-and-paste jobs, offering the advice to "tailor your sentencing memorandum to this particular defendant." While she doesn't need to be reminded of pertinent case law, of course, she states, "If there is good authority on a disputed guideline issue, I want to see it."

Judge Levy gives great weight to the lawyers' sentencing recommendations. "It is important that the lawyers be clear on what they are asking for and the rationale for it. This is where focused advocacy is critical because if they want me to adopt their recommendation, they have to link that recommendation to facts that are in the record and sound reasons that support the sentence. There are occasions when lawyers are not clear as to what sentence they would like me to consider imposing and the facts and reasoning that support it."

Judge Bashant also welcomes lawyers' sentence recommendations, if they are well reasoned. "If the recommendation is particularly low, it often causes me to question the lawyer's credibility, not just on the recommendation, but in other arguments he's making." In court, Judge Bashant wants counsel to listen to her concerns and respond to them. She advises, "If I've given a tentative indication about how I am going to rule on a particular guideline issue, and it is in the defendant's favor, don't argue it. On the other hand, if I am going to go with the presentence report or the government's position, then I want to hear it argued."

Lawyers often do their clients a disservice when they simply adopt what is in the presentence report (PSR), according to Judge Bashant. "What I typically see in our district is for the 'Defendant's Statement of the Offense' section of the PSR to read 'Upon the advice of counsel, Defendant refused to answer any questions, but adopted the facts outlined in the factual basis of the plea agreement as his statement of offense.'" Judge Bashant says that while she understands that lawyers likely take this approach because they fear their client may further incriminate themselves, it is her opinion that this is a missed opportunity.

"This is a chance for the defendant to give his version of what he did, why he did it, why he is not going to do it again and why this was aberrant behavior." She thinks lawyers who do not allow their clients to answer the probation officer's questions sometimes do their clients a disservice, adding, however, that she realizes that "it requires that a defense attorney spend time with a client preparing him for the presentence interview beforehand. "Where a lawyer can play a large role is when there are facts that

are missing from the records — facts about the client’s background, motivation and future plans. That’s where the lawyer’s role can become quite important,” says Judge Bashant.

When assured the defendant will not reoffend, Judge Bashant is looking for concrete examples. “For example, in an unlawful immigration case, show me that your client has a job waiting for him back in Mexico.” Employer letters stating that they know the defendant and would rehire him upon his release from prison carry a lot of weight with Judge Bashant.

The same is true for Judge Levy. Also important to Judge Levy is what the defendant has done since being apprehended. For example, if detained, has the defendant taken advantage of any rehabilitation programming or performed a useful service like teaching other inmates a new job skill at the jail? “If the defendant was on presentence release, I want to know what she or he has done during that period, whether the defendant has made amends or paid restitution; was the defendant working and how did it go; has the defendant received mental health or substance abuse treatment and what do the providers have to say about the defendant’s progress; and generally anything that bears on whether the defendant has taken meaningful steps to turn his or her life around.”

Judge Levy goes on to emphasize the importance of defense counsel establishing trust with him, as well. “Don’t minimize the seriousness of what your client did.” In other words, if a lawyer can show that he/she is on the same page with their client as to the seriousness of the offense, the chances of having your other statements accepted by Judge Levy increase. In a difficult case, Judge Levy, like Judge Bashant, feels strongly that the lawyer needs to “humanize” his or her client in explaining why the client did what he did, why he won’t do it again, and why he is deserving of a light sentence. If there are any aggravating factors, be sure to address them.

Judge Bashant is particularly interested in knowing why the offense was committed. “Was it done because the defendant was in financial straits? If so, I want to know the defendant’s plans for the future so that this doesn’t happen again,” she says. “I am very interested in why the defendant will be able to make a go of it, particularly if his crime was committed for economic reasons.”

Allocution Is Serious Business

Like most judges I’ve interviewed, these two judges both take allocution very seriously. “Allocution matters,” says Judge Levy. “I will never hold poor communication skills against a defendant,” he emphasizes. What’s important is whether he is persuaded that the defendant is sincere and demonstrates insight about the crime and the actual changes the defendant must make in order to live a positive and successful life. He observed, “I am mindful that a highly educated sociopath may deliver an eloquent allocution. If I conclude that a defendant is not sincere, that will work against him..”

Judge Bashant doesn’t want the defendant to apologize to her. “I want him to apologize to the victim and his or her family, particularly if they are in the courtroom. Just like a parent with a child who has done wrong, I am looking for ‘insight’ from the defendant,” she says. She wants lawyers to know that she will dialogue with their client.

Do Psych Evaluations and Character Letters Make Any Difference?

Asked for her views on mental health reports, Judge Bashant responded that they could be helpful only if the evaluator has spent a considerable amount of time with the defendant. “A report where the expert has spent 50 minutes with the defendant and has concluded that he or she is not a risk to

reoffend is not particularly helpful,” she shared. A lawyer, therefore, should not hesitate to submit a report by a mental health professional who has treated the defendant for a significant period of time rather than one from a professional forensic expert. “I recognize that clinicians who have spent a lot of time with their patient may come across as advocates,” says Judge Bashant, but, so, too, forensic experts also often seem to be advocates. She is particularly interested in knowing whether the offender has a diagnosable mental health disorder that may have contributed to the commission of the offense and which is treatable.

Judge Levy finds psych evaluations to be helpful in determining why the defendant did what he did and the likelihood of recidivism. He is familiar with many of the experts who testify in Maine, and he will give serious consideration to any assessment that credibly demonstrates that the expert has exercised independent professional judgment. Like Judge Bashant, Judge Levy welcomes a report from a treating professional, though he has concern that the expert may be acting as an advocate as opposed to an evaluator. “In any event, I want to know the risk of the defendant reoffending.” Judge Levy commented. He is of a mixed mind when it comes to the expert testifying in court. On one hand, it makes the expert subject to cross-examination and allows Judge Levy to question the expert. On the other hand, he doesn’t want the expert to simply “parrot” what he says in his report.

Character letters are important to Judge Bashant, and she finds them very helpful if they demonstrate that the writer knows what the defendant has done and then explains why this is aberrant behavior unlikely to recur if the defendant is a first offender. She is “interested in the protection of the public.”

Both judges welcome community service recommendations as alternatives to incarceration. Judge Bashant is impressed if the community service is related to the offense, for example, a talk to school groups about the problems of drugs. If the defendant has previously or is currently performing community service, Judge Levy finds it helpful to receive a detailed letter from the director of the agency that discusses the defendant’s work ethic, attitude, relationships with coworkers and actual contributions to the agency’s mission. “I will consider whether the continued service the offender wishes to perform is a needed service to the community and measure that against the need for incarceration. It all goes to just punishment,” he says.

Judge Levy is interested to receive comparative sentencing information that describes the sentences imposed by other judges in comparable cases.

Collateral civil consequences are important to Judge Bashant, who said that, with San Diego being so close to the Mexico border, “if a long-term, legal, permanent resident with an American family is going to be deported, I will take this into consideration when deciding the appropriate punishment.”

In short, both judges want lawyers to “humanize” their clients. Judge Levy is equally concerned about collateral civil consequences and believes it is incumbent on defense counsel to identify and explain those consequences in a sentencing memorandum or at sentencing.

Conclusion

Judge Bashant and Judge Levy, like most of the judges I’ve interviewed, want counsel to address the four “why” questions: (1) Why did the defendant do what he did? (2) Why was the behavior out of character with an otherwise law-abiding life? (3) Why is he unlikely to reoffend? (4) Why should they cut him a break?.

Virtually all want to see that the defendant has internalized what he has done so that they can determine whether he has seriously taken responsibility and is truly remorseful. Allocution can play a big part in humanizing the defendant. A lawyer needs to carefully prepare his or her client for this.

Your overall purpose needs to be humanizing your client. Tell a compelling story. Tell the judge something new, something she or he doesn't already know. I keep hearing the words "trust" and "credibility" from the judges. Attorneys would be wise to keep this in mind, especially with respect to the information presented, arguments made and sentences recommended.

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