

Views From The Bench On Sentencing Representation: Part 5

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Criminal defense lawyers consider Judges John R. Adams and Otis D. Wright II tough sentencers. Judges Justin L. Quackenbush and Walter H. Rice are viewed as being at the opposite end of the spectrum. With their reputations, it was interesting to learn how similar they were on what constitutes good defense sentencing advocacy. Judge Quackenbush sits in the Eastern District of Washington in Spokane and Judge Rice sits in the Southern District of Ohio in Dayton. Both were appointed in 1980. Judge Adams, of the Northern District of Ohio in Cleveland, was appointed in 2003. Judge Wright sits in the Central District of California in Los Angeles and took the federal bench in 2007. All but Judge Quackenbush were former state court judges.



Alan Ellis

Allocution

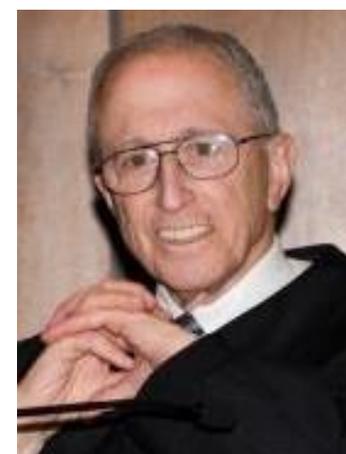
Judge Mark W. Bennett of the Northern District of Iowa, whom I interviewed in part 1 of this series, has written on the importance of allocution in the article “Heartstrings or Heartburn: A Federal Judge’s Musing on Defendants’ Right and Rite of Allocution,” which was published in March 2011 issue of *The Champion*. He followed this article with a survey of fellow judges which showed the high value most place on allocution (“A Survey and Analysis of Federal Judge’s Views on Allocution in Sentencing,” 65 *Ala. L. Rev.* 735 (2013)).



U.S. District Judge Justin L. Quackenbush

All of the judges here agree on its importance. Judge Quackenbush, a 37-year jurist, likes to hear a defendant allocute at sentencing, even if he is reading from written notes, unless, of course, the lawyer drafted those notes.

Judge Rice agrees, saying, “I can oft determine a defendant’s sincerity during a colloquy at sentencing. I often engage the defendant in conversation so I can learn more about him.” He also commented that he does not want to hear a canned speech. “I come out on the bench with a tentative range of sentence in mind, but a good allocution can cause me to impose a lower sentence. I may ask the defendant if he has harmed others and I may ask him what he plans to do about it.”



U.S. District Judge Walter H. Rice



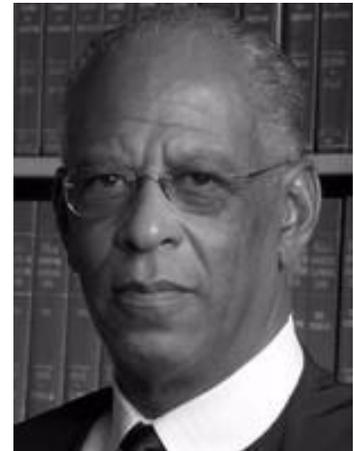
U.S. District Judge John R. Adams

Judge Adams says, “Sentencing is very personal. The more I see a defendant, the more I get to know him.” Judge Wright notes, “I want the unvarnished truth. It can really help if I believe that they are sincere. I can tell whether a defendant is being sincere by what he says in court.” Judge Adams comments, “A defendant’s allocution is generally more important than what a lawyer says at sentencing. I don’t want to have the defendant making excuses for his conduct.”

Judge Adams doesn’t want to see a defendant wallow in self-pity. “He should start his allocution by apologizing to the victims. I also want to see what a defendant has done in an attempt to make the victims whole, particularly in white collar fraud cases. If I see a presentence report that says the defendant has spent a lot of money on luxuries and has nothing left to pay back restitution, I get very annoyed.”

Similarly, Judge Wright will hold it against a defendant if he feels that your client has not done what he could have to make things right with his victims and says it is important for the defendant to make restitution prior to sentencing, particularly where there are vulnerable victims. “I will communicate to these victims that the defendant will not hurt you again. I want victims to know that I care about them. It is important to me that a defendant tries to make things right.”

One of the key points made by the majority of the judges that I’ve interviewed is the notion of whether a defendant has “internalized” what he has done, why he did it, what he has learned from it and why he is not going to do it again. Judge Rice will often ask a defendant what he is going to do upon release from prison in order to determine whether the offender is likely to re-offend. “I often engage a defendant in allocution so I can hear more about him.”



U.S. District Judge Otis D. Wright II

This is not to say that a lawyer need be a potted plant during the sentencing. Judge Quackenbush suggests it is important for lawyers to present any favorable information to the U.S. probation officer prior to the preparation of the presentence report. “Get it to the probation officer early. It is extremely helpful if provided even prior to the PSR interview itself,” he recommends.

Judge Adams stresses how important it is that the defendant be honest with his probation officer. He likes to meet with the probation officer prior to sentencing to get an idea of how honest and forthright the defendant has been.

The Lawyer’s Credibility

All four of these judges stress the importance of the lawyer’s credibility. Judge Rice says, “Lawyers need to be candid with me. They should not whitewash their client’s crimes. I don’t want a lawyer to sugarcoat his client or the offense.” For example, if the defendant has a bad record, say so, but explain what you want me to understand about this record and about the likelihood of rehabilitation.

Judge Rice also wants help in fashioning the best sentence. For example, he appreciates it when a lawyer poses a well-reasoned alternative to incarceration.

Judge Wright doesn't want to feel that he's being manipulated. "The best thing a lawyer can do is to start out by making sure that he and I are on the same page." For example, in a particularly reprehensible case, he wants the lawyer to acknowledge that the offense is, indeed, a heinous one if it is. "Once we are both in agreement as to what the client did and how victims have been impacted by it, that lawyer has a lot of credibility going forward. When I see that the lawyer and I are talking about the same defendant and the impact their actions had on the victims, I oftentimes will give the defendant a lower sentence than the attorney even asked for," he shared.

Lawyers who make frivolous arguments turn off Judge Adams. "It is important that a lawyer put together a good sentencing memorandum and make a good presentation in court," he shared. Judge Quackenbush expects a lawyer to cite cases involving important guidelines issues. Mindful that the presentence report always contains the government's version, Judge Rice says, "It's incredibly important for the defense lawyer to object to erroneous statements, even if they don't impact the guidelines because they will follow the defendant throughout his time in the Bureau of Prisons." He also says that he wants a picture of the defendant that is different from what is in the presentence report. "A good lawyer knows how to humanize his client. If the lawyer is going to make claims about a defendant being in poor health or family members suffering, he or she should give me evidence to support that claim," he says.

While three of the judges welcome a lawyer's sentencing recommendation, they all agree that a critical mistake they see lawyers make is to ask for too low of a sentence. Attorney sentencing recommendations are less important to Judge Adams; however, he notes that, "if a lawyer suggests a sentence within the realm of reasonable, I'll take it into consideration." Judge Wright went on to say that while a lawyer should not "take himself out of the conversation by asking for too low a sentence, he should never worry about asking me for a higher sentence than ultimately imposed. After all, a client who gets a relatively low sentence is not going to be unhappy with what his lawyer did."

All judges find that the earlier a lawyer can get his sentencing memoranda filed the better. None of them like boilerplate citations to Booker and the 3553 factors. As Judge Rice said, "If I don't know it by now, the republic is in danger." All of these judges expect the lawyer in a sentencing memorandum to tell them something they don't already know.

Positive family connections are very important to Judge Quackenbush, who says, "A very supportive family plays an important role in my sentencing." Asked whether he would recommend bringing a supportive spouse to the presentence interview, he says that this might be a very good idea.

If a defendant has a substance abuse and/or mental health issue, Judge Quackenbush looks favorably on getting treatment prior to sentencing.

All of the judges are concerned with unwarranted disparity. Judge Quackenbush is interested in nationwide sentencing statistics and recommends that lawyers provide them at sentencing. "Sentencing statistics from the United States Sentencing Commission should be consulted as those statistics show other judges have often departed from 'draconian' guideline ranges; for example, child pornography possession cases."

Psych Reports and Letters from Family, Friends and Employers

The judges differ about psych reports. They are not especially important to Judge Wright, who feels many of them come from "hired guns." On the other hand, he says that if he appoints the expert or the report comes from the Bureau of Prisons, they may carry substantial weight. "The timing of the exam is

important,” he says. “The earlier in the process, the better. Not just after the verdict or plea and before sentencing. In fact, if the report was done prior to the defendant being caught having been aware that he was under investigation, it will receive even more credit.”

Judge Adams finds it useful when the parties agree that an independent expert should be appointed, commenting that, “it is very important that a defendant make full disclosure to the examiner as to what brought him into court.” If a defendant has a substance or a mental health problem, Judge Quackenbush looks favorably on his getting treatment prior to sentencing.

Judge Rice notes that he likes to see a psych evaluation and even orders them in child pornography and child sexual exploitation cases, adding that if the defendant has committed a particularly heinous offense, he wants to know whether or not there is a mental disorder which contributed to its commission and, if so, whether the defendant is amenable to treatment and, if so, what his prognosis of the success of treatment. He also is impressed with a defendant who has, on his own, gotten treatment for a substance abuse or mental health problem.

Judge Adams notes, “A solid psych report followed by live in-court testimony can be very, very helpful.” By and large, the judges find it useful to engage the examiner in the court in questioning. Judge Adams looks for consistency from the defendant. “Oftentimes he will tell his pretrial services officers that he has no drug and alcohol problem and then tell the psych examiner that he does.”

Character letters can be important to the judges, unless they are form letters. All agree that, to be credible, the writer should acknowledge that he/she is aware of what the defendant has done.

Judge Quackenbush suggests that counsel submit no more than four or five character letters. All the judges agree that it is the quality that counts, not the quantity.

Letters from employers who indicate that they know what the defendant has done but nevertheless are willing to offer his job back when he gets released from prison particularly impresses Judge Wright.

Offenders who perform community service by “using their acumen in keeping a not-for-profit alive when it otherwise would go out of business can have a considerable impact.” A defendant who, on his own and prior to sentencing, has demonstrated an intention to pay his debt to society by performing community service impresses Judge Rice. He recalls one notable case where the director of the agency lauded the defendant’s service and urged him to allow him to perform community service rather than be incarcerated, saying how important the defendant’s help was to keeping the agency afloat.

If the presentence report says that defendant is the sole supporter of his family, the lawyer should give examples of this. For example, Judge Quackenbush recommends that, “if there is an elderly family member who will suffer as a result of his incarceration, I want to know precisely how. The lawyer needs to bring this to life.” However, none of the judges is comfortable with the defendant bringing young children to the sentencing.

Judge Adams allows character witnesses to testify at sentencing, and says he will ask character witnesses if they understand what the defendant did.

Restitution

The judges agree that restitution can demonstrate sincerity. Judge Wright says that, in a case where

there are vulnerable victims and the money can't be found, if he believes that a defendant is secreting the money with the hope of spending it when he gets out, "I will do whatever I can to make sure that he doesn't get out to spend the ill-gotten gains." Judge Wright expects a defendant to make restitution, or, in other words, to: "Put his money where his mouth is. I want heartbroken, vulnerable victims to know that I take what happens to them very seriously. My sentences will reflect this, particularly where I believe a defendant has not done what he could have to make things right with his victims," he says.

Similarly, Judge Adams says, "If I see a presentence report that says the defendant spent a lot of money on luxuries, but has nothing left to pay back on restitution, I get very annoyed. A defendant needs to acknowledge what he has done and do his very best to make the victims whole."

It is very important to Judge Adams that a defendant disclose all of his assets. "If I learn that the defendant has been hiding or transferred assets to avoid paying restitution, it will be very harmful to the defendant," he says. Like Judges Adams and Wright, Judge Quackenbush has a problem with defendants who he perceives are hiding assets, particularly where restitution is in order.

Conclusion

One of the best things a lawyer can do is to make sure he/she and the judge are on the same page at the outset of the sentencing process. The more judges I've interviewed, the more I've come to appreciate how important allocution is. Clients can often sell themselves at the sentencing hearing. It is essential that we prepare them for allocution and the fact that judge may engage them in conversation.

The judges are looking for "internalization." While it is helpful for us to explain why a client did what he did, what he has learned from it and why he's not going to do it again, it's better when it comes from the defendant.

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