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Views From The Bench On Sentencing Representation: Part 6

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Part 3 of this series included interviews with 12 U.S. district court judges on the topic of sentencing advocacy for the challenging client who has committed a heinous offense with a serious prior record as an aggravating factor. Judge James S. Gwin of the Northern District of Ohio in Cleveland was one of those judges. My interview with Judge Gwin was conducted during the pendency of an appeal, United States v. Ryan B. Collins. Collins was found guilty of receiving, distributing and possessing child pornography and Judge Gwin sentenced Collins to five years. The sentencing guideline range was 216-267 months.

At sentencing and after the verdict, Judge Gwin disclosed he had polled the jury to ask them what they believed to be an appropriate sentence. With one exception, every jury recommended a sentence of less than half of the five-year mandatory minimum accompanying Collins's offenses.

On appeal, the government objected to the polling, challenging the judge's use of the jury poll.


U.S. District Judge James S. Gwin

On June 29, 2016, the Sixth Circuit found that the propriety of jury polling in imposing a sentence was an issue of first impression, the court of appeals, noting that federal law provides a sentencing judge with the unfettered discretion as to the information received in determining his sentence, found that Judge Gwin's considering the jury's sentencing recommendation as part of the sentencing process did not conflict with his ability to properly weigh the Section 3553(a) factors and craft an appropriate sentence. The five years was also held to be substantively reasonable.

Among other nontraditional federal sentencing factors, Judge Gwin considers what a state sentence would be in a similar case with a similar defendant with a similar background, noting that 18 U.S.C. §3553(a) says that courts should avoid unwarranted disparity for offenders who engage in "similar conduct." He notes that this reference to "similar conduct as opposed to similar offenses, allows me to look at state sentences. To the extent that cases say that a judge should not consider state cases for similar conduct for a defendant with similar backgrounds, I think they are wrong."

Judge Gwin often views a defendant who has been dealt a seemingly bad hand as often being less blameworthy than an individual born to advantaged circumstances.

On the other hand, Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois in Chicago will automatically not hold the fact that the defendant comes from a privileged background against him. In white collar cases, she is most concerned where there are victims. Judge St. Eve, who has been on the bench for 14 years, was one of the youngest judges ever appointed to the federal bench at age 36. She believes in the importance of mental health reports and wants to see the psych report in advance of sentencing. It may surprise readers to learn that, as with many judges I've interviewed, she also prefers to hear from the expert at sentencing, commenting, "I find it most helpful if the expert is somebody who has treated the defendant for a significant period of time rather than somebody who has just gone over to the jail and interviewed him for two hours." Judge St. Eve likes to question these experts. "The more information I have; the more informed decision I can make," she added.


U.S. District Judge Amy J. St. Eve

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia in Washington, D.C., who has been described by lawyers as one of "the smartest and best judges"[1] on that court says, "Explain to me why, after I had to sentence a low-level drug offender to a mandatory minimum of 10 years, I should give probation to your white collar crime client, who has led a previous life of luxury and didn't need to commit his crime, so that he can get back to his country club." Judge Friedman advises attorneys to not routinely ask for probation and he recalls a case where defense counsel said, "Judge, we are not asking for probation in this case. We don't believe that it is appropriate in this case; however, we believe that the guidelines are too high and what the prosecutor is asking for is also too high and would recommend that you impose the following sentence and this is why." In that case, as well as in a fair number of others, he was persuaded to go below the tentative sentence that he came into court with.


U.S. District Judge Paul L. Friedman

Like Judge St. Eve, Judge Friedman welcomes live witnesses at sentencing. "For one thing, I want to engage people in conversation," he says. He also recalls, as an example, a case involving a former law enforcement officer where the lawyer called a host of lawyers, government and law enforcement officials who simply came up to the podium, told him their name, who they were, what they did, how they knew the defendant, and simply that "they were there to support him." Judge Friedman also particularly likes when an employer says that knowing everything he knows about the defendant and what he has done, he will welcome back his employee when he gets released from prison.

Allocution

All three judges address the importance of allocution. A defendant does himself no good by apologizing to Judge Gwin. Judge Gwin has, however, been moved when the defendant credibly apologizes to his family for what he's put them through and the pain that he has caused them. Defendants who apologize to the victim also impact him. He recalls one case in which the victim, himself, asked that the defendant not be sentenced to jail. He imposed a lower sentence than he had anticipated he viewed the lower

sentence as “just punishment” for what the defendant had done.

Judge St. Eve says, “I like allocution. I like to engage the defendant during allocution. Remorse is important. Restitution is also important because actions speak louder than words. Recidivism is an important concern to me. I want to hear from a defendant what he intends to do so that he won’t reoffend. Does he have family support? Is there a job waiting for him? What are his plans upon release?”

Judge Friedman is interested in knowing why the defendant did what he did, saying, “I want him to give me an answer.” He also comments that if a defendant is on pretrial release, “he should in addition to abiding by all the conditions of release, particularly staying free from drugs while on release if that is the defendant’s problem, make efforts to find a job if he doesn’t have a job, perform community service, and get treatment, if that’s what his mental health professional recommends.”

If a defendant tells Judge Friedman that he recognizes that he needs help and explains what he intends to do once released from prison, it can be very impactful for a reduced sentence.

The Role of the Lawyer

Judge St. Eve says that the best thing a lawyer can do for her is give her a full picture as to who their client is. She says, “I am trying to figure out who this person is. For example, character letters can be very meaningful. It’s important for lawyers to review these character letters before they are submitted. I oftentimes listen to live testimony; but often the character letters suffice.” Another key thing is to identify a case of hers where she imposed a sentence that was lower than the sentence that she might otherwise impose in your case.

All three judges want quality pre-sentence memoranda and none of them want boilerplate arguments or boilerplate citations to Booker and the 3553(a) factors. However, they do understand that arguments on disputed guideline matters are important. What these judges say is equally if not more important is helping them understand who the client is, why he did what he did, and what can be done to insure that he won’t do it again.

In a few cases, particularly egregious ones with challenging clients, Judge Friedman believes that the lawyer should have the client evaluated by a mental health professional to determine whether there is any type of mental disability that contributed to the commission of the offense. He recommends, “If it turns out there is, come up with a treatment plan.”

With respect to sentencing memorandum, Judge Gwin says counsel should begin with a two or three paragraph executive summary of the case, saying, “Get to the point. Make it easy to read and understandable.”

“Try to tell me something good about your client,” says Judge St. Eve. “I am looking for the good in everyone that I sentence. I also expect the defendant to make restitution and to right the wrong that he has done.”

Judge Gwin suggests that a lawyer develop a theory of the sentence just like a theory of the defense for trials. Take a theme, such as the defendant’s terrible childhood, and support it with proof. He also welcomes data and statistics showing what sentences have been imposed across the country for similar offenses for people who have similar issues and backgrounds. He is interested to learn, if a defendant

has been detained, that he has completed any programs that were available to him.

Similarly, Judge Friedman says that it is helpful when a defendant who is intelligent and educated tutors other inmates in prison or helps them with letters, legal research and writing. “Reports and statements by correctional officers are very helpful,” he adds.

One of Judge Gwin’s pet peeves is a lawyer who doesn’t listen to the questions that he poses, commenting, “When arguing to me, they need to be straight with me.” Judge Gwin feels that lawyers can do a better job at sentencing.

All three judges welcome sentencing recommendations, but all also stress that if a lawyer makes an unreasonably low one, he or she is going to lose credibility. They also recommend that lawyers help their clients develop a plan for paying restitution, particularly to vulnerable victims who have been harmed.

Conclusion

I have been a lawyer for almost 50 years, and sentencing has made up a large part of my practice. Still, I have learned a lot from these interviews. For example, the importance of allocution is very clear. It’s crucial that you prepare your client for what to say and how to respond to questions put to them by the judge. Similarly, live witnesses at sentencing are often welcome, particularly mental health experts. Many lawyers feel that judges don’t want to hear a witness whose report they already have. This is so if the expert is simply going to parrot what is in his or her report. However, if you preface your notice to the court that you are going to be calling the expert so as to make him or her available for questioning by the court and the prosecutor, it will often be well received.
Letters from employers stating that knowing everything they know now about the defendant and his offense, they would nonetheless hire him now or upon his release from prison can also go a long way.

Finally, restitution plans are very helpful. Even if your client is only able to pay $25 a month, starting early in paying restitution and in putting together a plan for continued payment cannot be underestimated. The best thing a lawyer sometimes can say in court is: “Your Honor, I hereby tender a check in the amount of X in full payment of restitution.”

—By Alan Ellis, The Law Offices of Alan Ellis

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[1] Almanac of the Federal Judiciary Vol. 1 (2016).