

# What Federal Judges Want to Know at Sentencing

ALAN ELLIS

**F**or the past year and a half, I have had the opportunity to interview almost two dozen federal judges, discussing with them their philosophies on and advice for lawyers representing clients at federal sentencing. As I analyzed the information shared during the interviews, a disturbing fact became apparent: We criminal defense lawyers are falling down on the job when it comes to sentencing. Simply stated, the judges said that they are not getting the information they need during the sentencing phase of a case. Some of the themes and advice that emerged from those interviews can help criminal defense lawyers prepare for this difficult phase in court.



## Allocution and Internalization

Judge Mark W. Bennett wrote about the importance of allocution in his article “Heartstrings or Heartburn: A Federal Judge’s Musing on Defendants’ Right and Rite of Allocution,” which appeared in the March 2011 issue of *The Champion*, the National Association of Criminal Defense Lawyers’ monthly magazine. He followed this article with a survey of fellow judges that showed the high value that most place on allocution.<sup>1</sup> None of the 21 judges I interviewed told me that allocution is not important to them. On the contrary, they would often rather hear from your client than you, the lawyer, during the sentencing hearing, unless you have new information not contained in your sentencing memorandum and other submissions.

Judge John R. Adams of the U.S. District Court for the Northern District of Ohio, who sits in Akron and is widely considered to be a tough sentencer, said, “Sentencing is very personal. The more I see a defendant, the more I get to know him. 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 Otis D. Wright II of the Central District of California in Los Angeles, who also has the reputation of being a tough sentencer, concurred. “I want the unvarnished truth,” he said. “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 Walter H. Rice, who sits in the Southern District of Ohio in Dayton and is considered by many observers to be at the opposite end of the spectrum, said, “I can often 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 does not want to hear a canned speech, stating that “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.” Judge Rice said he will often ask a defendant what he is going to do upon release from prison in order to determine whether he is likely to reoffend.

If this is your first time before a particular judge, find out from other lawyers how he or she views allocution and what questions, if any, the judge is likely to ask your client if he allocutes. Sit in on another of the judge’s sentencings to see how he treats allocution. Prep your client for allocution just as if you would prep him for testifying on his own behalf in trial. Judge Robert N. Scola Jr. of the Southern District of Florida in Miami, a past president of the Miami Chapter of the Florida Association of Criminal Defense Lawyers, even suggested that you have a colleague listen to your client’s proposed allocution and ask that client any questions the judge may ask. He also recommends that if co-defendants are being sentenced on a date earlier than your client, sit in and listen to their allocutions and any questions put to them.

When asked which of the cases coming before them that they find most challenging, there was agreement—predatory child sexual offenders where children have been harmed and white-collar criminals where vulnerable people have been harmed. Judge Patrick J. Schiltz of the District of Minnesota in Minneapolis, a former law clerk for Justice Antonin Scalia, shared that among his hardest cases are those involving white collar “con men who prey on vulnerable victims.” He commented, “You need to show me your client is not a con artist at heart, that he is not a psychopath or a sociopath. If there is a mental illness that contributed to the commission of the crime, let me know about it.”

## Restitution

Judge Neil V. Wake of the District of Arizona in Phoenix said that what is important is that the defendant has internalized his crime and taken ownership of his mistake. “The payment of restitution is a good example of internalizing and owning the offense. Even as little as \$25 a month demonstrates to me that the defendant is committed to rehabilitation.”

Judge Adams doesn’t want to see a defendant wallow in self-pity, instead preferring the defendant to begin by apologizing to the victims. Judge Adams followed with, “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. He added that it is important for the defendant to make restitution prior to sentencing, particularly where there are vulnerable victims.

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 said.

Judge Scola commented that if a defendant is ordered to pay a “large” amount of restitution, he doesn’t expect that the defendant is going to be able to pay the full amount. “If the loss in the case is \$1 million, but the defendant only received \$10,000 for his participation, he should pay that amount back or offer to do so with arrangements.” Judge Scola gave examples of what he considers real efforts for restitution, saying, “If he has equity in a home, he should get a home equity loan. If his family and friends truly love him, they should help him.” In other words, do what you can. “I’d rather have 50 character witnesses pay \$100 each toward the defendant’s restitution than to provide 50 character letters. Making reasonable efforts to pay restitution is one indication of sincere remorse.” He added, “If your client is leasing a car for \$900 a month while on bond and pays no restitution, that’s not going to help him.”

## Pet Peeves

Every single one of the judges, in responding to my question about their pet peeves with defense lawyers, told me how much they dislike boilerplate citations to *Booker*<sup>2</sup> and its progeny. Judge Bennett said, “I get annoyed when lawyers cite *Booker* and the 18 U.S.C. §3553(a) factors, as if I didn’t know the law.” Judge Rice added, “If I don’t know it by now, the republic is in danger.”

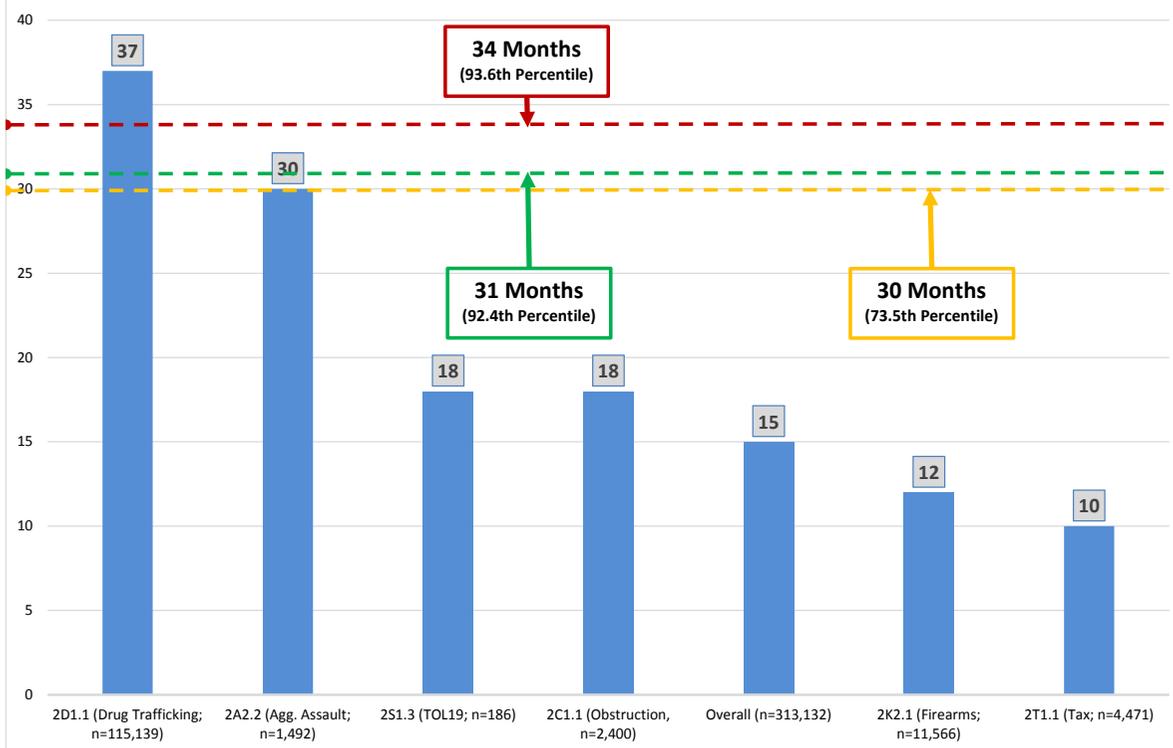
Of course, if there are disputed guidelines or other legal issues, cite cases in support of your position.

## Sentencing Videos

Many of the judges I interviewed commented on the value of sentencing videos. Chief Judge Lawrence J. O’Neill Jr. of the Eastern District of California in Fresno said videos are an excellent way of getting character witnesses that are often far better than letters. He tells the story of a father of a boating accident victim who described how the defendant saved his daughter’s life. No way can a letter have this kind of impact.<sup>3</sup>

## Comparison of Defendant's Sentence to Median Sentences of Select Offense Categories in CHC I

Source: U.S. Sentencing Comm'n, *Interactive Sourcebook of Sentencing Statistics by Guideline*, Tbl. 14AG (2006-2015)



### Disparity

Judge Justin L. Quackenbush of the Eastern District of Washington in Spokane recommends that lawyers provide statistics in their sentencing memorandum. "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," he said.

Use statistics of other sentences to show unwarranted disparity in the district, the districts within a particular state, the circuit, and nationwide. We used to append charts. Now we embed the charts into the sentencing memorandum itself.

### Conclusion

What struck me most during these interviews is how the judges feel that we lawyers frequently do not give them the information they need at sentencing. Judge Schiltz said it this way: "It's surprising how many otherwise competent attorneys 'punt' at the sentencing hearing." Judge Scola suggested that lawyers take a page out of the book from our death penalty colleagues and advised, "Don't wait to think about sentencing advocacy." In other words, since 99 percent of one's federal criminal clients will be facing sentencing, start preparing the case for sentencing early on.

Virtually all of the judges stressed that you need to humanize your clients. "Tell us his story," they said. However, more than one judge told me that in doing so, don't minimize the seriousness of what the client did. Don't sugarcoat your client. You gain credibility if you show his strengths and weaknesses. In other words, if you can show that you are on the same page with the court as to the seriousness of the offense, the chances of having your other statements accepted increase.

Finally, if there is good case law right on point on a contested issue, there is no need to necessarily give the judge a memorandum of law. Just highlight the case on point and give it to him or her. This is the same for the U.S. probation officer. Needless to say, copy the prosecutor. ☺



*Alan Ellis is a past president of the National Association of Criminal Defense Lawyers, a Fulbright Award winner, and a criminal defense lawyer with offices in San Francisco and New York City. Ellis has 50 years of experience as a practicing lawyer, law professor, and federal law clerk. He is a nationally recognized authority in the fields of federal plea bargaining, sentencing, prison matters, appeals, habeas corpus 2255 motions, and international prisoner transfer for foreign inmates. Ellis has successfully represented federal criminal defendants and inmates throughout the United States. He is a sought-after lecturer in criminal law education programs and is widely published in the areas of federal sentencing, Federal Bureau of Prisons matters, and appeals and other post-conviction remedies, with more than 120 articles and books and 70 lectures, presentations, and speaking engagements to his credit. He can be reached at AELaw1@alanellis.com.*

### Endnotes

- <sup>1</sup>Mark W. Bennett, *A Survey and Analysis of Federal Judge's Views on Allocation in Sentencing*, 65 ALA. L. REV. 735 (2013).
- <sup>2</sup>*United States v. Booker*, 543 U.S. 220 (2005).
- <sup>3</sup>See Alan Ellis & Tess Lopez, *Use of Video*, 26 CRIM. JUST. (Summer 2011); Doug Passon, *Using Moving Pictures to Build the Bridge of Empathy at Sentencing*, CHAMPION (June 2014).