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Representing the "Challenging" Client at Sentencing

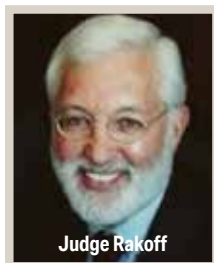
By Alan Ellis



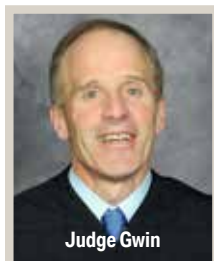
Alan Ellis has 52 years of experience as a practicing lawyer, law professor, and federal law clerk. He is a past president of the National Association of Criminal Defense Lawyers, a Fulbright Award winner, and a federal criminal defense lawyer specializing in sentencing, prison matters, appeals, and 2255 motions, with offices in San Francisco and New York City. © 2020 Alan Ellis. All rights reserved.

In the course of my interviews with more than 30 federal judges over the past four years on what works and doesn't work in sentencing advocacy, I asked many of them what a defense lawyer could do when he has a client who has committed a heinous crime. Most judges seem to agree that con men who prey on vulnerable victims are the worst. They shared some pretty specific recommendations with me on how to effectively mitigate sentences.

Many judges want you to demonstrate that your client is not a con man or a psychopath or sociopath, if you believe this to be the case. Quite a few judges suggested to me that they want to be convinced that your client did what he did because of a mental disorder. That can be especially helpful if he sought treatment prior to sentencing and, even better, prior to being caught.



are under investigation can be impactful," according to Judge Jed Rakoff of the Southern District of New York in Manhattan.



"If you have a case where a defendant has committed an egregious crime, emphasize something in his background demonstrating possible mental health issues," urged Judge James S. Gwin of the Northern District of Ohio in Cleveland. "This can make a defendant less blameworthy." He noted, however, that psychiatric or psychological reports prepared only for sentencing by a qualified, well respected mental health expert don't carry as much weight as reports from a mental health professional who treated the defendant for a significant period of time.



Judge Cynthia Bashant of the Southern District of California in San Diego emphasized that mental health reports can be useful only if the evaluator has spent a considerable amount of time with the defendant. "The report where the expert has spent 15 minutes with the defendant and has concluded that he is not a risk to reoffend is not particularly helpful," she said. "A lawyer 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 the word from a professional forensic expert. I recognize that some clinicians who have spent a lot of time with their patients may come across as advocates but so, too, often are paid forensic experts." Judge Bashant is particularly interested in knowing whether the offender has a treatable diagnosed mental health disorder that may have contributed to the commission of the offense.



Judge Jon D. Levy of the U.S. District Court for Maine in Portland told me that he will give serious consideration to any assessment that credibly demonstrates that the mental health provider has exercised independent professional judgment. Like Judge Bashant, he welcomes a report from a treating evaluator. "I want to know the risk of the defendant reoffending," Judge Levy stated. "I like the professional to come



to court for the sentencing hearing. It makes him subject to cross examination. It allows him to question the expert."

Like Judge Rakoff, Judge Justin Quackenbush of the Eastern District of Washington in Spokane, who is also considered a fairly light

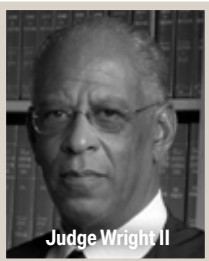


Judge Adams

sentencer, explained that if a defendant does have a demonstrated mental health problem, he looks favorably on those who have sought treatment prior to sentencing—preferably prior to being caught.

Judge John R. Adams of the Northern District of Ohio in Akron, who is on the other end of the sentencing spectrum and has a reputation for being a tough sentencer,

said, “What I have found particularly useful is a solid report from an expert who I have appointed.” He suggested agreeing on an independent expert with the prosecutor. “This independent expert report



Judge Wright II

coupled with his in-court testimony can be very useful,” he said, adding that “a good report coupled with the expert’s enlightening in-court testimony at the sentencing hearing can be very, very helpful.”

Judge Otis D. Wright II of the Central District of California in Los Angeles, another reputedly tough sentencer, doesn’t want to feel that he is 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,” he said. For example, in a particularly egregious case, he wants a lawyer to have acknowledged 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 person and the impact their actions have



Judge Erickson

Character letters can also be helpful. In addition, many judges told me that they appreciate being informed of good deeds a defendant has done before learning he was under investigation. Judge Ralph Erickson of the U.S. Court of Appeals for the Eighth Circuit, who was a district court judge in North Dakota when I interviewed him in 2018, put it this way: “Tell me something

your client did when no one was keeping score.” Examples included mowing the lawn or shoveling the snow of the walk of a disabled neighbor.

Observations

I’ve been practicing criminal law for more than 50 years. During that time, I’ve come to realize that criminal behavior is deviant behavior. Deviant behavior is often driven by mental health disorders. Studies by the National Institute for Justice have shown that one-fourth of inmates in state and federal prisons have a diagnosable DSM-V mental health disorder. Accordingly, I generally have my clients evaluated by a mental health professional. This is not the report that I share with the court; it’s something that helps me devise a theory of the sentencing for my client.

In choosing a mental health professional to evaluate my client and report to the court, I often ask the prosecutor who he uses for an expert. Typically, after a stunned silence, I get an answer by the next day. Then I generally use these same people. First of all, they are bullet-proof. Second, they like to burnish their resumes with

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on the victims, I oftentimes will give the defendant a lower sentence than the attorney even asks for.” He warned that 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 he doesn’t get out to spend his ill-gotten gains.” Judge Wright expects a defendant who is trying to appear remorseful to make restitution—in other words, to “put his money where his mouth is.” “I want heartbroken vulnerable victims to know that I take what happened 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.”

Similarly, Judge Adams says, “If I see a Presentence Report that shows the defendant spent a lot of money on luxuries with nothing paid 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 his assets. “If I learn that the defendant has been hiding or has transferred assets to avoid paying restitution, it will be very harmful to him.”

Even Judge Quackenbush, who is a lighter-sentencing judge, has a problem with a defendant who he perceives is hiding assets, particularly where restitution is in order.

their having worked with defense lawyers and will often give me the results I hope for.

I also believe in having the mental health professional testify in court. By simply quoting from several sections of their report, I lessen the chance that the judge will say, “Why do I need to hear from the expert? I’ve read his report.” I then add that he or she will be available in court for any questions.

Years ago, I read a case that said, “In America, we treat non-violent offenders who act from a mental disease or disorder differently than those who act out of greed and avarice.”

Speaking of judges who get annoyed when they think a defendant is hiding his assets, one of the worst things I have seen in Presentence Reports is where, under financial status, it states that the defendant has not yet submitted a financial report to the probation officer. ☉