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Sentencing the White Collar Offender: A View From the Bench

I've been practicing law for nearly 50 years. During that time, I have had a great deal of experience with judges who have been willing to share all manner of suggestions. This article presents some of their best advice for white-collar criminal defense attorneys whose clients are facing sentencing.

- **Minimize citations in your sentencing memorandum.** For example, don't cite or quote *Booker*, *Kimbrough*, *Gall* or the 3553 factors. Judges tell me they do not need to be reminded of boilerplate-type information presented in lengthy memoranda. Like most in the legal profession, judges are very busy and often in the midst of a trial. One suggestion for sparing the judge, and you, the time and effort that goes into preparing and reviewing such a memorandum is to create a sentencing video. In addition to saving time, a sentencing video can portray the defendant's remorse and the struggles of those who would be adversely affected by their incarceration, as well as the benefit



The Law Offices of Alan Ellis is a full-service sentencing and post-conviction law firm representing exclusively white collar and other federal criminal defendants and inmates throughout the United States.

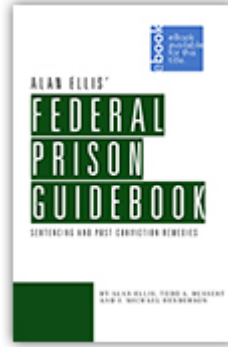
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of a personal connection with well-spoken character witnesses. See Ellis and Lopez, “Use of Video,” *Criminal Justice* (Summer 2011).

- **Own the mistake and demonstrate remorse.** If possible, emphasize that the defendant is a hardworking, contributing member of society who acted out of character in an otherwise law-abiding life and strayed down the wrong path this one time. Be sure to address why he or she won’t do it again.
- **Point out instances of disparity.** Show what sentences other judges in the same district are imposing on similarly situated offenders in similar cases. Use data from the Sentencing Commission from the same and other districts within the state, as well as data for all such cases within the circuit. Finally, include national data and statistics. Judges admit to being more inclined to follow what their fellow judges in their district have done and, to a certain degree, those within the same state and circuit. It is not particularly helpful to talk about a case in a distant geographic area unless it is right smack on-point. Make sure any cases you cite are close to yours in offense, facts, prior record and offender characteristics. Otherwise, you may be comparing apples to oranges – and the judge will know it.
- **Demonstrate sincerity through restitution efforts.** If someone was victimized as a result of your client’s actions, start a restitution program. Be certain you can show that the defendant has started to made contributions to the program. Propose an alternative sentence and, if you can, get the victim to support



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it.

- **Address collateral civil consequences.** In appropriate circumstances, explain what a loss of a professional license means to your client. For example, point out that it is unlikely that he or she will be able to pursue a lifelong dream.

Prison Practice Tips: RDAP

- It is important for defense counsel to make sure that the Presentence Investigation Report (PSR) adequately documents any drug abuse or dependency (illegal or prescription) or alcohol problem. Unless a client's substance abuse is adequately documented in the PSR, he or she may not qualify for the BOP's Residential Drug Abuse Program (RDAP), and will not get the chance to earn up to a one-year reduction in sentence pursuant to 18 U.S.C. §3621(c)(2), which permits such a reduction for nonviolent inmates who successfully complete RDAP.
- To qualify for RDAP, one must have at least 24 months or more remaining to serve; a verifiable, documented pattern of substance abuse or dependence within the 12-month period preceding arrest on the underlying offense; have no serious mental or cognitive impairment precluding full program participation; be halfway house-eligible (which precludes participation by removable non-U.S. citizens); and sign acknowledgement of program responsibilities.

- The BOP places primary reliance on a prisoner's self-reporting to the US Probation Office presentence report writer. Whatever is written in the PSR is presumptively valid, and any claim of a disorder that the PSR does not plainly substantiate is treated as suspect.

ABOUT THE LAW OFFICES OF ALAN ELLIS

The Law Offices of Alan Ellis is a federal sentencing, prison and post-conviction, appeal and 2255 motion law firm representing federal criminal defendants and inmates throughout the United States. The firm endeavors to obtain for its clients the lowest possible sentence and if it is one of incarceration, the best facility possible with release at the earliest opportunity. Alan Ellis, a Past President of the National Association of Criminal Defense Lawyers (NACDL) and a Fulbright award winner, has defended thousands of cases over almost 50 years. He has authored more than 150 articles and books, including the Federal Sentencing Guidebook and the Federal Prison Guidebook. He is a frequent speaker and has more than 85 lectures, presentations and speaking engagements to his credit.

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