

Advice from the Bench for the White-Collar Client Facing Sentencing

BY ALAN ELLIS

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 the incarceration, as well as provide the benefit of a personal connection with well-spoken character witnesses. (See Alan Ellis & Tess Lopez, *Use of Video*, 26 CRIM. JUST., no. 2, Summer 2011, at 60.)

Own the mistake and demonstrate remorse.



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Show how he or she is *truly* remorseful. 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 make contributions to the program. Propose an alternative sentence and, if you can, get the victim to support 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.

Community service. In cases where probation or a short sentence are in play, have your client secure a community service option. Have the client start doing the work, get a letter from the organization confirming that he or she is doing the work, and then urge the judge to make it a condition of probation or supervised release that your client be required to continue to perform a significant number of hours of this service to the sponsoring agency. ■