

Views From The Bench On Sentencing Representation: Part 7

Law360, New York (September 13, 2016, 11:48 AM ET) --

A judge once told me that sentencing is a morality play and a defense lawyer is the stage director.

Be Succinct; Less Is More

More than one judge I've interviewed for this series has told me that they expect lawyers to be succinct; tell them what they don't already know; be candid about the client's crime and its impact; and bear in mind that your job in sentencing representation is to connect with the judge, not to impress your client and their friends and family.

In this article, I share more information about the judges' suggestions for having an impact in their courtrooms.



Alan Ellis



U.S. District Judge Jed Rakoff

As Judge Robert L. Hinkle of the Northern District of Florida in Tallahassee says, "I recognize that a lawyer has to show the client and the client's family and friends in the courtroom that the attorney's doing something to influence me. But frankly, if I've indicated that I have read the PSR, the sentencing memorandum, and the character letters and the attorney then proceeds to parrot something that is already in those submissions, I'll let the attorney go on for a little bit, but I don't find it particularly helpful." He adds, "A lawyer should be attentive to how I do my job. If I've indicated that I've read everything, lawyers should know that I have and not waste time in court."

As Judge Jed Rakoff of the Southern District of New York in Manhattan says, "Know your judge." And as Judge Cynthia Bashant of the Southern District of California in San Diego advises, "If I've given a tentative indication about how I am going to rule on a particular guideline issue, and it is in the defendant's favor, don't argue it."

Judge Hinkle warns that he may run out of patience if counsel is not helping him. "If there's an important guideline dispute, I'm



U.S. District Judge Cynthia Bashant

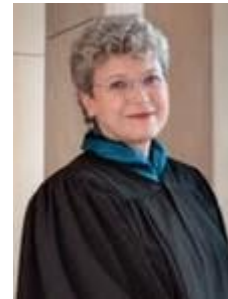
OK with oral argument if the lawyer really needs to drive the point home.” However, he would prefer that this information be given to him in the sentencing memorandum, adding, “It is best for me to receive the sentencing memorandum at least a week in advance. I come out on the bench with a tentative sentence in mind, and if I get the sentencing memorandum the day before the sentencing, it is not going to be very helpful.”

Judge Hinkle appreciates lawyers who are well prepared and who are succinct and on point. “Longer is not better; often, less is more. Also, it is very important that a lawyer be totally honest with me. Don’t sugar coat the defendant. If your client did a terrible thing, acknowledge it.”

As with most judges I’ve interviewed, the important things Judge Hinkle would like for lawyers to tell him include what the defendant did, why he did it, what else is going on with his life, and why he won’t do it again.

Sentencing Recommendations

Chief Judge Marcia S. Krieger of the District of Colorado in Denver welcomes a well-crafted, well-reasoned and well-supported sentencing recommendation by counsel. She finds it useful if counsel thinks in terms of what they would do if they were the judge.



U.S. District Judge
Marcia S. Krieger

Judge Neil V. Wake of the District of Arizona in Phoenix also welcomes sentencing recommendations. “I give great weight to a serious, credible recommendation of sentence by the lawyers,” he says.

“I want defense lawyers to make a recommendation that hopefully will be in the sentencing range — not the sentencing guideline range — that I have in mind. If they do, this can often cause me to go to the low end of my range. Lawyers should not be concerned about asking me for more than I intend to impose. I will never hold it against the lawyer or his client when he’s done this. I will always impose the sentence that I feel is appropriate.”



U.S. District Judge Neil V. Wake

Family Circumstances

Judge Wake is of a mixed mind when it comes to family circumstances. “If a defendant is going to be taken from his home, that carries little weight with me because that’s a part of punishment. However, if there is a special needs child who needs the defendant at home, that carries weight with me.”

Judge Hinkle also does not give much weight to family circumstances. “It is not fair that I sentence a defendant with no children more harshly than a defendant with children.”

Allocution and Restitution

Like most judges, allocution is important to Chief Judge Krieger. In recalling an NPR story on firms that counsel individuals and companies in crisis intervention, she talks about the three F’s: (1) follow up, (2) fess up and (3) fix it. In other words, she finds it very helpful if the defendant shows her that this is what he did, why he did it and what he’s going to do so that it doesn’t happen again. Important for Chief

Judge Krieger is that the defendant “publicly admits his shame.” The fact that he does this publicly shows her that he has internalized his crime.

Restitution shows Judge Wake that the defendant owns his mistake. “I have met people who can afford to pay restitution,” he says. “Even as little as \$25 a month shows me that defendant is committed to rehabilitation. I don’t understand why a defendant has the ability to pay something doesn’t. I try to look into a defendant’s heart to see whether in fact he has realized his offense, owns his mistake, and takes steps toward rehabilitation.”

More than half of Judge Wake’s caseload is illegal reentry cases. He says he never holds it against a defendant who is inarticulate and unable to demonstrate remorse. “I never hold it against an individual who is unable to allocute at sentencing. I keep my cultural bias out of my decisions.”

What is most important to all three judges is that the defendant has internalized his crime and owns his mistake. “I try to look into his heart to see whether, in fact, he has realized his offense, has owned his mistake, and has taken steps toward rehabilitation,” explains Judge Wake. Acknowledging that treatment is a very important part of sentencing, a defendant who has started and is undergoing treatment demonstrates a commitment to rehabilitation.

Chief Judge Krieger says that she has “seen allocutions where the defendant has shown that he is tremendously sincere and thoughtful about what he is saying.” It is very important for the lawyer to prepare his client for allocution if allocution is to be made. For example, a bribery defendant should show that he’s mindful of what he did to undermine society’s confidence in the government function involved. On the other hand, if a defendant is going to have a chip on his shoulder, feel victimized or is angry about what’s happened to him, Chief Judge Krieger, if she were the lawyer, would not allow the individual to allocute. A well-prepared allocution, according to Chief Judge Krieger, shows that the lawyer has “brought his client along. A bad lawyer simply says what his client wants him to say.”

Collateral Civil Consequences

Collateral civil consequences are not that impactful to Judge Hinkle. “I am concerned with rich man’s justice versus poor man’s justice.” The fact that a defendant with a higher socioeconomic station is going to suffer more severe collateral civil consequences than one with a lower station in life is not generally a factor to him.

Alternatives to Prison

Chief Judge Krieger feels that community service may show that a defendant has owned the shame publicly and can be an effective alternative to prison unless she clearly wants to punish the defendant through incarceration. “I find it helpful where the defendant has proposed a community service by talking to schools, businesses, and other groups about what he’s done.” She finds this better than simply the notoriety of the sentence in meeting general deterrence. In appropriate cases, Judge Krieger finds that intermittent confinement is an effective sentencing alternative. For example, a year’s worth of weekends in jail over holidays, vacations, and events such as weddings and graduations. “Every time a defendant has to report to the jail, put on jail clothes, and eat jail food, it reminds the defendant of what he did and is effective in holding him accountable for his actions.”

Judge Wake says that community service performed prior to being caught or learning he is under investigation is a clear indication of a defendant’s core values. He adds, “It makes a big impression with

me.”

Sentencing Memoranda and Letters

Like virtually every judge whom I’ve interviewed so far, Judge Wake does not want boilerplate Booker citations. He thinks character letters should be limited to five. Judge Hinkle similarly would limit character letters to five. Both want examples of a defendant’s good deeds.

Judge Wake and Judge Hinkle do not care for letters from friends and families saying what a “good guy” the defendant is. They want specific examples of good deeds and good qualities.

Chief Judge Krieger particularly doesn’t give much weight to character letters where the writer says he doesn’t believe that the defendant has committed a crime. She points out that these letters show that the defendant is not being candid with family and friends and may also be in denial about what he did.

Disparity

Unwarranted disparity is a big issue for Judge Wake. Data showing sentencing trends can be very helpful if the data is credible.

Sentencing Videos

Judge Wake has seen sentencing videos and welcomes them if they are not too long and if they show him information other than what he’s heard about the case from the client. He doesn’t want to be told in the video or at sentencing what he already knows about the defendant. Judge Hinkle says that he has never seen a sentencing video, but he has seen day-in-the-life videos in personal injury cases and that he can see that a sentencing video might very well help him in a particular case. He does not think they should become commonplace.

Conclusion

While a client’s allocution can change the tentative sentence that most judges have when they take the bench at sentencing, rarely does an attorney do much during the hearing to alter the outcome. This is why a well-crafted sentencing memorandum is so crucial. Additionally, lawyers are starting to submit biographical videos when their clients are sentenced. According to the New York Times and the Wall Street Journal, proponents say that they could transform the process. Defendants and their lawyers already are able to address the court at sentencing, but the videos are adding a new dimension to the punishment phase of the prosecution. Sentencing videos, especially well-produced ones, can be powerful. Some federal public defenders offices and private attorneys are unlocking the potential of video in the sentencing phase of criminal cases, supplementing sentencing memorandum and letters of support that typically are used to plead for leniency.[1]

Lastly, data and statistics can be effective in showing sentencing trends at the district, the state, the circuit and nationwide. As the U.S. Supreme Court has stated most recently in discussing at length the data and statistics published by the U.S. Sentencing Commission in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (April 20, 2016):

The Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing. In most cases district courts continue to impose "either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion."

Thus, effectively using the commission's data and statistics in your client's sentencing memorandum not only can be quite useful to demonstrate helpful downward sentencing trends, but also can be used at the appellate level to overturn a particular sentence, as was the case in Molina-Martinez. New companies such as www.sentencingstats.com can provide such data and analyses for counsel.

—By Alan Ellis, The Law Offices of Alan Ellis

Alan Ellis, a past president of the National Association of Criminal Defense Lawyers, is a criminal defense lawyer with offices in San Francisco and New York. He practices in the areas of federal sentencing and prison matters, and was awarded a Fulbright Senior Specialist Award by the U.S. State Department to conduct lectures in China on American criminal law in the fall of 2007.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Stephanie Clifford, "A Flattering Biographical Video as the Last Exhibit for the Defense," New York Times (May 24, 2015); Doug Passon, "Using Moving Pictures to Build the Bridge of Empathy at Sentencing," The Champion (June 2014); Joe Palazzolo, "Leniency Videos Make a Showing at Criminal Sentencings," Wall Street Journal, Dow Jones Reprints (May 29, 2014); Alan Ellis and Tess Lopez, "Use of Video," Criminal Justice magazine (Summer 2011).