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Views From The Bench On Sentencing Representation: Part 1

Law360, New York (March 1, 2016, 10:28 AM ET) --

Alan Ellis

In an article published in the fall 2015 issue of the American Bar Association's Criminal Justice magazine ("Advice from the Bench for White Collar Client Facing Sentencing"), I shared some of what I have learned from federal judges during my nearly 50 years of practice.[1] After that article published, I felt that an expanded, in-depth article that featured the experience, philosophy and viewpoints of those and other federal judges was needed. Law360 agreed, and a multipart series was born.

For this first installment of the series, I interviewed two federal judges at length and asked them to share some do's and don'ts for lawyers who appear before them at sentencing. Future articles in the series will feature interviews with other U.S. district court judges.

Senior Judge Jed Rakoff of the Southern District of New York emphasizes how important it is to "know your judge." If you are not familiar with him or her, ask other lawyers, particularly the federal defender in the district. A judge's former law clerks are another good source of information. One of the things that you may want to ask them is whether the judge reads sentencing memos and character letters, and how long those letters should be.

U.S. District Judge Jed Rakoff

"The number of character letters is not that important, it's quality that counts," says Judge Rakoff. "What I am looking for is good deeds that are unknown to others. For example, a defendant who has done something for a neighbor without any thoughts of obtaining anything in return." He also notes that one thing a character letter should not state is that the writer "can't believe that the defendant did what he was convicted of."

Data and statistics from the court, the other federal courts in the state, the circuit and nationwide, mean "zilch" to Judge Rakoff. "However, if you have a case on point that is factually and legally close to your case, wherein another judge in the district has imposed a relatively low sentence, it carries some weight with me — assuming, of course, that I know and respect that judge," he says.

Judges want to hear from your client at sentencing, Judge Rakoff asserts. He suggests that if your client can make a good allocution, "don't save him until the end of the sentencing after hours' worth of legal argument." It is acceptable for a defendant to read his allocution, provided it sounds like the client's own words rather than something scripted by his or her lawyer.

On the other hand, Judge Rakoff is wary of victim impact statements that urge a particular sentence. "What do they know about the federal criminal justice system?"

Nor is he a big fan of the sentencing guidelines. He advises lawyers to avoid wasting a judge's time addressing guideline issues unless they are absolutely crucial to the case. He especially disfavors boilerplate citations to Booker and the 18 U.S.C. §3553(e) factors.

On the other hand, Judge Rakoff welcomes a reasonable, well-principled sentence suggestion. However, he warns that a lawyer can lose credibility by requesting an unreasonably low sentence. "Also, it is a mistake to vouch for your client unless you are sure of what you are saying," he adds. "A lawyer's reputation for veracity is very important. We judges talk among ourselves about lawyers and their credibility."

Asked what a lawyer can do when he/she has a client who has been convicted of a exceptionally heinous offense, Judge Rakoff contends that there generally is something good to be said about everyone. "I don't know a single judge who doesn't recognize that he has a human being in front of him being sentenced," he says.

Senior Judge Mark Bennett of the Northern District of Iowa agrees that lawyers should minimize citations in their sentencing memoranda. "I get annoyed when lawyers cite Booker and the 18 U.S.C. §3553(a) factors, as if I didn't know the law," he says. He also recommends that sentencing memoranda ideally should be between 10 and 20 pages and cautions, "Don't repeat what is in the pre-sentence investigation report."

U.S. District Judge Mark Bennett

As for sentencing recommendations, Judge Bennett often will give a lower sentence than recommended by the attorney. He admits that while this might embarrass a lawyer who is supposed to be zealously advocating for a low sentence, he never holds the defendant to the lawyer's recommended sentence, especially if he thinks the client deserves less.

Judge Bennett reminds us that if a ridiculously and unreasonably low sentence is recommended, the lawyer loses credibility. "If a lawyer every once in a while vouches for a client who he knows, that's OK with me," he explains. "If a lawyer does it repeatedly, on the other hand, it is worthless. It is particularly useful if I trust the lawyer's judgment."

Judge Bennett believes that allocution also is very important. In fact, he has published on allocution and is a noted authority on the subject. "I like to have a conversation with the defendant," he says. "That's one reason allocution is very important to me. I read every character letter, but I don't like it when the writer tells me what the sentence should be."

The defendant's community service carries weight with Judge Bennett. "If I am considering probation, it can tip the scales," he notes. Restitution is important, too, although he cautions that a defendant will

not be able to buy his way out of prison. Restitution may, however, result in a shorter sentence.

Asked about difficult cases, Judge Bennett says that he finds egregious white collar cases that have innocent victims and a defendant who has acted out of greed. “I am not going to be very sympathetic unless there is a strong mitigation factor like addiction, mental illness or good deeds in the client’s past,” he says. “I find it very helpful if the defendant has done good deeds,” especially if a character letter describes a defendant’s good deeds. By way of example, he points to “those cases where a defendant has mowed the lawn of an elderly neighbor or something else that few others would have known about. I appreciate community service, particularly if a defendant has performed it prior to sentencing, and there is a good letter from the agency asking that the defendant be allowed to return to the community performing community service.”

He adds that he appreciates “defendants who attempt treatment for substance abuse. Even if they have relapsed, I understand relapse is a part of addiction and I won’t hold it against the defendant.”

In child pornography cases, risk assessments are important to Judge Bennett, who emphasizes that “whenever you are going to use an expert, I put a lot of stock in an expert who I know and respect.”

Judge Bennett describes sexual contact offenses as “troubling.” “In child pornography cases, if the defendant did not believe what he was doing was a crime, I will consider that as a mitigation factor,” he says.

As for psychological reports, Judge Bennett finds it is sometimes better for a lawyer to present a solid report rather than bring in an expert witness and subject him to cross-examination. Again, the report is more likely to be influential if the judge knows and respects the expert who made it.

Judge Bennett puts a lot of stock in collateral civil consequences, particularly if an individual in a small community is shunned by the neighbors. “This has a big impact on me,” he says.

As for data and statistics, Judge Bennett agrees with Judge Rakoff and puts little stock in them, but notes that “it is important, since I sentence so many people, if a defense lawyer reminds me of a particular sentence that I imposed in a particular case that is similar.”

Also like Judge Rakoff, if Judge Bennett knows and respects a fellow judge, it is often helpful to point out that, in a very similar case, the other judge imposed a sentence that the lawyer is advocating for his own client. Otherwise, Judge Bennett says that data and statistics have virtually no impact on his sentencing decision.

Asked about sentencing videos, Judge Bennett says that he’s not yet seen one, but he has seen “day in the life” videos in civil cases, and finds them often to be impactful. He advises that even pictures could be helpful.

When asked if they are willing to entertain requests for a judicial recommendation to the Bureau of Prisons for designation and placement, Judge Bennett said he would never recommend a facility that he was not familiar with without discussing it with the defendant and counsel.

Judge Rakoff shared that he almost always recommends the facility requested by defense counsel.

As for voluntary surrendering, Judge Bennett says that except for those defendants who are mandatorily

detained at plea or verdict, he makes “an individual assessment of the statutory factors.” He adds that, “if the government agrees, I always allow self-reporting and sometimes allow it over the objection of the government, especially if the defendant is not a current drug addict.” Judge Rakoff says he always agrees to a self-surrender, saying, “I’ve never had a defendant fail to appear when he is supposed to.”

Conclusion

In my nearly 50 years of practicing federal criminal law, I have appeared before judges across the country, and have worked with many defendants and attorneys. Yet, there is always more to learn, which is what has been so fascinating about the process of interviewing the judges for this series.

As I analyzed the information shared during the interviews, some consistent themes became apparent. First and foremost, judges feel criminal defense lawyers are falling down on the job when it comes to sentencing. Simply stated, judges say they are not getting the information they need during the sentencing phase of a case.

While the judges appreciate a lawyer’s vigorous defense of their client, lawyers are cautioned to remember that the court is your audience. For example, recommending a ridiculously low sentence to impress your clients damages the creditability of the other aspects of the information presented in the judges’ eyes.

When asked which of the cases coming before them the judges find most challenging, the judges were in agreement: while collar cases where vulnerable people have been defrauded. Lawyers need to do an effective job at humanizing such clients. Future articles in the series will explain how.

—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 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.

[1] http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/2015_fall_cj.authcheckdam.pdf

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Views From The Bench On Sentencing Representation: Part 2

Law360, New York (March 15, 2016, 10:44 AM ET) --

Alan Ellis

In the first article published in this series on March 1, 2016, I shared some do's and don'ts for lawyers representing clients during sentencing. This information was gathered during interviews conducted with Judge Jed Rakoff of the Southern District of New York and Senior Judge Mark Bennett of the Northern District of Iowa. For this second article in the series, I interviewed Judge Patrick J. Schiltz of the District of Minnesota and Judge Robert N. Scola Jr. of the Southern District of Florida.

Judge Patrick J. Schiltz and Judge Robert N. Scola, Jr. could not have two more dissimilar backgrounds.

Judge Schiltz was editor of the Harvard Law Review and clerked for the late U.S. Supreme Court Justice Antonin Scalia. He helped found the University of St. Thomas School of Law. Judge Schiltz was a George W. Bush appointee in 2006.

President Obama appointed Judge Scola to the district court in 2011. Prior to that, he was a state court judge in Miami. Before that, he was an active criminal defense practitioner serving for one year as the Miami chapter president of the Florida Association of Criminal Defense Lawyers.

Both judges were asked how they determine whether a defendant feels remorseful about his crime. Both answered with their version of "actions speak louder than words." Judge Scola said, "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."

U.S. District Judge Robert N. Scola Jr.

Judge Scola further 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 $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. On the other hand, he added, “I don’t want to have a defendant offer to pay restitution only if he stays out of jail. No quid pro quo.”

Judge Schiltz shared his thoughts on how a defendant can demonstrate that he is sincere about turning his life around. He recommends your client “[g]o get a job. Work at McDonald’s. Go back to school or get your GED. Do something.”

When asked his opinion about the best thing a lawyer can do when representing a defendant who has committed a particularly reprehensible crime, Judge Schiltz first shared that the hardest cases are those involving white collar “con men.” He then 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.”

Both judges also shared their pet peeves. For Judge Scola, these include (1) lawyers who do not submit presentence memorandums, those who submit them on the eve of sentencing and those who submit poorly prepared ones; (2) lawyers who give him boilerplate Booker and its progeny citations in a presentence memorandum; (3) lawyers who ask for ridiculously low sentences; (4) lawyers who don’t prep the defendant or character witnesses prior to the hearing; (5) lawyers who don’t interrupt their clients who, during allocution, start digging a hole for themselves; and (6) lawyers who forget that the court is the audience and put on a useless show for their client, family and friends.


U.S. District Judge Patrick J. Schiltz

So, what makes a positive impression on Judge Scola? “I am very impressed with lawyers who show good legal advocacy in their pre-sentence memorandum, particularly as to disputed guideline issues,” he said. He appreciates lawyers who get him everything he needs well in advance of the hearing, suggesting that if you have five or six good character letters, you should “put them in the sentencing memorandum, quote from them, and attach them as Exhibit. A. Put the rest in another exhibit.”

Judge Schiltz bemoans the quality of lawyering he frequently sees at sentencing. “Practicing criminal law in federal court is largely federal sentencing,” he said, and correctly points out that 97 percent of defendants plead guilty and appear before for sentencing. In 10 years of trying criminal cases, he says the conviction rate before him has been close to 100 percent. With these types of statistics, Judge Schiltz says, “It’s surprising how many otherwise competent attorneys 'punt' at the sentencing hearing.” Simply stated, “I don’t get the help I’d like.”

Judge Schiltz says that he picks a range of months before he comes into court with a written explanation in support so the written submission of counsel is very important. “I don’t want 40 pages of regurgitated Booker and 3,553 factors but rather a handful of heart felt letters,” he says. “Six to eight pages would be ideal, but no more than 20.” He strongly added, “Tell me something I don’t know about your client.”

Judge Schiltz recommends that lawyers carefully screen character letters before submitting them. He said that he appreciates learning about a good deed that is not otherwise known about the defendant. He gave an example of “a defendant who, during a heavy snowstorm, shovels the sidewalk of an elderly disabled neighbor.” Judge Schiltz feels that inarticulate character letters that give examples of a defendant’s kindness often come across as more genuine.

The bottom line for both judges is that it is essential to humanize your client as much as possible.

Judge Scola says that live witnesses should speak for two minutes at most and share why the defendant is a good husband, brother or son. They should not read what they are saying. “I am looking for the human element,” he comments. He feels that character letters and character witnesses are helpful if they can be truly incisive to whom the person is, why they did what they did and why they are unlikely to do it again. Like Judge Schiltz, Judge Scola is “touched by genuineness.”

Allocution generally makes no difference in Judge Scola’s sentencings. In 5 percent of cases, it might actually hurt a defendant. “On the other hand, I once had a defendant appear in front of me thank me for appointing his CJA lawyer and explained why he felt he was treated fairly by the system. I was impressed by his insight and his appreciation and I gave him a lower sentence than intended.”

In part 1 of this article series, Judge Jed Rakoff said that he doesn’t know any judge who doesn’t appreciate the fact that he has a human being appearing in front of him. Judge Schiltz agrees. “Help me appreciate that the defendant is a human being who will spend years in a cage.” Judge Scola echoed the same sentiment.

Judge Schiltz readily welcomes a lawyer’s recommendation of a sentence, saying that some attorneys have a real “knack” for making well-reasoned, principled and appropriate recommendations. However, he also warned that he will dismiss recommendations that are unreasonably low. He conceded, however, that “in fact, if I go down in court from my written number, it’s not that much.” He further comments that “going from 48 to 44-46 months is typical, and I do this only if I learn something in court that I didn’t know before.”

Interestingly, Judge Scola views his discretion more narrowly than Judge Schiltz, pointing out that he wants to give the lowest possible sentence in accord with the sentencing guidelines, 18 USC §3553 and Eleventh Circuit precedent. “I am very mindful that the Eleventh Circuit requires a valid reason for a variance and also a justifiable reason for the amount of the variance,” he says. “I try to impose a sentence that will not be overturned on appeal.”

Indeed, Judge Scola has never had a sentence overturned on appeal in his four and a half years on the bench. “The first job of a lawyer is to provide me with law on the disputed legal issues that will be upheld by the Eleventh Circuit,” he says.

Both judges welcome evidence of the defendant’s community service, but less so when performed while awaiting sentencing. A promise of future community service has no impact on sentencing. Those, however, who have a history of community service before their arrest, and, better yet, before they knew they were under investigation, receive very favorable consideration.

Judge Schiltz doesn’t like canned psychological/psychiatric reports by professional “hired gun” experts. Also, if he sees that the report is based on inaccuracies about the offense, he says, “I am going to give it little weight.” He says he is less concerned with appeals because, in the Eighth Circuit, it is hard to get reversed, as long as no procedural mistakes are made and the basis for the sentence is adequately explained.

Both judges are very concerned with disparity in sentencing, and want to avoid imposing disparate sentences on defendants who have committed a similar offense with a similar criminal background. Judge Schiltz says that if a lawyer wants to argue that another judge on the bench in the District of Minnesota

imposed a particular sentence, it won't impact him unless the cases are "apples to apples" adding, "the lawyer needs to be as specific as possible in showing me this." Judge Scola says that while he is not interested in what judges in California and New York do, he is interested in what judges in the Southern District of Florida have done. Again, like Judge Schiltz, he said that he finds it helpful if a lawyer can identify the particular case and state why it is similar to his or her case and why the particular judge did what he did. Both judges indicated that they would welcome statistics on sentences imposed on similar defendants who have committed similar offenses with similar prior records in their district and their circuit and nationwide.

Both judges offered excellent suggestions. They want to know what a defendant will do once they get out of prison. Having a support system is very important, said Judge Schiltz. "A defendant who has support, in my opinion, is at a lower risk of reoffending. I might give a defendant who has good support a shorter term of supervised release than a defendant who doesn't have much support and may very well reoffend."

Judge Scola suggests that, in a multidefendant case, if co-defendants have been sentenced earlier than your client, attend that sentencing. "See what I have determined to be their guidelines. Learn how I feel about the case. At times your client's name will come up. Listen to what I say about him."

Finally, both judges (and every judge I have interviewed so far) have a problem with child pornography offenders. Judge Schiltz says, "I am post-Booker judge. The guidelines are a benchmark for me. A starting point." However, he added, "In child pornography cases, they are utterly useless." In child pornography cases, both Judge Scola and Judge Schiltz make a big distinction between offenders who have merely looked at child pornography versus those who are trolling the Internet for potential victims, offenders who actively distribute or produce it, or who have had contact or tried to have contact with a child. Both judges say that they treat the former far more leniently than the latter, especially on first offenses.

Conclusion

In addition to the four judges that I have interviewed for parts 1 and 2 of this series, I have now interviewed almost a dozen more. Two overall themes have emerged. First, judges want to see that your client has internalized what he has done, what impact it has had upon his life, the lives of his victims, if any, and, significantly, his family and close friends. Second, they find lawyers who regurgitate information they already know to be useless and are put off by it. A common comment is: Tell me something I don't already know about your client.

—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.

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Views From The Bench On Sentencing Representation: Part 3

Law360, New York (April 12, 2016, 10:24 AM ET) --


Alan Ellis

As this "Views From The Bench On Sentencing Representation" series of articles continues to develop, I have had the privilege of interviewing 12 federal judges to date. Each of the judges, of course, has his or her own style and philosophy. However, through conversations with each of them, I have recognized the value of sharing the thoughts of the judges on specific topics. For this article, I asked a dozen judges for their advice to lawyers who are representing a client in a particularly challenging case.

I have joked that when the law is against you, argue the facts; when the facts are against you, argue the law; and, when both are against you at sentencing, take the probation officer out to lunch.

But seriously, what do you do when you have a client who has committed a reprehensible offense with a record as long as your arm? I asked a number of federal judges for their answers to this question.


U.S. District Judge John R. Adams

First of all, many judges feel that mental illness is rampant among criminal defendants. Universally, they welcome psychiatric and psychological reports, but caution that they are only going to give these reports weight if they are credible. Judge John R. Adams of the Northern District of Ohio in Akron, who has a reputation for being a tough sentencer, says, “What I find particularly useful is if the parties agree that an independent expert should be appointed.” He noted that his preference is that the expert be a psychiatrist, neurologist or other mental health professional with an M.D. degree. He notes, “A solid report with live testimony can be very, very helpful.”


U.S. District Judge James S. Gwin

Judge James S. Gwin, also of the Northern District of Ohio in Cleveland, advises that, “If you have a case where the defendant has committed a particularly egregious crime, emphasize something in his background that demonstrates possible mental health issues.

Oftentimes, psychiatric troubles in the defendant's past can be insightful. They can make a defendant less blameworthy." However, Judge Gwin noted that psychiatric and psychological reports secured only for sentencing do not carry as much weight with him.

Judge Gwin recommends using any evidence of pre-indictment admission of guilt, especially admission of guilt made to the victim. "A defendant who has apologized to his victim before arrest makes a good impression on me, and if the victim himself asks me not to send a defendant to prison, I will take that very seriously because I believe a lower sentence in such a case would be 'just punishment.'"

Although most federal authority says disparity analysis should be compared with other federal sentences, Judge Gwin says he also would be interested in knowing what a state sentence would be in a similar case for a similar defendant with a similar background.

Judge Richard G. Kopf of the District of Nebraska in Lincoln is interested in a defendant who has the capability of introspection and who has come to grips with the impact of his offense on others--not just the victims but also those who are close to him. "I particularly value a defendant who truly understands the harm that he has done to these folks. One of the best allocutions I've ever heard was 'Judge, I want to atone for what I did to the victims and my family. I deserve some prison time. I've hurt the victims, I've hurt my family and I've hurt myself. When I get out, I'm ready to take the following steps.'" Judge Kopf told me that he believed the defendant and his statement had a big impact on the sentence.


U.S. District Judge Richard G. Kopf

As for the lawyer, Judge Kopf emphatically states, "I trust the defense lawyer will tell me the 'raw truth' about his client. I like lawyers to take an ethical approach at sentencing."


U.S. District Judge Justin Quackenbush

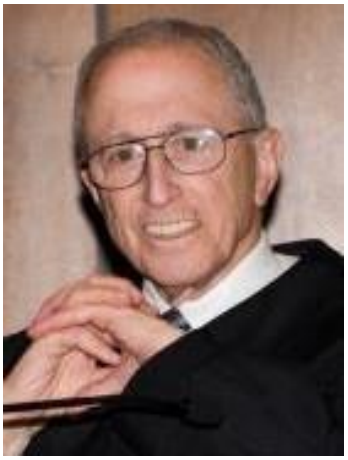
Judge Justin Quackenbush of the Eastern District of Washington in Spokane says that if a defendant has a substance and/or a mental health problem, he looks favorably on defendants who seek rehabilitation and treatment prior to sentencing. Better yet, prior to being caught. Serious medical issues also are of importance to Judge Quackenbush. He notes that general deterrence is not a major factor, but says that positive family connections are an important consideration. "A supportive family plays an important role in the sentencing decision," he says. Asked whether he might recommend bringing a supportive spouse to the Presentence Investigation Interview, Judge Quackenbush thinks that would be a good idea. However, he stressed that he is uncomfortable with a defendant's young children being brought to sentencing.


U.S. District Judge Paul L. Friedman

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia told me that his policy prior to sentencing is to meet one-on-one with the probation officer. "I view the probation officer as a key advisor," he says. He says that prosecutors or their investigators usually talk to probation so he

highly recommends that a defense lawyer be an advocate for his client with probation and do whatever he or she can to persuade the probation officer to look favorably at the defendant in this pre-sentencing meeting.

“I also particularly like when an employer says that knowing everything he knows about the defendant and what he has done he would welcome him back as an employee when he gets released from custody,” added Judge Friedman.


U.S. District Judge Walter Rice

Judge Walter Rice of the Southern District of Ohio in Dayton also is very interested in psychiatric and psychological evaluations. “If the offense is a particularly heinous one, I want to know whether mental illness was a contributing factor, and, if so, whether the defendant is amenable to treatment, as well as the prognosis upon the completion of a treatment program.” Judge Rice is equally impressed with a defendant who has, on his own, sought treatment for a drug problem, particularly when he has done this prior to being caught.

A key factor during sentencing is demonstrating whether the defendant has “internalized” what he has done, why he did it, what he has learned from it and why he is not going to do it again. Judge Rice often will engage a defendant in conversation through allocution in order to learn more about him. “I will ask a defendant what he is going to do upon release from prison so that I can determine whether I believe he is not going to re-offend.”


U.S. District Judge Amy J. St. Eve

Judge Amy J. St. Eve of the Northern District of Illinois in Chicago says that in very challenging cases, the best thing a lawyer can do is to help her understand who the client is, why he did what he did, and what can be done to ensure that he will not do it again. She says she is very interested in mental health reports and wants to see them well in advance of sentencing. “I like to question these experts. The more information I have, the more informed decision I can make.” Judge St. Eve finds it more helpful if the expert is someone who has treated the defendant for a significant period of time rather than someone who has just met the defendant at the jail and interviewed him or her for two hours. She puts more stock in these experts rather than a professional forensic expert. During my interview, Judge St. Eve reiterated the point that “the best thing a lawyer can do for me is to give me a complete picture of who the client is.” Recidivism also is important to her. She wants to hear from a defendant what he intends to do to ensure that he won’t reoffend. “Does he have family support? Is there a job waiting for him? What is his criminal history? What are his plans upon release?” are the types of questions she says she might ask.


U.S. District Judge Neal Wake

Judge Neal Wake of the District of Arizona in Phoenix repeated that what is important is that the defendant has internalized his crime and takes 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.” Family needs can be important to Judge Wake. “If a defendant is going to be taken from his home, that carries little weight with me because that’s part of the punishment. However, if there is a special needs child who needs the defendant at home, that could carry weight with me.”

Community service and good deeds done prior to the defendant’s crime being discovered is a significant indication of a defendant’s core values, says Judge Wake. “I try to look into a defendant’s heart to see whether in fact he has realized his offense, owns his mistake and has taken steps toward rehabilitation. These also can have a big impact on me.” Judge Wake has seen sentencing videos and welcomes them, particularly if they provide “new and useful” information.

The majority of the judges interviewed feel that character letters can be meaningful. They all point out that it is important for the lawyers to review the letters before they are submitted to make sure they are not repetitive or simply state what a good guy the defendant is. Instead, they all want letters that give specific examples of good deeds and any special needs of the defendant and his family.


U.S. District Judge Jed Rakoff

Asked what a lawyer can do when he or she has a client who has been convicted of an exceptionally heinous offense, Judge Jed Rakoff of the Southern District of New York in Manhattan contends that “there generally is something good to be said about everyone. I don’t know a single judge who doesn’t recognize that he has a human being in front of him being sentenced.”


U.S. District Judge Mark Bennett

Judge Mark Bennett of the Northern District of Iowa in Sioux City is known as a relatively liberal sentencer. Asked about difficult cases, Judge Bennett says that he finds egregious those white-collar cases that have innocent victims and a defendant who has acted out of greed. “I am not going to be very sympathetic unless there is a strong mitigation factor like addiction, mental illness or good deeds in the client’s past,” he says. “I find it very helpful if the defendant has done good deeds, especially if a character letter describes a defendant’s good deeds.”

When asked his opinion about the best thing a lawyer can do when representing a defendant who has committed a particularly reprehensible crime, Judge Patrick Schiltz of the District of Minnesota in Minneapolis also 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."


U.S. District Judge Patrick Schiltz


U.S. District Judge Robert Scola

Judge Robert Scola of the Southern District of Florida in Miami suggests that, in all cases, we lawyers take a page out of the book from our death penalty defender colleagues. He advises, "Don't wait to think about sentencing advocacy." In order words, since 99% of one's federal criminal clients will be facing sentencing, start preparing the case for sentencing early on.

Conclusion

I've been asked how soon lawyers should prepare for sentencing in a case. The answer is: as soon as the check clears. Judges, universally, want to know why our client did what he did, and why he won't do it again. One judge recommended that an independent psychiatrist agreed upon by the parties would be the most credible expert. Along these lines, I often ask the prosecutor in the case who he likes to use. I find their experts only too happy to work for the defense occasionally and, of course, their opinions are virtually unassailable.

—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.

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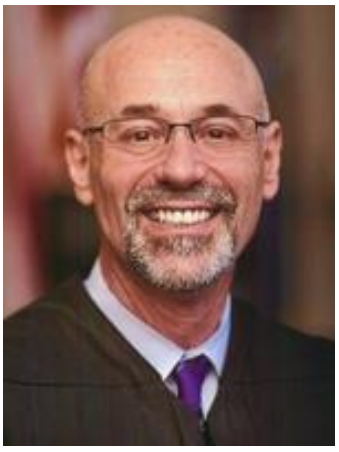
Views From The Bench On Sentencing Representation: Part 4

Law360, New York (May 3, 2016, 11:29 AM ET) --

Alan Ellis

Judge Cynthia A. Bashant of the Southern District of California in San Diego and Judge Jon D. Levy of the District of Maine in Portland were both appointed by President Obama in 2014 and confirmed at the same time. They preside literally on opposite sides of the country, but have kept in touch exchanging ideas on judging, including sentencing. Judge Bashant was formerly a state court judge who handled both juvenile and criminal matters, and Judge Levy was formerly a state trial judge and an associate justice on the Supreme Court of Maine. Lawyers consistently describe both as "right down the middle" at sentencing. Like many judges, these two jurists come out on bench with tentative guideline rulings and sentences in mind.

Before the Proceedings Begin



U.S. District Judge Jon D. Levy

In Maine, the judges convene a presentence conference in chambers several weeks before the sentencing, which Judge Levy finds extremely helpful. At the meeting, the lawyers are expected to discuss any objections to the presentence report that they intend to raise at the sentencing, any remaining documents or information that should be exchanged prior to the sentencing, the nature of any testimony or other evidence that will be required to resolve objections to the presentence report, and whether there are any questions regarding the Guidelines or the applicable law that deserve briefing. A schedule for the submission of sentencing memos and exhibits is established, as are the time, date and length of the sentencing hearing. This allows the lawyers to schedule the sentencing around the availability of the witnesses, victims, and family members who will attend.

The presentence conference is a critical first step, says Judge Levy, because it provides him insight as to the issues that the lawyers feel are most consequential. This, in turn, influences how he prepares for the sentencing. "Effective defense presentation at this stage can be very important to the ultimate outcome of the case. It is an opportunity for the lawyer to direct my attention to the key sentencing issues. The information I receive at the conference should be solid."

U.S. District Judge Cynthia A. Bashant

Judge Bashant comes out on the bench and begins by announcing her tentative sentence, including how she intends to rule on disputed guideline issues. Therefore, it is very important that counsel provide her with a sentencing memorandum at least one week in advance of the sentencing hearing. Judge Bashant says, "A lawyer should get me a sentencing memorandum at least one week in advance because that is when I am going to start reading the presentence report, any addendum and the parties' sentencing memoranda. This is when I will first start developing my tentative sentence. If the prosecution already has submitted a sentencing memorandum, a late filing by defense counsel puts the defendant 'behind the eight ball.'"

Credible Sentencing Recommendations Welcomed

Like all judges I have interviewed so far, Judges Bashant and Levy don't like boilerplate citations to Booker, its progeny or 18 U.S.C. §3553 factors in sentencing memoranda. Judge Bashant also doesn't like cut-and-paste jobs, offering the advice to "tailor your sentencing memorandum to this particular defendant." While she doesn't need to be reminded of pertinent case law, of course, she states, "If there is good authority on a disputed guideline issue, I want to see it."

Judge Levy gives great weight to the lawyers' sentencing recommendations. "It is important that the lawyers be clear on what they are asking for and the rationale for it. This is where focused advocacy is critical because if they want me to adopt their recommendation, they have to link that recommendation to facts that are in the record and sound reasons that support the sentence. There are occasions when lawyers are not clear as to what sentence they would like me to consider imposing and the facts and reasoning that support it."

Judge Bashant also welcomes lawyers' sentence recommendations, if they are well reasoned. "If the recommendation is particularly low, it often causes me to question the lawyer's credibility, not just on the recommendation, but in other arguments he's making." In court, Judge Bashant wants counsel to listen to her concerns and respond to them. She 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. On the other hand, if I am going to go with the presentence report or the government's position, then I want to hear it argued."

Lawyers often do their clients a disservice when they simply adopt what is in the presentence report (PSR), according to Judge Bashant. "What I typically see in our district is for the 'Defendant's Statement of the Offense' section of the PSR to read 'Upon the advice of counsel, Defendant refused to answer any questions, but adopted the facts outlined in the factual basis of the plea agreement as his statement of offense.'" Judge Bashant says that while she understands that lawyers likely take this approach because they fear their client may further incriminate themselves, it is her opinion that this is a missed opportunity.

"This is a chance for the defendant to give his version of what he did, why he did it, why he is not going to do it again and why this was aberrant behavior." She thinks lawyers who do not allow their clients to answer the probation officer's questions sometimes do their clients a disservice, adding, however, that she realizes that "it requires that a defense attorney spend time with a client preparing him for the presentence interview beforehand. "Where a lawyer can play a large role is when there are facts that

are missing from the records — facts about the client's background, motivation and future plans. That's where the lawyer's role can become quite important," says Judge Bashant.

When assured the defendant will not reoffend, Judge Bashant is looking for concrete examples. "For example, in an unlawful immigration case, show me that your client has a job waiting for him back in Mexico." Employer letters stating that they know the defendant and would rehire him upon his release from prison carry a lot of weight with Judge Bashant.

The same is true for Judge Levy. Also important to Judge Levy is what the defendant has done since being apprehended. For example, if detained, has the defendant taken advantage of any rehabilitation programming or performed a useful service like teaching other inmates a new job skill at the jail? "If the defendant was on presentence release, I want to know what she or he has done during that period, whether the defendant has made amends or paid restitution; was the defendant working and how did it go; has the defendant received mental health or substance abuse treatment and what do the providers have to say about the defendant's progress; and generally anything that bears on whether the defendant has taken meaningful steps to turn his or her life around."

Judge Levy goes on to emphasize the importance of defense counsel establishing trust with him, as well. "Don't minimize the seriousness of what your client did." In other words, if a lawyer can show that he/she is on the same page with their client as to the seriousness of the offense, the chances of having your other statements accepted by Judge Levy increase. In a difficult case, Judge Levy, like Judge Bashant, feels strongly that the lawyer needs to "humanize" his or her client in explaining why the client did what he did, why he won't do it again, and why he is deserving of a light sentence. If there are any aggravating factors, be sure to address them.

Judge Bashant is particularly interested in knowing why the offense was committed. "Was it done because the defendant was in financial straits? If so, I want to know the defendant's plans for the future so that this doesn't happen again," she says. "I am very interested in why the defendant will be able to make a go of it, particularly if his crime was committed for economic reasons."

Allocution Is Serious Business

Like most judges I've interviewed, these two judges both take allocution very seriously. "Allocution matters," says Judge Levy. "I will never hold poor communication skills against a defendant," he emphasizes. What's important is whether he is persuaded that the defendant is sincere and demonstrates insight about the crime and the actual changes the defendant must make in order to live a positive and successful life. He observed, "I am mindful that a highly educated sociopath may deliver an eloquent allocution. If I conclude that a defendant is not sincere, that will work against him.."

Judge Bashant doesn't want the defendant to apologize to her. "I want him to apologize to the victim and his or her family, particularly if they are in the courtroom. Just like a parent with a child who has done wrong, I am looking for 'insight' from the defendant," she says. She wants lawyers to know that she will dialogue with their client.

Do Psych Evaluations and Character Letters Make Any Difference?

Asked for her views on mental health reports, Judge Bashant responded that they could be helpful only if the evaluator has spent a considerable amount of time with the defendant. "A report where the expert has spent 50 minutes with the defendant and has concluded that he or she is not a risk to

reoffend is not particularly helpful," she shared. A lawyer, therefore, 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 one from a professional forensic expert. "I recognize that clinicians who have spent a lot of time with their patient may come across as advocates," says Judge Bashant, but, so, too, forensic experts also often seem to be advocates. She is particularly interested in knowing whether the offender has a diagnosable mental health disorder that may have contributed to the commission of the offense and which is treatable.

Judge Levy finds psych evaluations to be helpful in determining why the defendant did what he did and the likelihood of recidivism. He is familiar with many of the experts who testify in Maine, and he will give serious consideration to any assessment that credibly demonstrates that the expert has exercised independent professional judgment. Like Judge Bashant, Judge Levy welcomes a report from a treating professional, though he has concern that the expert may be acting as an advocate as opposed to an evaluator. "In any event, I want to know the risk of the defendant reoffending." Judge Levy commented. He is of a mixed mind when it comes to the expert testifying in court. On one hand, it makes the expert subject to cross-examination and allows Judge Levy to question the expert. On the other hand, he doesn't want the expert to simply "parrot" what he says in his report.

Character letters are important to Judge Bashant, and she finds them very helpful if they demonstrate that the writer knows what the defendant has done and then explains why this is aberrant behavior unlikely to recur if the defendant is a first offender. She is "interested in the protection of the public."

Both judges welcome community service recommendations as alternatives to incarceration. Judge Bashant is impressed if the community service is related to the offense, for example, a talk to school groups about the problems of drugs. If the defendant has previously or is currently performing community service, Judge Levy finds it helpful to receive a detailed letter from the director of the agency that discusses the defendant's work ethic, attitude, relationships with coworkers and actual contributions to the agency's mission. "I will consider whether the continued service the offender wishes to perform is a needed service to the community and measure that against the need for incarceration. It all goes to just punishment," he says.

Judge Levy is interested to receive comparative sentencing information that describes the sentences imposed by other judges in comparable cases.

Collateral civil consequences are important to Judge Bashant, who said that, with San Diego being so close to the Mexico border, "if a long-term, legal, permanent resident with an American family is going to be deported, I will take this into consideration when deciding the appropriate punishment."

In short, both judges want lawyers to "humanize" their clients. Judge Levy is equally concerned about collateral civil consequences and believes it is incumbent on defense counsel to identify and explain those consequences in a sentencing memorandum or at sentencing.

Conclusion

Judge Bashant and Judge Levy, like most of the judges I've interviewed, want counsel to address the four "why" questions: (1) Why did the defendant do what he did? (2) Why was the behavior out of character with an otherwise law-abiding life? (3) Why is he unlikely to reoffend? (4) Why should they cut him a break?.

Virtually all want to see that the defendant has internalized what he has done so that they can determine whether he has seriously taken responsibility and is truly remorseful. Allocution can play a big part in humanizing the defendant. A lawyer needs to carefully prepare his or her client for this.

Your overall purpose needs to be humanizing your client. Tell a compelling story. Tell the judge something new, something she or he doesn't already know. I keep hearing the words "trust" and "credibility" from the judges. Attorneys would be wise to keep this in mind, especially with respect to the information presented, arguments made and sentences recommended.

—By Alan Ellis, The Law Offices of Alan Ellis

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Views From The Bench On Sentencing Representation: Part 5

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Alan Ellis

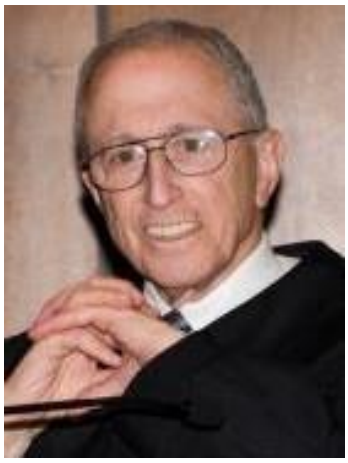
Criminal defense lawyers consider Judges John R. Adams and Otis D. Wright II tough sentencers. Judges Justin L. Quackenbush and Walter H. Rice are viewed as being at the opposite end of the spectrum. With their reputations, it was interesting to learn how similar they were on what constitutes good defense sentencing advocacy. Judge Quackenbush sits in the Eastern District of Washington in Spokane and Judge Rice sits in the Southern District of Ohio in Dayton. Both were appointed in 1980. Judge Adams, of the Northern District of Ohio in Cleveland, was appointed in 2003. Judge Wright sits in the Central District of California in Los Angeles and took the federal bench in 2007. All but Judge Quackenbush were former state court judges.

Allocution

Judge Mark W. Bennett of the Northern District of Iowa, whom I interviewed in part 1 of this series, has written on the importance of allocution in the article "Heartstrings or Heartburn: A Federal Judge's Musing on Defendants' Right and Rite of Allocution," which was published in March 2011 issue of The Champion. He followed this article with a survey of fellow judges which showed the high value most place on allocution ("A Survey and Analysis of Federal Judge's Views on Allocution in Sentencing," 65 Ala. L. Rev. 735 (2013)).

U.S. District Judge Justin L. Quackenbush

All of the judges here agree on its importance. Judge Quackenbush, a 37-year jurist, likes to hear a defendant allocute at sentencing, even if he is reading from written notes, unless, of course, the lawyer drafted those notes.



U.S. District Judge Walter H. Rice

Judge Rice agrees, saying, "I can oft 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 also commented that he does not want to hear a canned speech. "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."


U.S. District Judge John R. Adams

Judge Adams says, “Sentencing is very personal. The more I see a defendant, the more I get to know him.” Judge Wright notes, “I want the unvarnished truth. 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 Adams comments, “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 Adams doesn’t want to see a defendant wallow in self-pity. “He should start his allocution by apologizing to the victims. 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 and says it is important for the defendant to make restitution prior to sentencing, particularly where there are vulnerable victims. “I will communicate to these victims that the defendant will not hurt you again. I want victims to know that I care about them. It is important to me that a defendant tries to make things right.”


U.S. District Judge Otis D. Wright II

One of the key points made by the majority of the judges that I’ve interviewed is the notion of whether a defendant has “internalized” what he has done, why he did it, what he has learned from it and why he is not going to do it again. Judge Rice will often ask a defendant what he is going to do upon release from prison in order to determine whether the offender is likely to re-offend. “I often engage a defendant in allocution so I can hear more about him.”

This is not to say that a lawyer need be a potted plant during the sentencing. Judge Quackenbush suggests it is important for lawyers to present any favorable information to the U.S. probation officer prior to the preparation of the presentence report. “Get it to the probation officer early. It is extremely helpful if provided even prior to the PSR interview itself,” he recommends.

Judge Adams stresses how important it is that the defendant be honest with his probation officer. He likes to meet with the probation officer prior to sentencing to get an idea of how honest and forthright the defendant has been.

The Lawyer’s Credibility

All four of these judges stress the importance of the lawyer’s credibility. Judge Rice says, “Lawyers need to be candid with me. They should not whitewash their client’s crimes. I don’t want a lawyer to sugarcoat his client or the offense.” For example, if the defendant has a bad record, say so, but explain what you want me to understand about this record and about the likelihood of rehabilitation.

Judge Rice also wants help in fashioning the best sentence. For example, he appreciates it when a lawyer poses a well-reasoned alternative to incarceration.

Judge Wright doesn't want to feel that he's 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." For example, in a particularly reprehensible case, he wants the lawyer to acknowledge 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 defendant and the impact their actions had on the victims, I oftentimes will give the defendant a lower sentence than the attorney even asked for," he shared.

Lawyers who make frivolous arguments turn off Judge Adams. "It is important that a lawyer put together a good sentencing memorandum and make a good presentation in court," he shared. Judge Quackenbush expects a lawyer to cite cases involving important guidelines issues. Mindful that the presentence report always contains the government's version, Judge Rice says, "It's incredibly important for the defense lawyer to object to erroneous statements, even if they don't impact the guidelines because they will follow the defendant throughout his time in the Bureau of Prisons." He also says that he wants a picture of the defendant that is different from what is in the presentence report. "A good lawyer knows how to humanize his client. If the lawyer is going to make claims about a defendant being in poor health or family members suffering, he or she should give me evidence to support that claim," he says.

While three of the judges welcome a lawyer's sentencing recommendation, they all agree that a critical mistake they see lawyers make is to ask for too low of a sentence. Attorney sentencing recommendations are less important to Judge Adams; however, he notes that, "if a lawyer suggests a sentence within the realm of reasonable, I'll take it into consideration." Judge Wright went on to say that while a lawyer should not "take himself out of the conversation by asking for too low a sentence, he should never worry about asking me for a higher sentence than ultimately imposed. After all, a client who gets a relatively low sentence is not going to be unhappy with what his lawyer did."

All judges find that the earlier a lawyer can get his sentencing memoranda filed the better. None of them like boilerplate citations to Booker and the 3553 factors. As Judge Rice said, "If I don't know it by now, the republic is in danger." All of these judges expect the lawyer in a sentencing memorandum to tell them something they don't already know.

Positive family connections are very important to Judge Quackenbush, who says, "A very supportive family plays an important role in my sentencing." Asked whether he would recommend bringing a supportive spouse to the presentence interview, he says that this might be a very good idea.

If a defendant has a substance abuse and/or mental health issue, Judge Quackenbush looks favorably on getting treatment prior to sentencing.
All of the judges are concerned with unwarranted disparity. Judge Quackenbush is interested in nationwide sentencing statistics and recommends that lawyers provide them at sentencing. "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."

Psych Reports and Letters from Family, Friends and Employers

The judges differ about psych reports. They are not especially important to Judge Wright, who feels many of them come from "hired guns." On the other hand, he says that if he appoints the expert or the report comes from the Bureau of Prisons, they may carry substantial weight. "The timing of the exam is

important," he says. "The earlier in the process, the better. Not just after the verdict or plea and before sentencing. In fact, if the report was done prior to the defendant being caught having been aware that he was under investigation, it will receive even more credit."

Judge Adams finds it useful when the parties agree that an independent expert should be appointed, commenting that, "it is very important that a defendant make full disclosure to the examiner as to what brought him into court." If a defendant has a substance or a mental health problem, Judge Quackenbush looks favorably on his getting treatment prior to sentencing.

Judge Rice notes that he likes to see a psych evaluation and even orders them in child pornography and child sexual exploitation cases, adding that if the defendant has committed a particularly heinous offense, he wants to know whether or not there is a mental disorder which contributed to its commission and, if so, whether the defendant is amenable to treatment and, if so, what his prognosis of the success of treatment. He also is impressed with a defendant who has, on his own, gotten treatment for a substance abuse or mental health problem.

Judge Adams notes, "A solid psych report followed by live in-court testimony can be very, very helpful." By and large, the judges find it useful to engage the examiner in the court in questioning. Judge Adams looks for consistency from the defendant. "Oftentimes he will tell his pretrial services officers that he has no drug and alcohol problem and then tell the psych examiner that he does."

Character letters can be important to the judges, unless they are form letters. All agree that, to be credible, the writer should acknowledge that he/she is aware of what the defendant has done.

Judge Quackenbush suggests that counsel submit no more than four or five character letters. All the judges agree that it is the quality that counts, not the quantity.

Letters from employers who indicate that they know what the defendant has done but nevertheless are willing to offer his job back when he gets released from prison particularly impresses Judge Wright.

Offenders who perform community service by "using their acumen in keeping a not-for-profit alive when it otherwise would go out of business can have a considerable impact." A defendant who, on his own and prior to sentencing, has demonstrated an intention to pay his debt to society by performing community service impresses Judge Rice. He recalls one notable case where the director of the agency lauded the defendant's service and urged him to allow him to perform community service rather than be incarcerated, saying how important the defendant's help was to keeping the agency afloat.

If the presentence report says that defendant is the sole supporter of his family, the lawyer should give examples of this. For example, Judge Quackenbush recommends that, "if there is an elderly family member who will suffer as a result of his incarceration, I want to know precisely how. The lawyer needs to bring this to life." However, none of the judges is comfortable with the defendant bringing young children to the sentencing.

Judge Adams allows character witnesses to testify at sentencing, and says he will ask character witnesses if they understand what the defendant did.

Restitution

The judges agree that restitution can demonstrate sincerity. Judge Wright says that, in a case 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 that he doesn't get out to spend the ill-gotten gains." 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 says.

Similarly, Judge Adams says, "If I see a presentence report that says the defendant spent a lot of money on luxuries, but has nothing left to pay 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 of his assets. "If I learn that the defendant has been hiding or transferred assets to avoid paying restitution, it will be very harmful to the defendant," he says. Like Judges Adams and Wright, Judge Quackenbush has a problem with defendants who he perceives are hiding assets, particularly where restitution is in order.

Conclusion

One of the best things a lawyer can do is to make sure he/she and the judge are on the same page at the outset of the sentencing process. The more judges I've interviewed, the more I've come to appreciate how important allocution is. Clients can often sell themselves at the sentencing hearing. It is essential that we prepare them for allocution and the fact that judge may engage them in conversation.

The judges are looking for "internalization." While it is helpful for us to explain why a client did what he did, what he has learned from it and why he's not going to do it again, it's better when it comes from the defendant.

—By Alan Ellis, The Law Offices of Alan Ellis

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Views From The Bench On Sentencing Representation: Part 6

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Alan Ellis

Part 3 of this series included interviews with 12 U.S. district court judges on the topic of sentencing advocacy for the challenging client who has committed a heinous offense with a serious prior record as an aggravating factor. Judge James S. Gwin of the Northern District of Ohio in Cleveland was one of those judges. My interview with Judge Gwin was conducted during the pendency of an appeal, United States v. Ryan B. Collins. Collins was found guilty of receiving, distributing and possessing child pornography and Judge Gwin sentenced Collins to five years. The sentencing guideline range was 216-267 months.

At sentencing and after the verdict, Judge Gwin disclosed he had polled the jury to ask them what they believed to be an appropriate sentence. With one exception, every jury recommended a sentence of less than half of the five-year mandatory minimum accompanying Collins's offenses.

On appeal, the government objected to the polling, challenging the judge's use of the jury poll.


U.S. District Judge James S. Gwin

On June 29, 2016, the Sixth Circuit found that the propriety of jury polling in imposing a sentence was an issue of first impression, the court of appeals, noting that federal law provides a sentencing judge with the unfettered discretion as to the information received in determining his sentence, found that Judge Gwin's considering the jury's sentencing recommendation as part of the sentencing process did not conflict with his ability to properly weigh the Section 3553(a) factors and craft an appropriate sentence. The five years was also held to be substantively reasonable.

Among other nontraditional federal sentencing factors, Judge Gwin considers what a state sentence would be in a similar case with a similar defendant with a similar background, noting that 18 U.S.C. §3553(a) says that courts should avoid unwarranted disparity for offenders who engage in "similar conduct." He notes that this reference to "similar conduct as opposed to similar offenses, allows me to look at state sentences. To the extent that cases say that a judge should not consider state cases for similar conduct for a defendant with similar backgrounds, I think they are wrong."

Judge Gwin often views a defendant who has been dealt a seemingly bad hand as often being less blameworthy than an individual born to advantaged circumstances.

On the other hand, Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois in Chicago will automatically not hold the fact that the defendant comes from a privileged background against him. In white collar cases, she is most concerned where there are victims. Judge St. Eve, who has been on the bench for 14 years, was one of the youngest judges ever appointed to the federal bench at age 36. She believes in the importance of mental health reports and wants to see the psych report in advance of sentencing. It may surprise readers to learn that, as with many judges I've interviewed, she also prefers to hear from the expert at sentencing, commenting, "I find it most helpful if the expert is somebody who has treated the defendant for a significant period of time rather than somebody who has just gone over to the jail and interviewed him for two hours." Judge St. Eve likes to question these experts. "The more information I have; the more informed decision I can make," she added.


U.S. District Judge Amy J. St. Eve

Judge Paul L. Friedman of the U.S. District Court for the District of Columbia in Washington, D.C., who has been described by lawyers as one of "the smartest and best judges"[1] on that court says, "Explain to me why, after I had to sentence a low-level drug offender to a mandatory minimum of 10 years, I should give probation to your white collar crime client, who has led a previous life of luxury and didn't need to commit his crime, so that he can get back to his country club." Judge Friedman advises attorneys to not routinely ask for probation and he recalls a case where defense counsel said, "Judge, we are not asking for probation in this case. We don't believe that it is appropriate in this case; however, we believe that the guidelines are too high and what the prosecutor is asking for is also too high and would recommend that you impose the following sentence and this is why." In that case, as well as in a fair number of others, he was persuaded to go below the tentative sentence that he came into court with.


U.S. District Judge Paul L. Friedman

Like Judge St. Eve, Judge Friedman welcomes live witnesses at sentencing. "For one thing, I want to engage people in conversation," he says. He also recalls, as an example, a case involving a former law enforcement officer where the lawyer called a host of lawyers, government and law enforcement officials who simply came up to the podium, told him their name, who they were, what they did, how they knew the defendant, and simply that "they were there to support him." Judge Friedman also particularly likes when an employer says that knowing everything he knows about the defendant and what he has done, he will welcome back his employee when he gets released from prison.

Allocution

All three judges address the importance of allocution. A defendant does himself no good by apologizing to Judge Gwin. Judge Gwin has, however, been moved when the defendant credibly apologizes to his family for what he's put them through and the pain that he has caused them. Defendants who apologize to the victim also impact him. He recalls one case in which the victim, himself, asked that the defendant not be sentenced to jail. He imposed a lower sentence than he had anticipated he viewed the lower

sentence as “just punishment” for what the defendant had done.

Judge St. Eve says, “I like allocution. I like to engage the defendant during allocution. Remorse is important. Restitution is also important because actions speak louder than words. Recidivism is an important concern to me. I want to hear from a defendant what he intends to do so that he won’t reoffend. Does he have family support? Is there a job waiting for him? What are his plans upon release?”

Judge Friedman is interested in knowing why the defendant did what he did, saying, “I want him to give me an answer.” He also comments that if a defendant is on pretrial release, “he should in addition to abiding by all the conditions of release, particularly staying free from drugs while on release if that is the defendant’s problem, make efforts to find a job if he doesn’t have a job, perform community service, and get treatment, if that’s what his mental health professional recommends.”

If a defendant tells Judge Friedman that he recognizes that he needs help and explains what he intends to do once released from prison, it can be very impactful for a reduced sentence.

The Role of the Lawyer

Judge St. Eve says that the best thing a lawyer can do for her is give her a full picture as to who their client is. She says, “I am trying to figure out who this person is. For example, character letters can be very meaningful. It’s important for lawyers to review these character letters before they are submitted. I oftentimes listen to live testimony; but often the character letters suffice.” Another key thing is to identify a case of hers where she imposed a sentence that was lower than the sentence that she might otherwise impose in your case.

All three judges want quality pre-sentence memoranda and none of them want boilerplate arguments or boilerplate citations to Booker and the 3553(a) factors. However, they do understand that arguments on disputed guideline matters are important. What these judges say is equally if not more important is helping them understand who the client is, why he did what he did, and what can be done to insure that he won’t do it again.

In a few cases, particularly egregious ones with challenging clients, Judge Friedman believes that the lawyer should have the client evaluated by a mental health professional to determine whether there is any type of mental disability that contributed to the commission of the offense. He recommends, “If it turns out there is, come up with a treatment plan.”

With respect to sentencing memorandum, Judge Gwin says counsel should begin with a two or three paragraph executive summary of the case, saying, “Get to the point. Make it easy to read and understandable.”

“Try to tell me something good about your client,” says Judge St. Eve. “I am looking for the good in everyone that I sentence. I also expect the defendant to make restitution and to right the wrong that he has done.”

Judge Gwin suggests that a lawyer develop a theory of the sentence just like a theory of the defense for trials. Take a theme, such as the defendant’s terrible childhood, and support it with proof. He also welcomes data and statistics showing what sentences have been imposed across the country for similar offenses for people who have similar issues and backgrounds. He is interested to learn, if a defendant

has been detained, that he has completed any programs that were available to him.

Similarly, Judge Friedman says that it is helpful when a defendant who is intelligent and educated tutors other inmates in prison or helps them with letters, legal research and writing. “Reports and statements by correctional officers are very helpful,” he adds.

One of Judge Gwin’s pet peeves is a lawyer who doesn’t listen to the questions that he poses, commenting, “When arguing to me, they need to be straight with me.” Judge Gwin feels that lawyers can do a better job at sentencing.

All three judges welcome sentencing recommendations, but all also stress that if a lawyer makes an unreasonably low one, he or she is going to lose credibility. They also recommend that lawyers help their clients develop a plan for paying restitution, particularly to vulnerable victims who have been harmed.

Conclusion

I have been a lawyer for almost 50 years, and sentencing has made up a large part of my practice. Still, I have learned a lot from these interviews. For example, the importance of allocution is very clear. It’s crucial that you prepare your client for what to say and how to respond to questions put to them by the judge. Similarly, live witnesses at sentencing are often welcome, particularly mental health experts. Many lawyers feel that judges don’t want to hear a witness whose report they already have. This is so if the expert is simply going to parrot what is in his or her report. However, if you preface your notice to the court that you are going to be calling the expert so as to make him or her available for questioning by the court and the prosecutor, it will often be well received.
Letters from employers stating that knowing everything they know now about the defendant and his offense, they would nonetheless hire him now or upon his release from prison can also go a long way.

Finally, restitution plans are very helpful. Even if your client is only able to pay $25 a month, starting early in paying restitution and in putting together a plan for continued payment cannot be underestimated. The best thing a lawyer sometimes can say in court is: “Your Honor, I hereby tender a check in the amount of X in full payment of restitution.”

—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.

[1] Almanac of the Federal Judiciary Vol. 1 (2016).

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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.


Alan Ellis

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.


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."


U.S. District Judge Cynthia Bashant

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

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 that 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 Courthas 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.

[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).

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Views From The Bench On Sentencing Representation: Part 8

Law360, New York (March 14, 2017, 11:31 AM EDT) --

Alan Ellis

What can you do if faced with the government argument that a lesser sentence for your client would depreciate the seriousness of the offense and promote disrespect for the law? As one judge once told me, "Tell me something that your client did when no one was keeping score." In my recent interviews with Judge James C. Mahan of the U.S. District Court for the District of Nevada, Judge Mark L. Wolf of the U.S. District Court for the District of Massachusetts in Boston and Chief Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey in Camden, they all agreed: Demonstrate that your client is essentially a good person and rehabilitatable.

Judge Mahan is not particularly interested in this general deterrence argument. "I'm focused on this guy in front of me," he says. "What do we do with him?"

Judge Simandle points out that the lawyer should remember that "I am sentencing the individual."

Judge Wolf cautions that a defendant's good deeds do not include giving money to charities that he would not have been able to assist generally except for the crime he committed.

Sentencing Memorandum

Chief Judge Jerome B. Simandle

A lawyer's sentencing memorandum is very important to Judge Simandle. It's a lawyer's first opportunity to make a good impression with him. "Don't waste your time with the first five pages using boilerplate citations," he advises. "Put the important stuff in these first five pages. Don't make it too long. I read every word. Don't submit a sentencing memorandum late or out of time. Don't submit character letters that lack credibility." Judge Simandle says that it's a good idea to quote from the better letters and attach them as Exhibit A, with the rest of the letters as Exhibit B, leaving out the ones that are worthless or counterproductive. While he allows a few live witnesses, he says, "Less is more." He may ask the witness, "Have you spoken to the defendant about his crime?"

Judge Simandle recommends that lawyers develop a theme, a theory of the sentencing: why the defendant did what he did, why he's a good human

being at heart, why he's rehabilitatable, why he's unlikely to do it again, and why he has earned a break.

Judge Mahan comes to the bench, as do most judges, with an inclination as to what sentence he is going to impose. He has already discussed the case with his "brain trust" — his law clerks, who have reviewed the presentence report and any sentencing memoranda. Thus, it is important that a lawyer present all of his arguments, including a well-crafted sentencing recommendation, in the sentencing memorandum.

Judge Wolf requires a sentencing memorandum to be filed two weeks prior to sentencing and replies one week thereafter. "The best lawyers take advantage of this opportunity to educate me in advance about the case," he declares.

He does not want boilerplate citations, but does welcome legal arguments on disputed guideline issues. Judge Wolf, like so many of the judges I've interviewed, says, "Tell me something I don't already know about your client."


U.S. District Judge James C. Mahan

Judge Wolf is interested in character letters that demonstrate the defendant's good deeds and other qualities that are not apparent in the presentence report. He appreciates letters that use common language and are not based on a lawyer's template about what to say. Like Judge Simandle, Judge Wolf finds it helpful if the sentencing memorandum quotes from the best letters, and prefers lawyers to attach those letters as Exhibit A and the remainder as Exhibit B.

All three judges emphasized credibility, reminding lawyers not to sugarcoat their clients and to tell the judges the client's strengths and weaknesses.

Lawyers Can't Do All That Much at the Sentencing Hearing

Asked what a lawyer can do in court if she or he has presented a good sentencing memorandum, Judge Simandle responded, "Hit the high points and reemphasize them. Begin with the guidelines, which are the starting point. Be prepared to respond to the government's argument."

Judge Mahan notes that "a lawyer can't do much at the sentencing hearing to add to what they have already presented." While he wants to hear what steps the defendant has taken to show that he is unlikely to reoffend, this information should also be in the sentencing memorandum.


U.S. District Judge Mark L. Wolf

Allocution

Although the lawyer can't add much at the hearing, the defendant can. Allocution is important to Judge Mahan who wants to hear what the defendant has done to clean up his act.

Allocution is equally important to Judge Wolf, who says, "I sometimes give a lower sentence based on allocution. I am sentencing the defendant, not the lawyer. I want to understand the person that I am sentencing. From the lawyers, I am particularly interested in information that is not in the presentence report."

Judge Simandle says that he won't hold it against an individual who is inarticulate or so nervous that he can't allocute well. "On the other hand," he cautions, "a sociopath can give a very good speech that is often insincere. I am looking for sincerity."

Judges Welcome Sentencing Recommendations

All three judges welcome sentencing recommendations if they are well crafted, present a program for rehabilitation and are not unreasonably low. Judge Mahan asks, "What do we do with this guy? Does he need drug and alcohol and/or mental health treatment? Give me a plan. Tailor it to this defendant."

Unwarranted Disparity

State court sentences can be important to Judge Wolf, who also was once a state court judge. He gives as an example a low-level drug case involving a relatively small amount of drugs and a case involving large amounts but in which the defendant had a relatively minor role. If the case normally could have been prosecuted in state court, an argument as to what the state sentence would be can be useful.

Judge Wolf says he's not often swayed by a sentence imposed by other U.S. district court judges in Massachusetts, because he doesn't have that defendant's presentence report in front of him to know what unique characteristics that individual may possess. Likewise, Judge Mahan doesn't want a lawyer to argue that another judge has sentenced a similar defendant to Y months because "I don't know the facts of that case."

By contrast, Judge Simandle welcomes Sentencing Commission data as to what sentences have generally been imposed in New Jersey, the Third Circuit and nationwide. The sentencing situations of co-defendants in the same case should also be mentioned when known

Mental Health and Substance Abuse Professionals

Judge Simandle shared that he thinks highly of mental health professionals who have evaluated the defendant, particularly those professionals who are used by both sides. If such an expert is supportive of the defendant, it can carry considerable weight with him. "I respect psychology and criminology," he says. His opinion is that an expert who has been used by the government and who has credibility is often better than one who solely aids the defense.

Other Considerations

Judge Mahan takes a broader view of aberrant behavior than what the guidelines might define. If a defendant has committed a one-time offense in a marked departure from an otherwise law-abiding life, Judge Mahan wants to know about it. "Show me a compelling reason why the defendant did what he did," he says. He is interested in a defendant who has a low likelihood of recidivism.

What can a lawyer do when he represents the "challenging defendant" — a client who has committed a heinous offense and who has a serious prior record? Judge Wolf finds it advantageous in such a case if the defendant promptly admits the offense and makes restitution to the victims. He says that ordinarily he does not find family needs to be persuasive, because such adverse impacts are common when someone commits a crime. An exception would be considered in unusual circumstance, such as the defendant is a sole provider and caretaker for a special needs child.

Judge Simandle gives civil collateral consequences importance unless they are related to the commission of the

offense. For example, a lawyer who embezzles funds from his client trust account and is going to lose his license as a result, doesn't carry much weight with him. On the other hand, a lawyer who has committed a crime unrelated to the practice of law and will lose his license may receive some consideration.

Such collateral civil consequences do not carry much weight with Judge Wolf, who maintains that "oftentimes these are self-inflicted wounds, which generally impact privileged defendants who had a choice in doing what they did." Judge Wolf emphasizes that he is concerned with "rich man's justice versus poor man's justice" when he sentences highly disadvantaged individuals as opposed to those who come from a privileged background.

Nor is restitution of great importance to Judge Wolf, particularly if a wealthy family is paying it. "It doesn't tell me anything about the defendant," he says. However, serious mental health issues can be important to Judge Wolf. Despite the the Bureau of Prisons' protestations to the contrary, he is concerned that they cannot always adequately care for a defendant who has a unique serious medical problem. "This is something that I wrestle with," he says candidly.

A defendant who has been detained and who helps other inmates is someone who makes a good impression on Judge Simandle, particularly if the activities are documented by certificates or comments from jail staff. "Defendants who make the best of a bad situation are important to me," he avows, adding that he takes very seriously what a defendant has done while on pretrial release if he or she is not detained. For instance, if a defendant has made serious efforts at rehabilitation, such as dealing with a mental health or substance abuse problem, this is important. "If Pretrial Services has required a defendant to take certain steps towards rehabilitation, I want to know if he has followed through on this. I believe in redemption and reward extraordinary efforts at rehabilitation."

Conclusion

The key message that I hear over and over from judges is, "Don't sugarcoat your client. Tell me his strengths and the weaknesses. Tell me his story. Humanize your client."

Also, virtually every judge I've interviewed welcomes well-crafted sentencing recommendations provided sound reasons for them are given. For example, recommending a carefully planned treatment program for a defendant who suffers from a mental disorder or substance abuse can help the judge to structure a sentence that includes supervised release with specific proposed programming for rehabilitation. Judges care about what a defendant has done to clean up his act. An effective lawyer recognizes a judge's preferences and acts in concert with them.

—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 in 2007 to conduct lectures in China on American criminal law and its constitutional protections.

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Views From The Bench On Sentencing Representation: Part 9

By **Alan Ellis**

Law360, New York (July 28, 2017, 3:03 PM EDT) --
"What is best for the victim?" asked U.S. District Judge Lawrence J. O'Neill. "What is best for the community? What is best for the defendant?"


Alan Ellis

U.S. District Judge Morrison C. England Jr. advised: "If you have a client who needs treatment, have a treatment plan whereby you ask for a lengthy continuance of sentencing so you can see what the treatment program does for him."

"Wait," I interrupted. "I need to write this down."

I was engaged in a discussion with the two judges at the annual retreat of the Eastern District of California Bench Bar Conference, held last fall at Tenaya Lodge in Yosemite National Park. David W. Dratman, a veteran Sacramento criminal defense lawyer of over 39 years, and I had been invited to interview Chief Judge O'Neill of Fresno and former Chief Judge England of Sacramento. (The Federal Defender recorded the 90-minute Q&A session on video, which is being edited by documentary filmmaker, sentencing video specialist and defense attorney Doug Passon.)

The prospect of the interview was especially appealing because both judges are known for handing down stiff sentences. For example, "The Almanac of the Federal Judiciary" characterized Judge England this way: "He is pretty harsh. He defers to the government." "He's a very harsh sentencer." "He's not going to bend much." The almanac's comments about Chief Judge O'Neill were similar: "He's definitely a harsh sentencer."

Asked early on about the importance of a sentencing memorandum, Judge O'Neill replied that he looks for one that is "fair and balanced. ... You should include the positives and the negatives. ... Don't sugarcoat your client. It doesn't work and takes away from your credibility." Judge O'Neill cautioned that a lawyer who has done a thorough sentencing memo shouldn't expect to add much at the hearing. At that time, Judge O'Neill said, "I'll be looking to the government to respond and, of course, the defense lawyer's reply."

U.S. District Judge Morrison C. England Jr.

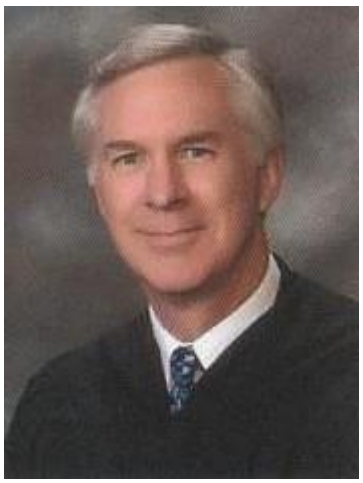
Judge England noted that "when I take the bench I am ready to hear 'how we tie this all up,'" and a sentencing memorandum can accomplish that if it's written in a coherent, easy-to-read manner and "just long enough to get the story out." As advice to defense attorneys, he suggested that you copy the probation officer with your sentencing memorandum because sometimes it causes them to change their mind before they make the final recommendation.

Neither judge appreciates wasting space in the sentencing memorandum by discussing Booker and its progeny — "Don't just spit out the law," is how Judge England put it. He recommended that attorneys take each of the 18 U.S.C. §3553 factors — especially those dealing with the nature of the offense, the history and characteristics of the defendant, and sentencing disparities —and apply them to their client.

In multidefendant cases, in particular, Judge England says, it's helpful to distinguish between relative culpability and criminal history.

Judge England was asked if he was interested in what other judges have done in similar cases. "No," he said, "that's what I call 'In re Down the Hall.'" Such discussions might be helpful "only if it is a unique case of first impression and something that I'm looking at how to figure out."

When asked if he had any pet peeves about defense lawyers, Judge England described those who are "true believers" and give every defendant "the full shot." In such instances, his comment was: "Where's your credibility? Baby rattlesnakes are the most dangerous creatures in the world. They don't know how much poison to give, they give you the "full shot" every time."



U.S. District Judge Lawrence J. O'Neill

Credibility with a judge can be helpful to the defendant, and it is something that defense lawyers should build over the long term through more realistic responses on behalf of their clients.

Judge O'Neill said he gets a bit peeved when all the defense talks about is the defendant's horrid childhood and how this background factored into the crime. When the defendant gets out of custody, he's still going to have this same background, the judge points out. So, what does the defense propose to make sure this person will not continue committing crimes?

At least part of the answer to that question might be that the offender needs to step up and take responsibility for the crime rather than lean on such mitigating circumstances as an unfortunate youth. "I really take that to heart," said Judge England. "If you're going to accept responsibility, then accept responsibility." That means allocution takes on great importance. "It can make or break where I am going," he explained. "I have a pretty good idea when I take the bench, what sentence I am going to impose. Then I listen to arguments and allocution. The needle moves during allocution, up or down." Judge England recommended that defense lawyers explain the value of allocution to their clients; and then let them decide what to say.

Judge O'Neill adds that while defense lawyers must be careful not to script their clients' allocutions, it might prove useful to have them address some of the all-important five W's: "Why did the defendant do what he did? What has he learned? What is he going to do about it? Why is he unlikely to do it again? Why should he get a break?"

Judge England opined that one of the biggest mistakes defense lawyers make is not having their clients answer the question, "What were you thinking when you did what you did?" "All too often," in Judge England's view, "the defendant will say a few words and the lawyer will interrupt saying, 'Your Honor, what he really means is ...' That is not helpful. I know it is stressful to speak in open court, but I really want is to hear from the defendant."

Judge O'Neill agreed on the importance of allocution. "There has to be some acknowledgement of what happened, what the effect was, and where we are going with it. I want to hear from the defendant. It's a huge mistake not to allocute.

"I also want to know what the person has been doing since the crime. Is he in treatment? Has he paid restitution? When a defendant says he cannot afford to pay any restitution, my next question is, 'Do you have a cellphone? If you do, you can afford to pay something?' If the defendant is out of custody, has he gotten a job? Is he working? Is he supporting his kids? Is he going to school? Has he done anything to better himself? Is he showing me that he has really taken to heart everything that happened? Has he paid some sort amount of restitution? Now when the lawyer says the crime was an aberration, it's more credible."

Queried about what he would like to see in letters of support, Judge O'Neill had words of caution for defense attorneys. "You see lawyers who send out requests for essentially form letters. Those are worthless. Similarly, a letter that says, 'I have known the client for years and he could not have done something like this, is pointless.' A letter that says '[I've known him for a long time and] I can hardly believe that he did this' is quite different." In Judge O'Neill's eyes, such a supporting letter is evidence of the defendant's aberrant behavior, not the writer's disdain for a system that is wrongfully prosecuting the defendant.

Judge England added that another effective letter is one from the defendant's employer, indicating he is aware of what happened and understands the need for punishment, but he will have a job open for the defendant when he gets out. Such a letter shows that the defendant has a network of support to make sure he will succeed — to Judge England, that is the point of character letters.

When the discussion turned to the role of mental health experts, both judges agreed that the professionals who are engaged in ongoing treatment with the defendant have more credibility. Unlike "hired guns," no one is paying their fee to testify, observed Judge O'Neill, who also noted that a treating professional is not necessarily less credible because he may more likely be an advocate for the defendant. "I find them willing to help and cure if possible, but also being realistic about the treatment and what they are seeing." he said.

We queried both judges on the topic of sentencing videos, which are becoming increasingly popular. Judge O'Neill told us that while skeptical at first, when he saw his first such video, he was very impressed and it impacted his sentence. Judge England responded that in his opinion, if the people are scripted and the dialogue seems rehearsed, or if the videos are primarily intended to play with a judge's heartstrings, then they are unlikely to be worth much. Using young children to achieve the heartstring

effect definitely should be avoided. “We know what they are going to say, we know that it’s awful for them,” he said. “My first question to the defendant would be, ‘Didn’t these children exist when you were committing the crime? Why are you asking me to consider this when you didn’t?’”

Since both judges are former state court judges, we asked them whether their overall sentencing philosophy had changed since they took the federal bench. Judge O’Neill said he was a much harsher sentencer in state court, but has become more sympathetic now, particularly when drug addiction is a factor. He recalled that a defendant recently appeared before him and stated, “You know, Judge, I don’t care what you do with me. I’ve just had it.” His lawyer then proposed a well-crafted drug treatment program for him and asked that sentencing be continued until after the defendant had completed the program. Judge O’Neill agreed to the request. It was at this point that Judge England suggested, “If you have a client who needs treatment, have a treatment plan whereby you ask for a lengthy continuance of sentencing so you can see what the treatment program does for him.”

Judge England urged defense attorneys to keep him informed about how a person he’s sentenced has fared subsequent to release. “It would be good to know that if I’ve given anyone a break, things have worked out. If I did [know], I might be more inclined to do the same in the future.”

Judge O’Neill said he wants lawyers to talk more about the victims. “I foresee a day when defense counsel presents more and more videos, and then prosecutors will do the same thing and have victims talk to us,” he predicted. “It’s important that fairness be across the board. Victims have constitutional rights, too.”

Judge England offered this suggestion to younger, inexperienced defense attorneys: Go into a busy courtroom and watch some pros who have done it many times, are good at it and are effective. If you’ve not appeared before a particular judge, go watch one of his sentencings, especially if it is a multidefendant case where your client has yet to be sentenced. “Lawyers are often reluctant to ask for help because they are embarrassed,” he said. “That’s an enormous mistake and a disservice to their clients.”

Conclusion

- Credibility with a judge can be helpful to the defendant, and it is something that defense lawyers should build over the long term through more realistic submissions on behalf of their clients.

- Lawyers should be thinking outside the box for solutions at sentencing. Strategies such as seeking sentencing delays in favor of intensive treatment, presenting a well-produced sentencing video, or writing an impressive, thoughtful sentencing memorandum that tells a story and avoids boiler-plate citations will go a long way to getting the results you want.

- Take Judge England’s advice and sit in on another one of your sentencing judge’s hearings, particularly if it involves a co-defendant. Judge Robert Scola of the Southern District in Florida in Miami recommends this also.

- Make a record. If you’ve not waived your right to appeal, the court of appeals may take a more sympathetic view than the sentencing judge and reverse and remand for resentencing. An empathetic panel may cause the court of appeals to take a closer look at the trial issues in the case if there are any.

- Make a principled sentencing proposal. Don't just ask for probation conditioned upon home confinement, treatment, community service, etc. Consider adding community confinement as a condition also to home confinement, intermittent confinement with home confinement at a local jail on weekends.

- Spell out your proposed treatment program and a worthwhile community service proposal.

- Start early. As my colleague Alan Silber of Hackensack, New Jersey, often says when asked how soon he starts preparing for sentencing: "As soon as the check clears."

- And I often say, if you want an atypical result, take an atypical approach.

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 in 2007 to conduct lectures in China on American criminal law and its constitutional protections.

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Views From The Bench On Sentencing Representation: Part 10

By **Alan Ellis** (January 24, 2018, 12:11 PM EST)

Alan Ellis

U.S. District Judges Frederic Block of the Eastern District of New York and Charles R. Breyer of the Northern District of California in San Francisco are legendary sentencing judges.

Judge Block is the author of two best-selling books, "Race to Judgment" and "Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge." In a remarkable decision, laying out all the ways our criminal justice system hurts ex-offenders, Judge Block sentenced Chevelle Nesbeth, a convicted low-level drug courier who tried to smuggle 602 grams of cocaine into the United States from Jamaica, to probation. Judge Block determined that the multitude of "collateral consequences" that Nesbeth would be subjected to as a convicted felon was severe punishment in itself; jail time on top of this would be excessive.

U.S. District Judge Frederic Block

In a 42-page opinion, Judge Block called for reform, arguing that federal and state laws imposing restrictions on people who have been convicted of felonies can amount to a "civil death." He outlined the sweeping breadth of collateral consequences and their likely impact on Nesbeth's life, including her likely inability to pursue her lifelong dream of a teaching career. Quoting extensively from the influential book "The New Jim Crow" by Michelle Alexander, Judge Block expressed moral indignation throughout his opinion at all the ways in which the American criminal justice system makes it harder for people with felony convictions to achieve stability in life.

Judge Breyer has been vice chair of the U.S. Sentencing Commission since 2013. One of his noteworthy rulings involved the trial and sentencing of Ed Rosenthal, an iconic cannabis activist in the San Francisco Bay area. Rosenthal was growing marijuana for medicinal purposes, which is legal under California state law; however, he was charged with three federal counts of conspiracy and cultivation. Breyer refused to allow defense attorneys to mention the state law because Rosenthal was indicted under federal law, which does not allow the growing of marijuana for any purpose. Rosenthal, who lived in Oakland, was growing marijuana in his official capacity as "an officer of the city" under Oakland's medical marijuana ordinance. In a news conference outside the courthouse, five of the jurors who convicted him issued a statement saying that they would not have voted to convict if they had been allowed to consider the California law. The five jurors subsequently apologized to Rosenthal and his family. The jurors were joined in the apology by the San Francisco district attorney and two members of the San Francisco Board of Supervisors.

Judge Breyer sentenced Rosenthal to one day in prison and a $1,000 fine, the most lenient sentence allowed under law. He said that it was reasonable to conclude that Rosenthal had believed he was acting legally.


U.S. District Judge Charles R. Breyer

Judge Breyer notes that one of his pet peeves is a lawyer's failure to file a sentencing memorandum. "It makes me think, 'What's happening here?' Some lawyers explain that they wanted to wait until the sentencing hearing," which he finds to be much too late. Judge Breyer points out that the government's sentencing memorandum generally begins with a statement of the case and a discussion of the offender, followed by a recommendation of the sentence. A defendant's sentencing memorandum, on the other hand, should focus on the history and characteristics of the defendant, his role in the offense, the role of any co-defendants and the sentences they received. If a defendant has co-defendants, lawyers should go to court to watch their sentencing and see how the judge views the offense, the co-defendants and the defendant, if his name comes up.

Judge Breyer welcomes sentencing recommendations from both sides. He explains that lawyers build credibility over the years with him, which is an important factor in how he values their recommendations. If the lawyer comes in too low, he loses credibility and Judge Breyer will often disregard not only the sentencing recommendation, but also other arguments that the lawyer might make. He says lawyers should always include in their sentencing recommendation why a higher sentence would be inappropriate and why the sentence they are recommending would be more appropriate.

Judge Block requires the U.S. probation officer in the presentence report, defense counsel and the government to discuss collateral civil consequences in their sentencing submissions. He wants a well-crafted sentencing memorandum. Asked what a lawyer can add at sentencing if he has provided the court with a top-notch sentencing memorandum, Judge Block says that he still wants counsel at the sentencing hearing to be assertive, strong and passionate. "If the family is in court, let me know. If there is any supportive law enforcement officer present, have them address me. If employers are there to speak on a defendant's behalf, this, too, can be very impactful."

He also likes character letters. "The more, the merrier," he declares. If a defendant's lawyer does not provide any character letters, the judge wonders whether the defendant has any kind of support system that will help him to not reoffend.

Allocution is important to both judges. Judge Breyer cautions, however, that it can be very tricky. "A defendant should absolutely not come off as the victim. He should not apologize to the court or the government; rather only to the victim. Apologize to the people whom you've hurt. Show me what you are going to be doing in the future."

Judge Breyer puts special value on character letters that show how the defendant has turned his life around. He doesn't want character letters that are duplicative, nor does he care for ones that say, "I can't believe he did what he did." Those kinds of letters demonstrate that the writer doesn't know the defendant well. If the defendant has a job waiting for him when he comes out of prison, this is meaningful. "I want quality, not quantity," he added.

Not surprisingly, as a long-time member of the Sentencing Commission and mindful of the need to avoid unwarranted disparity, Judge Breyer welcomes sentencing statistics from the commission, particularly

those from the Northern District of California. Inasmuch as he maintains that "it's the luck of the draw" as to which judge the defendant pulls at sentencing, it is helpful to him to know what other judges in his district have done in similar cases. He finds statistics from outside the district and more so outside the Ninth Circuit to be less helpful.

Judge Block also finds sentencing statistics to be compelling, particularly because 18 U.S.C. §3553 mandates that a judge avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct. In his decision in United States v. Parris, 573 F.Supp.2d 744 (2008), he asked counsel to search for and provide him with nationwide similarities in securities fraud cases. He reached out to the Sentencing Commission and learned that, while it did not use such statistics at the time, it did provide the Second Circuit statistical information packet for fiscal year 2006. He found that in contrast to the 360-months-to-life guideline range for the defendant's crimes, the mean terms of imprisonment in months imposed by district courts nationwide for nearly all other crimes were less serious than for securities fraud guidelines in this case.

Like Judge Block, Judge Breyer allows just about anyone to talk in court. While he doesn't find it necessary to bring mental health experts to court, he does consider it helpful for the defendant's lawyer to indicate that an expert will be made available, should the judge have any questions.

If the defendant is going to trial, testifies on his own behalf and sincerely believes that he is not guilty, Judge Block will not necessarily hold it against him. Asked what a defense lawyer should do when his client has gone to trial and lost, and he finds has testified falsely, Judge Block feels these cases are when a lawyer's role is even more important because "he has a much harder job to do for his client."

Judge Block shares the preference of most federal judges in not wanting canned briefs with Booker and its progeny cites. While he welcomes sentencing recommendations, he doesn't find it helpful if the defendant's lawyer recommends a specific sentencing; he would rather have the lawyer ask for a nonincarcerative sentence or "not a significant prison sentence." However, if a lawyer is making a sentencing recommendation that is higher than what he intends to impose, Judge Block, like most judges I've interviewed, will nevertheless impose a lower sentence if he thinks it is called for.

Regarding sentencing data, it is particularly important where there are co-defendants. Unwarranted disparity is one of the key 3553 factors, he notes.
Asked what to do when the government argues for a general deterrence sentence, Judge Breyer responds that it depends on the type of case. In a typical drug case, it's not all that important. On the other hand, he cites a case where a Transportation Security Administration officer in an airport pled guilty to allowing drug smuggling to occur. In that case, he thought a strong sentence important so that other TSA agents would think twice before doing this. Thus, he imposed a substantial prison sentence to drive the point home.

Judge Breyer finds some sentencing videos helpful. He gave an example of a woman who grew marijuana and extensively damaged national forest land. He was going to impose a substantial sentence until he was presented with "a day in the life" video showing the woman taking care of a special needs child. If she were incarcerated, the child would probably be turned over to the state. He thought that this was punishment enough and gave her a lower sentence than he had intended before seeing the video.

My Take

- Lawyers are oftentimes concerned that, if they ask for a higher sentence, the judge will impose that even if he or she would have otherwise intended to impose a lower sentence. I've never found this to be the case with any of the 25 judges that I've interviewed so far for this series.

- More and more judges are interested in sentencing statistics. Indeed, there are a large number of cases from the appellate courts holding that sentencing statistics should play a role in sentencing.

- So, too, I am finding more and more judges familiar with sentencing videos and finding them highly persuasive at times.

- Finally, when asking for probation or a short sentence followed by supervised release conditioned upon treatment, community service, restitution, etc., spell out a plan for the judge. Just don't ask for probation or supervised release conditioned upon treatment. Outline your treatment plan as specifically as possible.

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 in 2007 to conduct lectures in China on American criminal law and its constitutional protections. He is the co-author of "Federal Prison Guidebook: Sentencing and Post Conviction Remedies."

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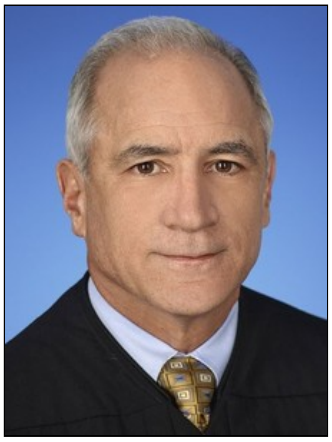
Views From The Bench On Sentencing Representation: Part 11

By **Alan Ellis** (May 8, 2018, 12:51 PM EDT)

"Sentencing is a morality play. The defense lawyer is the stage manager and the judge is the audience." (Lenny Sharon, past president of the Maine Association of Criminal Defense Lawyers).


Alan Ellis

Some of the more interesting insights that I've received from judges whom I've interviewed for this series have come from those who were criminal defense lawyers. This article focuses exclusively on the information shared by from four judges with the unique perspective of both the stage manager and the audience. (1) Judge Robert N. Scola, Jr., from the Southern District of Florida in Miami; (2) Judge Amit P. Mehta of the U.S. District Court for the District of Columbia in Washington; and (3) Chief Judge James K. Bredar and (4) Judge Paula Xinis, both of the U.S. District Court for Maryland. Chief Judge Bredar sits in Baltimore; Judge Xinis in Greenbelt.


U.S. District Judge Robert N. Scola Jr.

President Obama appointed Judge Scola to the district court in 2011. Prior to that, Scola was a state court judge in Miami. Before that he was an active criminal defense practitioner and served for a year as the Miami chapter president of the Florida Association of Criminal Defense Lawyers.

Emphasizing that making reasonable efforts to pay restitution is one indication of sincere remorse, Judge Scola suggests that "actions speak louder than words." He points out, "I'd rather have 50 character witnesses pay $100 each towards the defendant's restitution than to provide 50 character letters."


U.S. District Judge Amit P. Mehta

Before rejoining the Zuckerman Spaeder LLP law firm in Washington, D.C., Judge Mehta worked for the highly acclaimed Public Defender Service in Washington, which was founded by Charles L. Ogletree, now a Harvard Law School professor. Asked what a lawyer can do at a sentencing hearing to make a difference if he's already provided the court with a quality sentencing memorandum, Judge Mehta says, "Bring passion and candor to the case. Humanize your client. While I don't know of any judge who takes the bench without an idea of what the sentence is going to be and the sentencing memorandum is vitally important, hearing the lawyer's words at the hearing definitely can sway me. For example, show me that your client is not necessarily who he or she was at the time of the offense."

Chief Judge Bredar was formerly the chief federal public defender in Maryland. I have a high opinion of chief federal public defenders. First, they are well and generally favorably known to the judges of the court. Second, they practice federal criminal law 24/7 and are usually quite good at it. Chief Judge Bredar likes sentencing recommendations that are realistic. If you come in too low, you take yourself out of the conversation


U.S. District Judge James K. Bredar

and lose your credibility on other issues. He commented, "Be realistic. Show me why your recommended sentence is no longer than necessary to achieve the purposes of sentencing."

Judge Xinis is also a former federal public defender. One of the most gratifying things about interviewing judges who were formerly defense lawyers is that they often know my work in federal sentencing and prison matters. In fact, Judge Xinis told me that, as a practitioner, she often referred to her dog-eared copy of my "Federal Prison Guidebook" that sat on her desk.


U.S. District Judge Judge Paula Xinis

Judge Xinis is of a mixed opinion when it comes to sentencing recommendations, saying, "They are often useful to have; but on the other hand, sometimes a lawyer should not be wedded to a sentencing recommendation. For example, he or she should listen to where I am coming from in the courtroom. It may be that the recommendation may is too low, but on the other hand, it might be that it's too high based on what I have heard and said about the defendant in court."

Sentencing Memorandum

Judge Xinis dislikes cut-and-paste jobs when it comes to sentencing memoranda. "There is a disconnect between what is really needed, that is, information about the defendant, and boiler plate citations. It's far better to tell me why a variance is justified." She wants a lawyer to start with the offense and the defendant right up front. "I just want to dive into the facts. The good lawyers give me facts tied to the 3553(a) factors. Also, they tell me why a variance is justified. If the guidelines in the case overpunish, tell me why. Tell me about the legislative history or the U.S. Sentencing Commission history behind the guidelines, if it exists. Tell me why a guideline sentence would promote disrespect for the law in the eyes of the community."

Judge Scola notes that sentencing memoranda are the first opportunity for lawyers to make a positive impression on him. "I am very impressed with lawyers who show legal advocacy in their presentence memorandum on disputed guideline issues. I appreciate lawyers who give me everything I need well in advance of the hearing." One of his pet peeves is lawyers who do not submit a memorandum or submit them on the eve of sentencing, as well as lawyers who file poorly prepared ones.

He agrees with what I typically do with character letters: Quote from the best ones and attach them as Exhibit A to the sentencing memorandum. Make the rest another exhibit.

Judge Mehta agrees with most other judges that failure to submit a sentencing memorandum is a missed opportunity. "It may be the only time for legal advocacy. Tell me why your client did what he did. Show me that he is not necessarily who he was at the time of the offense. What steps have been taken to rehabilitate him or herself? Show me that he is not going to do it again." For example, people who have successfully battled substance abuse addiction show Judge Mehta genuine strength of character and that they are less likely to reoffend.

Chief Judge Bredar urges that the sentencing memorandum and letters be submitted as early as possible, particularly in a complex case. "In a complex case, I'll start my reading weeks before sentencing."

In Court

I asked each judge what a lawyer can do in court to help his client if he or she has already submitted a top-notch sentencing memorandum. Chief Judge Bredar indicates that he will often engage the lawyers in a conversation. "I'll have questions for them. A defense lawyer should make a powerful argument on the issues of the case that will cause me to hesitate before imposing a guideline

sentence." Judge Xinis is a self-described "hot" court, telling me, "I like to ask a lot of questions in court. I welcome live character witnesses. I will also ask a character witness to address the defendant directly."

Judge Xinis also likes live testimony from mental health professionals. "I like to engage them on points in their report that I don't agree with or have questions about." She says that lawyers who have put together terrific sentencing memoranda can still significantly add to what the sentence is going to be by what they say in court. "Tell me what sentence would be sufficient but not greater than necessary and why. Tell me why a prison sentence should not be a default sentence."

Judge Mehta also sees value in live testimony, including bringing the mental health experts in so he can question them. Character witnesses are helpful when they speak rather than send a letter. He suggests, "If a lawyer wants to present live testimony, all he need do is notify my chambers several days before."

Judge Scola gets annoyed with lawyers who don't prep their client or their character witnesses prior to the hearing, and with lawyers who fail to interrupt their clients who, during allocution, start digging a hole for themselves. Nor does he care much for lawyers who forget that the court is the audience and instead put on a useless show for their client's family and friends.

At a recent American Bar Association White Collar Bar Institute program in San Diego earlier this year, Judge Charles R. Breyer of the U.S. District Court for the Northern District of California in San Francisco and vice chair of the Sentencing Commission, whom I interviewed for **Part 10 of this series**, was on a sentencing and prison panel with me. He expressed a similar concern about lawyers who, when they see their client self-destructing by playing the victim and blaming others during allocution, forget that they can always ask for a recess to talk to their client before proceeding.

Allocution

During allocution, Judge Xinis likes to hear what a defendant's crime has meant to his family. She also wants to hear what impact it has had on his victim. "The best person to present this information is often the defendant, not his attorney."

Chief Judge Bredar comes out on the bench with a sense of what he is likely to do. Allocution, however, can change this. He wants to see if a defendant has any insight into the harm he has done. Although "allocution can be tricky," he thinks it's a bad move not to have your client allocute. "I am looking for remorse and insight as to why he did what he did and what he is going to do to make sure that it doesn't happen again. I want to hear what the defendant has done to try to make the victim whole again."

New Tools

While Judge Mehta has not yet seen a sentencing video, he would like to and thinks they could be provocative in causing a judge to sit up and take notice. "The more information you get in front of a sentencing judge, the better."

All four judges invite data and statistics on sentences imposed in similar cases. Indeed, I have found more and more cases citing data by the U.S. Sentencing Commission as grounds for reversing sentences. Judge Xinis finds statistical studies helpful. Judge Scola prefers sentencing statistics from his fellow judges in the Southern District of Florida rather than judges in California or New York. He nonetheless welcomes data for similar defendants who have committed similar crimes with similar prior records in the Eleventh Circuit and even nationwide. Judge Mehta also likes statistical data. "Showing me sentences imposed below the guidelines can support a variance in your case."

At the ABA White Collar Bar Institute program in San Diego, Chief Judge Beryl Howell of the U.S. District Court for the District of Columbia in Washington emphasized that unwarranted sentencing disparity is specifically listed as a sentencing factor in 18 U.S.C. §3553(a)(6): "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

She and Judge Breyer also reminded defense lawyers that they need to connect with the probation

officer early on, well before the presentence report is drafted.

Conclusion

Other than the guilty plea or the trial (which only occurs in three percent of all federal criminal cases), the first time most judges learn anything about your client is when they receive the presentence report. It is vital that the defense attorney connect with the probation officer well before that. The prosecution is going to inundate the probation officer with negative information about your client. You need to counteract, or better yet, preempt this as early as possible with positive information about your client. One way can be through a sentencing video, strong character letters and your own face-to-face, telephone or written advocacy.

As I often say, if the law is against you, argue the facts. If the facts are against you, argue the law. And if both the law and the facts are against you, take the probation officer to lunch.

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 in 2007 to conduct lectures in China on American criminal law and its constitutional protections. He is the co-author of "Federal Prison Guidebook: Sentencing and Post Conviction Remedies."

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