Own the Mistake and Demonstrate Sincere Remorse

by Alan Ellis

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In a September 2017 article for this magazine titled "What Federal Judges Want to Know at Sentencing," I shared my thoughts subsequent to interviewing nearly two dozen federal judges regarding their advice for lawyers representing clients at federal sentencing. Since then, I have conducted many more interviews. I've also appeared on CLE panels with federal judges to discuss sentencing and attended other programs.

For most judges, the key questions they want answered are:

1. Why did your client do what he did?
2. What has he done to own his mistake and demonstrate sincere remorse?
3. Why was the behavior out of character with an otherwise law-abiding life *if it was*?
4. Why is he unlikely to do it again?
5. Why should I cut him a break?

This is the first in a series of articles dealing with specific advice from the bench on sentencing advo-cacy. Turning to question 2 first, two ways of demon-strating sincere remorse are through allocution and trying to make the victim whole.

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 others," Judge Knopf says. "One of the best allocutions I have ever heard was 'Judge, I want to atone for what I did to the victims and my family. I deserve some prison time. I hurt the victims, I hurt my family and I've hurt myself. When I get out, I am ready to take the following steps.'"

Judge Ralph Erickson, now of the U.S. Court of Appeals for the Eighth Circuit but a U.S. District Court Judge in North Dakota when I interviewed him, recalls that one of the most convincing allocutions he heard was when the defendant turned to the parents of the victim who had died from an overdose of drugs he had sold him and said, "No punishment will be enough. If I could go back and change everything, I would."

"Allocution matters," declares **Judge Jon D. Levy of the District of Maine** in Portland. "I will never hold poor communication skills against a defendant. What's important is whether I am persuaded that the defendant is sincere and demonstrates insight about the crime. A highly educated sociopath may deliver an eloquent allocution. If I conclude that a defendant is not sincere, that will work against him."

Judge Mark Bennett of the Northern District of Iowa in Sioux City strongly believes that allocution is critical. He is a noted authority on the subject. He has published on allocution, including a survey of U.S. District Court judges gauging their views on the importance of it to them. His conclusion: very important. "I like to have a conversation with the defendant," he says. "That's one reason allocution is very important to me."

Judge Patti Sarris of the District of Massachusetts in Boston and former chair of the U.S. Sentencing Commission, says that what matters to her is a defendant who, during allocution, acknowledges the harm done to the victim. "What matters most is not the advocacy of the attorney. I really care about what the defendant says," she explains. "That does nudge me a lot."

Judge Cynthia A. Bashant of the Southern District of California in San Diego does not want the defendant to apologize to her during allocution. "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. Judge Bashant wants lawyers to know that she is willing to engage in dialogue with the client.

Judge Marcia S. Krieger of the District of Colorado in Denver says she has "seen allocutions where a defendant has shown that he is 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 is mindful of what he did to undermine confidence in the government function involved. A well-prepared allocution, according to her, shows that the lawyer has "brought his client along," adding that "[a] bad lawyer simply says what his client wants him to say."

Recalling a National Public Radio story on firms that counsel individuals and companies in crisis intervention, **Judge Krieger** talks about the three F's: (1) follow up, (2) 'fess up, and (3) fix it. It is important for Judge Krieger that a defendant "publicly admit his shame," which shows her that he has internalized his crime.

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

A defendant needs to step up and take responsibility for his crimes rather than lean on circumstances as an unfortunate youth. "I really take that to heart," states **Judge Morrison C. England Jr. of the Eastern District of California** in Sacramento. "If you are going to accept responsibility, then accept responsibility." Allocution can "make or break where I am going. 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 adds that one of the biggest mistakes defense lawyers can make is not having their client answer the question, "What were you thinking when you did what you did?"

Judge Lawrence C. O'Neill also of the Eastern District of California but in Fresno voices a similar view. "There has to be some acknowledgment of what happened, what the effect was and where we are going with it," he says. "I want to hear from the defendant. It's a huge mistake not to allocute. I also want to know what the defendant has been doing since the crime. Has he paid restitution? **If the defendant says he cannot afford to pay any restitution, my next question is 'Do you have a cell phone?' If you do, you can afford to pay something. If a defendant is out of custody, has he gotten a job? Is he working? Has he paid some amount of restitution? Is he showing me that he has really taken to heart everything that happened?** Now when the lawyer says a crime was an aberration, it's more credible."

Judge Charles R. Breyer of the Northern District of California in San Francisco warns that allocution can be tricky. "A defendant should absolutely not come off as the victim," he points out. "He should not apologize to the court or the government; rather only to the victim. Apologize to the people whom you have hurt."

U.S. District Judge Haywood Gilliam Jr. also of the Northern District of California in San Francisco says that what is effective with him is the defendant owning up to the crime, noting that any minimizing of the conduct at issue is a problem.

Judge James K. Bredar of the District of Maryland in Baltimore—who was formerly the chief federal defender there—says he comes out on the bench with a sentence already in mind. "Allocution, how-ever, changes this when I see the defendant has insight into the harm he has done." Agreeing that allocution can be tricky, he nonetheless 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 doing to make sure that it doesn't happen again. I want to hear what the defendant has done to make the victim whole again."

Judge Brian Jackson of the Middle District of Louisiana in Baton Rouge contends that lawyers need to prepare a client for allocution even if they have gone to trial and testified in their own behalf. "Even in those cases," he asserts, "it is important that they acknowledge that there are victims that are hurting. It's very important for a lawyer preparing their client for allocution do the job that they are retained to do."

U.S. District Judge James S. Gwin of the Northern District of Ohio in Cleveland recommends using any evidence of preindictment 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," he states, "and if the victim himself asks me not to send the defendant to prison, I will take that very seriously."

Judge Otis D. Wright of the Southern District of California in Los Angeles, a noted tough sentencer, looks disapprovingly upon a defendant who has not done what could have been done to make things right with the victim prior to sentencing, particularly where there are vulnerable victims. "I want victims to know that I care about them. It is important to me that a defendant tries to make things right." In a case where there are vulnerable victims and their money can't be found, and Judge Wright believes the defendant is secreting the money with the hope of spending it after being released, he will hold it against that defendant "big time. I will do whatever I can to make sure that he doesn't get out to spend the ill-gotten gains. Put his money where his mouth is. I want heartbroken vulnerable victims to know that I take what happens to them very seriously. My sentence will reflect this when I believe a defendant has not done what he could have to make things right for the victim."

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Another tough sentencer, **Judge John Adams of the Northern District of Ohio**, adds: I want the unvarnished truth. It can really help if I believe they are sincere. I can tell when a defendant is being sincere by what he says in court. I don't want to have him making excuses for his conduct or wallowing in self-pity. He should start his allocution by apologizing to the victim. Also, I 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. A defendant needs to disclose all his assets. If I learn that the defendant has been hiding or transferring assets to avoid paying restitution, it will be very harmful to him.

Judge Walter H. Rice of the Southern District of Ohio in Dayton, who is on the opposite end of the sentencing spectrum, agrees, saying, "I can often determine a defendant's sincerity during our colloquy at sentencing. I often engage a defendant in conversation so I can learn more about him. I may ask the defendant if he has harmed others and I will ask him what he plans to do about it."

According to **Judge Rice,** a reasonable effort to pay restitution is one indication of sincere remorse. "If the client is leasing a car for $900 a month while on bond and pays no restitution, that's not going to help him," he notes, adding that a key factor during sentencing is whether the defendant has "internalized" what he has done, why he did it, what he's learned from it and why he's not going to do it again. Judge Rice will frequently engage the defendant in conversation in order to learn more about him

J**udge Neil B. Wake of the District of Arizona** in Phoenix says that restitution indicates that a defendant has owned his mistake. objectives is important.

"I have met people who can't afford to pay their restitution," Judge Wake notes. "However, even as little as $25 per month shows me a defendant is committed to rehabilitation. I don't understand why a defendant who has the ability to pay something doesn't. I try looking into a defendant's heart to see whether in fact he owned his mistake and [has] taken steps toward rehabilitation. I want to see if an offend-er has internalized his crime and owns his mistake."

A former defense lawyer, **U.S. District Judge Robert Scola of the Southern District of Florida** in Miami, avows that he "would rather have 50 character witnesses pay $100 each toward the defendant's restitution than to provide 50 character letters. If family and friends truly love him, they should help him. Making reasonable efforts to pay restitution is one indication of sincere remorse."

Judge Scola further states that if the defendant is ordered to pay a large amount of restitution, he may not be able to pay the full amount. "If the loss in the case is $1 million, but defendant only received $10,000 for his participation, he should pay that amount back or offer to do so with arrangements. For example, if he has equity in a home, he should get a home equity loan. If there are victims out there and, for example, they want to be made whole and prison won't help, that can be a powerful mitigating factor if a defendant makes arrangements to do so."

Judge Scola suggests that we lawyers take a page out of the book from our death penalty defender colleagues: "Don't wait to think about sentencing advocacy. Since 99 percent of your federal criminal clients will be facing sentencing, start preparing the case for sentencing early on.

Observations

I am often asked how soon I **prepare for sentencing**. My answer is, **"As soon as the check clears."** According to the U.S. Sentencing Commission, 93 percent of federal criminal defendants wind up pleading guilty. Of the remaining 7 percent who go to trial, the government prevails in anywhere from two-thirds to three-quarters of the cases depending the year. That means that a federal defendant has a 99 percent chance of winding up in front of a sentencing judge and, according to statistics from the Commission, has an 86 percent chance of being sentenced to prison. While judges say they can be moved by an allocution, I think it's dicey to wait until the sentencing hearing. **First, develop a theory of the sentencing in which your client owns his mistake and demonstrates sincere remorse.** The best place to start is with the probation officer. Many judges have told me that they start thinking about the sentence they are going to impose in the case where a defendant has pled guilty **when they first receive the Presentence Report.** Having your client step up to the plate at his initial meeting with the probation officer can be critical. As I like to 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 out to lunch."