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Allocution: Where word choice can help or hurt a defendant's case

CRIMINAL PROCEDURE

TIMOTHY P. O'NEILL

Timothy P. O'Neill is a professor at The John Marshall Law School. In 2012, he was awarded the Chicago Bar Association's Herman Kogan Meritorious Achievement Award for legal journalism. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

Kevin Trudeau, as any insomniac knows, was a fixture on TV infomercials for years. Whatever your problem — bad memory, obesity, poor health — Trudeau had authored a book that provided the solution.

But unfortunately for Trudeau, he never wrote a book titled "How to Avoid Legal Problems." His conviction in federal court in Chicago last year for criminal contempt marked his third felony conviction.

At his sentencing hearing on March 17, the TV pitchman not surprisingly took advantage of his right of allocution, his right to personally address the court before sentence was imposed. In what the Chicago Tribune described as a "lengthy statement," Trudeau vowed that he would become a "better person" and promised that if he ever wrote another book, it would include "no embellishment, no puffery and absolutely no lies."

And what was the reaction of U.S. District Judge Ronald A. Guzman? The Tribune said the "visibly irritated" judge "wasn't buying a word." He went along with the prosecutors' request for a 10-year sentence.

If allocution doesn't work for a professional performer, does it work for anyone? This is the subject of Mark W. Bennett and Ira P. Robbins' new article "Last Words: A Survey and Analysis of Federal Judges' Views of Allocution in Sentencing," 65 Alabama Law Review 735 (2014)(available for free download at law.ua.edu/lawreview).

Allocution is defined in Black's Law Dictionary as an "unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime or say anything else in an effort to lessen the impending sentence." It can be found as far back as 1689 in England. Although not a constitutional right, it is specifically provided for in Federal Rule of Criminal Procedure 32(i)(4)(A)(ii). (The Illinois analog is found at 730 ILCS 5/5-4-1(a)(6).)

Bennett and Robbins, a federal judge and law professor, respectively, decided to conduct the first-ever survey of federal judges regarding their views on allocution. They e-mailed a 32-question survey to all 953 federal district judges; 54.5 percent (519 judges) responded.

They asked the judges to rank from a list of 20 possible responses the five characteristics of allocutions that most impressed them. The top five were "genuine remorse," "sincerity," "realistic and concrete plans for the future," "acknowledgement of and sincere apology to the victims" and "understanding of the seriousness of the offense." In fact, 178 of the judges ranked "genuine remorse" as the most important.

On the other hand, the five characteristics that least impressed the judges were "explaining how the defendant was the victim of circumstance," "finding religion," "promising never to commit another crime," "saying 'I can't change the past' or similar statements" and "thanking the prosecutor and agent for arresting and prosecuting the defendant."

The judges believed that defense attorneys have an important role in preparing the defendant for allocution. The judges encouraged counsel to advise their clients to prepare and rehearse, to use their own words and to be brief.

The judges also offered some ideas on what detracts from an allocution's effectiveness. Among the items some judges mentioned were a defendant not making eye contact with the judge; reading from a prepared statement; and apologizing to his own family before apologizing to the victims. On the other hand, many other judges denied that any of these factors had a negative impact.

The study does show some important dissonance. Although more than 80 percent of the judges claimed to find that allocution was either "extremely," "very" or "somewhat" important, the actual results seem less impressive.

Seventy-eight percent responded that allocution "rarely" results in a lower sentence below the guidelines range; 62 percent said that it "rarely" results in a lower sentence even within the guidelines range. And, in a finding that defendants and their attorneys should ponder, 2.8 percent of the judges stated that allocution "frequently" results in a higher sentence within the guidelines range.

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The nature of the crime appears to have some impact on the effectiveness of allocution. The judges appeared most resistant to lowering the sentences of certain child pornography crimes based on allocution; on the other hand, they appeared more willing to use allocution to lower sentences for marijuana trafficking and white-collar crimes.

The authors had several reactions to the survey's results. First, they were pleased to find that the political party of the president who appointed a judge seemed to have no significant effect on a judge's response to the survey.

Second, they were disappointed that 96.5 percent of the judges never warned defendants that their allocution could result in an increase, and not just a decrease, in the sentence. They saw this as a subject a defense attorney needed to discuss seriously with a client.

Third, they noted what they called the "Goldilocks problem": the difficulty of getting the allocution "just right" for any individual judge. Ideally, a defense attorney should be aware of — and advise his or her client about — the tastes and preferences of the sentencing judge.

A fourth issue deals with the very nature of allocution. The underlying assumption of the process is that a judge should be able to differentiate the sincerely remorseful defendant from the one who is "faking it." But behavioral psychologists uniformly believe that people in general are not as adept at picking out liars as they believe they are. The authors thus encourage judges to seek psychological training to improve their skills in this area.

Finally, the authors found it troubling that although the judges generally agreed that the allocution process required no changes, they also admitted that they relied more on the arguments of the defense attorney rather than the defendant's allocution in arriving at a sentence. The authors believe this indicates that there is substantial room for improvement within the allocution system.

As for future studies, Bennett and Robbins emphasize that this study covers only federal courts. The use of allocutions in state courts is a largely unexplored frontier. Here's hoping researchers will soon turn their attention to this important area.