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OUTSIDE COUNSEL

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# *Acceptance of Responsibility*

Each of the world's great religions demands a sinner's candid repentance and "acceptance of responsibility." He who "hides one thing in his heart, but speaks another,"[1] gets nowhere in his quest for absolution.

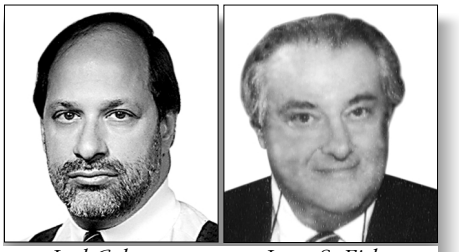
Secular judges typically recognize that, in contrast with the deity, their knowledge is limited. In sentencing those who stand before them and "accept responsibility" for their acts, earthly judges use certain touchstones to gauge sincerity, and whether leniency is merited.[2]

Under the Federal Sentencing Guidelines, as opposed to New York state statutes, those touchstones (designed to promote uniformity in sentencing) restrict how liberal a judge may be with credit for contrition.[3]

Simply put, a defendant can present herself to the court as a hair shirt-wearing Lady Macbeth who wanders the night wracked by guilt but if, like the Lady, she inadequately "accepts responsibility," it won't do. There's stuff she must do, and not do, to justify a prosecutor's agreement and a court's order enabling lower punishment.

In truth, defendants are often unremorseful. But, though it may seem apostasy to say so publicly, a studied "appearance" of regret (even if, perhaps, inwardly disingenuous) when addressing the court, the crime victim and the criminal process is required to avoid words or actions objectively inconsistent with guilt.

Depending on the sentence range, the reduction for responsibility acceptance can be significant — the difference between jail and home confinement or probation, or simply less jail time. Indeed, it's the reason for most guilty pleas. For example, a defendant whose exposure is 46 to 57 months at trial — assuming his testimony won't invite a perjury "bump" — would likely receive 33 to 41 months if, instead, he pleaded guilty (a potential difference of 16 months in jail), with the judge's credit for acceptance of responsibility.



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Still, is pleading guilty (i.e., saying the word "guilty" in a public courtroom and going through the motions of a "factual basis") all it takes to "accept responsibility?"

First, examine the guidelines. Section 3E1.1 allows the two-level downward adjustment if the defendant "clearly demonstrates acceptance of responsibility for his offense." If the initial offense level is higher than "16," meaning a potential sentence of 21 to 27 months or more, the defendant can receive another reduction, or a total of three levels — if, besides demonstrating "acceptance" he assisted the authorities in investigating or prosecuting his own misconduct by (1) "timely providing complete information ... concerning his own involvement in the offense," or (2) timely notifying the authorities of his plan to plead guilty to allow the prosecutor and court more efficient use of their resources. However, this third level reduction is available only on motion by the government, as in the case of a 5K1.1 "substantial assistance" motion.[4]

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The Application Notes to the guideline list characteristics bearing favorably on "acceptance," e.g., (1) voluntary termination or withdrawal from wrongful conduct; (2) voluntary payment of restitution before guilt adjudication; (3) voluntary surrender to the authorities; (4) voluntary assistance to recover fruits and instrumentalities of the crime; (4) voluntary resignation from the office or position held during the conduct; (5) post-offense rehabilitative efforts; and (6) the timeliness of the defendant's conduct in manifesting the timeliness of "acceptance."

## Vocalizing Acceptance

Application Note 1(a) deals with "admitting" conduct. Specifically, courts consider whether the defendant "truthfully" admitted the charged offense(s) and "truthfully or not falsely" denied any additional "relevant conduct" for which he is accountable under the guideline on relevant conduct. And, while a defendant need not volunteer conduct beyond the offense of conviction and may remain silent without affecting his "acceptance," if he "falsely denies, or frivolously contests" conduct that is "relevant," he acts "inconsistent with acceptance of responsibility."[5]

Conduct demonstrating "obstruction" in the post-conspiracy phase of the case, i.e., after the prosecution of substantive obstruction is undertaken, typically demonstrates non-acceptance of responsibility.[6]

Except in extremely rare circumstances, proceeding to trial makes "acceptance" adjustment unobtainable. However, even a timely guilty plea before trial, plus a truthful admission of wrongdoing, may still be outweighed by conduct the court finds inconsistent with acceptance.

To understand how a defendant can lose critical acceptance reductions, the following are probative Second Circuit cases dealing with the "admission" issue, as well as the idiosyncratic practices of some district judges regarding how they might hold a vacillating defendant's feet to

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the fire to establish the bona fides of acceptance, particularly when the prosecutor, judge or probation department is getting mixed signals.

• Breadth of Admission: To gain "acceptance," a defendant must accept responsibility "for his criminal conduct" — but, under a 1992 guidelines amendment and Second Circuit law, he is not required to volunteer or affirmatively admit conduct beyond the offense of conviction.[7]

• Completeness and Denials: Although a defendant need only admit his own conduct,[8] for either the two or three level adjustment (with offense level of 16 or more and timeliness of assistance in investigating himself or notification of intention to plead),[9] he may be denied acceptance if his account isn't the whole truth. So while he needn't volunteer relevant conduct beyond the offense or incriminate others, if he makes false denials or frivolously contests the conduct, he may lose acceptance.

Even with a satisfactory guilty plea, the Second Circuit has denied adjustment where the defendant, post-guilty plea, failed to show remorse and gave evasive and inaccurate information to the probation officer.[10] It is not even required that the non-acceptance conduct occur post-guilty plea. The circuit has denied acceptance both where (1) the defendant attempted to influence witnesses before pleading guilty,[11] and (2) where the defendant perjured himself at an earlier evidentiary hearing.[12] Likewise, it is unsurprising that criminal or quasi-criminal conduct (e.g., bail jumping, attempting to influence a coconspirator's sentence, continued drug use, failure to report to pretrial services, fudging a urine test) might forfeit adjustment.

## Insincerity Demonstrations

There are also cases where acceptance credit is denied for non-criminal conduct that belies contrition. For example, adjustments were denied where (1) a defendant failed to show "remorse" during an impromptu meeting with a victim post-plea;[13] (2) the district court found defendant's guilt acknowledgement insincere;[14] (3) the defendant suggested to a probation officer that he was simply a middleman, and as such, supposed to take the blame because he was paid;[15] (4) the defendant admitted guilt without acknowledging it or demonstrating remorse;[16] (5) the defendant moved to withdraw his guilty plea because the sentencing range was higher than expected;[17] and (6) the defendant unjustifiably failed to pay restitution, as promised.[18]

Particularly in the above situations, the sentencing judge is uniquely positioned to make subjective determinations of "lack of remorse" or "sincerity of contrition." Accordingly, the determinations of district judges are "entitled to great deference" — with a "clearly erroneous" standard of review.[19]

Senior Deputy Chief U.S. Probation Officer Tony Garoppolo in the Eastern District, responsible for the Probation Department's Sentencing Guideline Program, said that it is his office's policy for the Probation Department to recommend acceptance credit based on a guilty plea alone, absent any information that contradicts 'acceptance' — such as committing a new offense while on bail release or obstruction conduct, or if the defendant makes a materially false statement about the offense or denies his criminal intent.

In some federal districts, the probation department requires the defendant's statement of the offense in order to gain their recommendation of acceptance reductions. A number of judges, anecdotally Southern District Judges Jed S. Rakoff and Alvin K. Hellerstein, have particular views on the subject. Judge Rakoff, whose views were solicited for this article said:

> Application Note 3 to section 3E1.1 of the Sentencing Guidelines, dealing with acceptance of responsibility, provides that '[a] defendant who enters a guilty plea is not entitled to [a downward] adjustment under this section as a matter of right,' and Application Note 5 states that '[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility.' Ideally, therefore, I would like to interview each defendant personally to determine acceptance of responsibility; but since this is impractical, in most cases I delegate the task to the probation officer and tell each defendant that, if he wants to be considered for this downward adjustment, he must personally answer (except where he invokes his right to silence) any and all questions put to him by the probation officer regarding the underlying offense and related conduct. I further tell each defendant that he should have his attorney present to consult with (especially in case a Fifth Amendment issue arises) but that what I am looking for is the defendant's own candid responses rather than the attorney's 'spin.' Although it is extremely rare that I deny the downward adjustment for acceptance of responsibility to someone who has pleaded guilty, I find that the defendant's own discussion of his misconduct is invaluable not only in determining for how long he should be sentenced within the applicable range but also in determining whether or not to recommend his participation in special programs and the like.

Judge Hellerstein, for example, occasionally challenges a defendant directly, sometimes in homiletic terms, to encourage "true acceptance." In *United States v. Blackstock*, 02 CR 1428 (AKH), he confronted the defendant as follows:

> What does it mean to accept responsibility? It means you reflect on what you did, come to the realization that what you did was wrong, it was a crime. Then you come to the point where you take stock of yourself. Your family had trouble. You have been clean. You have excelled at school. You have gone on to take college courses. You can lead a clean life.
>
> So you have to take stock of yourself, what is the true Michael Blackstock. ... If you conclude that Michael Blackstock is a person who will lead a proper life or should, then you will have remorse. That's the second step in acceptance of responsibility.
>
> The first is understanding what you did; the second is remorse for what you did. Then the third step ... is righting the wrongs to another, showing to yourself and to others that you understand right from wrong and understand that what you did was wrong and that you are paying back, you are righting the wrong. Those are the three steps that constitute acceptance of responsibility.

## Conclusion

It is imperative that a lawyer know the policies of the probation department and sentencing judge. Beyond that, when the guilty plea decision rests on the defendant's ability to obtain acceptance level reductions, he must be advised of the need to ensure that, when he pleads guilty, he doesn't do anything "inconsistent with acceptance."

(1) "The Illiad," Homer.
(2) See "Federal Criminal Practice: A Second Circuit Handbook" by Mehler, Gleeson, J., and James for an excellent analysis of the subject.) 2002 Edition, Lexis-Nexis, pp. 618-627.
(3) U.S.S.G. §3E1.1, Acceptance of Responsibility.
(4) U.S.S.G. §3E1.1, *U.S. v. Keppler*, 2 F.3d 21, 23 (2d Cir. 1993); *U.S. v. Rood*, 281 F.3d 353, 356 (2d Cir. 2002).
(5) See also *U.S. v. Leonard*, 50 F.3d 1152, 1158-59 (2d Cir. 1995).
(6) But see *U.S. v. Resterpo*, F.2d 661 (2d Cir. 1991).
(7) U.S.S.G. §3E1.1(b); *U.S. v. Oliveras*, 905 F.2d 623, 626-27 (2d Cir. 1990).
(8) *U.S. v. Reyes*, 13 F.3d 638, 640 (2d Cir. 1994).
(9) U.S.S.G. §3E1.1(b); see also *U.S. v. Leonard*; supra, note 5.
(10) See *U.S. v. Zhuang*, 270 F.3d 107, 110 (2d Cir. 2001).
(11) *U.S. v. Harris*, 38 F.3d 95, 99 (2d Cir. 1994).
(12) *U.S. v. Giwah*, 84 F.3d 109, 113 (2d Cir. 1996).
(13) See *Harris*, supra.
(14) *U.S. v. Rivera*, 96 F.3d 41 (2d Cir. 1996).
(15) *U.S. v. Zhuang*, supra.
(16) *U.S. v. Cousineau*, 929 F.2d 64, 69 (2d Cir. 1991).
(17) *U.S. v. Goodman*, 165 F.3d 169, 175 (2d Cir. 1995).
(18) *U.S. v. Zichetello*, 208 F.3d 72, 107 (2d Cir. 2000).
(19) U.S.S.G. §3E1.1, Application n.5; *U.S. v. Remini*, 967 F.2d 754, 761 (2d Cir. 1992).