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ETHICS AND CRIMINAL PRACTICE

Expert Analysis

Judges' Quandary: Truth and Sentencing

By **Joel Cohen**

On Dec. 2, 2008, a Manhattan Family Court juvenile counselor named Tony Simmons was charged with sexually assaulting three girls under his supervision. The case was assigned to a New York Supreme Court justice who offered Mr. Simmons what was viewed as a "sweetheart deal" to plead guilty: no jail and 10 years probation. After an outcry from victims' advocates, an unusually harsh statement from the district attorney and outraged newspaper editorials, the judge had a change of heart, offering Mr. Simmons a 3-year prison sentence or the opportunity to face trial.[1] Whatever the judge's motivation for changing her mind (she indicated that it was his lack of remorse during his interviews with the Probation Department) the plea offer was withdrawn and the defendant went to trial, resulting in a conviction on Jan. 21, 2011.[2] On Feb. 1, 2011, Mr. Simmons was sentenced to the maximum penalty—4 years in prison.[3] This article is not about or motivated by that case, but it is a worthwhile starting point.

So, let's change the facts: Your client faces a stiff jail sentence in state court based on his guilty plea for his date rape of a sympathetic victim. As is her practice, before sentence the judge conferences the case in chambers and tells you and the district attorney that she plans to impose a 4-year jail sentence. In the off-the-record chat, based on your client's difficult past, you try to persuade the judge to grant leniency, pushing for probation. Despite your persuasive efforts, the judge is extremely concerned about a screaming front page headline in the tabloids that would say something like—"Date Rape Judge Disses All Rape Victims!"

She might, however, grant some level of leniency, maybe even probation, if the district attorney were to specifically ask for a low sentence or agree to state on the record that he does not oppose your requested sentence. And so she tells you, slyly looking at the prosecutor, "If the district attorney would go along with your request, I'd be inclined to approve it." The district attorney, however, responds, "No, that's not our office's protocol. Our office describes the facts for the court on the record, but makes no recommendations or agreements to accept defense sentencing requests. As your Honor knows, that's our firm policy."

Now, of course, there would be nothing wrong, no ethical impropriety, with the judge saying what she said. The judge has been clear that the district attorney's position, fully stated on the record, carries a lot of weight with the judge, as is probably the norm in courts around the country—and in most cases is likely in keeping with best practices. Still, what if, instead, she is less circumspect? She tells the defense attorney the following in her off-the-record chambers chat with the lawyers: "Are you kidding? You know the lay of the land. The tabloids, not to mention the blogs, will kill me if I do what you ask. They're all over this case. Still, if the D.A. is willing to agree to it on the record and thereby 'have my back,' I'm willing to risk taking my lumps."

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Has she done something wrong as a matter of judicial ethics? Has she effectively acknowledged—indeed, downright admitted to the parties behind closed doors—that, in some (at least) theoretically impermissible way, in making her sentencing decision she is being influenced by public opinion and personal notoriety? Succinctly, has she violated the Rules of Conduct for judges in this state by being "swayed by partisan interests, public clamor or fear of criticism"?[4]

There is an argument, of course, that she did. Clearly, she has demonstrated an uncommonly bold transparency that, as an intelligent person, she would never disclose on the record by explaining to the parties what was truly on her mind. Truth be told, it would likely be at least in the back of the mind of almost any judge who was about to impose a sentence being covered on the front pages of the tabloids. This, not to mention that the story would appear in blogs such as therobingroom.com,[5] which rate judges based on the anecdotal musings of both pleased or, more likely, disgruntled litigators or even litigants.

Truth is, many state judges let their hair down, particularly to litigators they know and with whom they feel comfortable—as part of the courthouse fraternity ("the rotunda bar association," as it is sometimes called)—as did the judge in the above hypothetical. (Federal judges, parenthetically, are strictly forbidden to engage in off-the-record pre-pleading or pre-sentencing discussions).[6]

Private Conversations

Let's assume a different set of facts. Instead of the hypothetical judge who foolishly "talked too much," let's examine the hypothetical judge who admits her private thinking to her spouse or her trusty law secretary with whom she "goes back a long way." In that private, confidential conversation she would have admitted that bad press and a potential reelection loss against a "hang 'em high" candidate was the incentive for the proposed 4-year sentence, in the absence of "cover" from the district attorney.

Looking at these two hypotheticals side by side—the second being where the judge's innermost thoughts will never see the light of day—it appears that the judge's only "shortcoming," if you can call it that, was in telling the lawyers exactly what was on her mind ("I need cover, and [sub silentio] maybe I don't have the backbone to do 'the right thing' on my own.")

In a phrase, though, the judge was probably "truthful and transparent"—presumably something we want from judges! Further, if transparency is an important goal in the meting out of balanced justice, as realistically it should be, what exactly did the judge do wrong, if anything, in the scenario where she boldly disclosed in chambers exactly what was on her mind—rather than camouflage the weakness that propelled her sentence decision-making?

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Televangelist Bakker's Case

Of course, we don't want judges to make decisions based on impermissible considerations—for example, race, ethnicity, gender or national origin. Famously, in 1989, federal District Judge Robert ("Maximum Bob")[7] Potter in Charlotte, N.C., sentenced televangelist Jim Bakker to 45 years in jail for fraud. He did so, though, after making scathing remarks on the record to Mr. Bakker as having given "no thought…[to] those of us who do have a religion [being] ridiculed as being saps from money grubbing preachers or priests."[8]

The U.S. Court of Appeals for the Fourth Circuit reversed the sentence, holding that courts cannot sanction sentencing procedures "that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it."[9] This resulted, finally, on remand, in a significant sentencing reduction—an 18-year sentence for Mr. Bakker imposed by a different district judge (and later, actually a further reduction to 8 years).[10]

In imposing the initial sentence and highlighting his personal (clearly biased) feelings about Mr. Bakker and other similar preachers, Judge Potter betrayed the inner workings of his mind. Notably, the Fourth Circuit said, "as the community's spokesman, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others."[11] Meaning, had Judge Potter stopped there, the court probably would not have reversed the same 45-year sentence—which presumably would have been based on the same improper considerations that Judge Potter articulated, i.e., his perception about the "money grubbing preachers" that, at least to Judge Potter, Mr. Bakker personified.

Surely, no judge should make sentencing decisions based on personal biases, but yet it happens undoubtedly around the country every day. Indeed, Justice Benjamin Cardozo famously taught us that: "All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions…We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[12]

Still, in some way, isn't it preferable that Judge Potter (honestly) articulated his thought process at sentencing, even as questionable as it was? For when anyone, especially a judge, tells you what (s)he is truly thinking, isn't there a greater chance that the able lawyer is better equipped to respond to the judge's concerns head on to try to make persuasive arguments which the litigator hopes would provide an antidote to the judge's thinking? Had Judge Potter kept his innermost (indeed, biased) beliefs to himself and nonetheless imposed the same sentence that was a legal (pre-Guidelines) sentence, Jim Bakker (rightly or wrongly) would still be sitting in prison—no reversal, no reassignment, no new sentence ab initio.

Other Examples

There are, of course, other examples where a judge's transparent thinking has been the cause of appellate reversals, but are not viewed as ethical violations. For example, one district judge in the U.S. Court of Appeals for the Second Circuit has had a number of circuit reversals that stemmed from his idiosyncratic view that, when the defense seeks a downward departure from sentencing guidelines (a Rule 5K1.1 motion),[13] the failure by the prosecutor to provide a specific sentencing recommendation should result in the court granting no departure whatsoever.

Since no law or case requires the prosecutor to make a specific recommendation for a sentence reduction, several of this judge's sentencing decisions have been reversed.[14] On occasion, in fact, the circuit court remanded the district judge's case to a different judge after the court vacated lengthy sentences that gave the defendants no sentencing benefits for their significant cooperation. Obviously, this judge, unlike the judge in the hypothetical that began this article, has been willing to go on the record and "truthfully" state the "bias" that has guided him—albeit, according to the Second Circuit, erroneously.

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The advantage of the judge's candor? The defendants' lawyers were able to gain reversals. Had he, instead, simply rejected the cooperation in these cases as being insufficient to warrant significant departures or, perhaps, even departed downward minimally as a token compliance with law, the defendants would likely have been largely out of luck. They would continue to serve lengthy sentences that probably would have been unwarranted given their admittedly "substantial assistance"[15] to the government.

Interestingly, on Jan. 28, the Second Circuit reversed a sentence imposed on a defendant who had pled guilty to a child pornography offense.[16] There, the district judge had extensively discussed at sentence the defendant's "predisposition" to reoffend, saying that the defendant had a "gene that you were born with, and it's not a gene that you can get rid of." For the circuit, the judge's stated views required remand to a different judge, given that "the judge's fairness or the appearance of the judge's fairness is seriously in doubt."[17] Indeed, the judge was candid about his views on the record, even though his view was probably unsound as a matter of genetics—but, as pertinent here, the judge's "truthful" statement of his views undoubtedly helped gain the sentence reversal and remand to a more "objective" judge.

This is not intended to suggest that a judge's practice, which may be legally wrong, is acceptable merely because he makes a record of his view of what should be proper practice, even if he knows the law or facts to be to the contrary. Rather, it is far better for the record to reflect the judge's true motivations and thinking, better enabling the lawyer to address it either before that judge himself or on appeal.

Jim Bakker's result is a classic. Had Judge Potter or the district judge mentioned above kept their motivating views to themselves, all of those defendants would have been far the worse for it. It seems that particularly in a new age of transparency, we should want our judges to tell us exactly what is on their minds, rightly or wrongly, when they have our clients' fates in their hands. Indeed, if they introspectively recognize that they are indeed being "swayed by partisan interests, public clamor or fear of public criticism,"[18] as verboten by the Rules of Conduct, perhaps we put them in the untenable position of engaging in opaque silence when they articulate on the record their reasons for their sentencing decisions.

Stated more forcefully, perhaps we need to rethink the judicial ethic that basically insists that judges sometimes engage in a certain amount of deceptiveness on the record, lest they appear to communicate that they are influenced by ostensibly impermissible considerations. It might actually do Justice Cardozo proud!

1. See Tim Stelloh, "Judge Withdraws Plea Deal for Probation in a Rape Case," N.Y. Times, Nov. 15, 2010, at A26.
2. See John Eligon, "No-Prison Deal Revoked, Trial Starts for Ex-City Worker Accused in Sexual Assault of Girls," N.Y. Times, Jan. 13, 2011, at A20; John Eligon, "Juvenile Justice Counselor Is Guilty of Sexual Assault," N.Y. Times, Jan. 22, 2011, at A16.
3. See John Eligon, "Court Counselor Sentenced to Four Years for Sex Assaults," CITY ROOM, N.Y. TIMES, Feb. 1, 2011, http://cityroom.blogs.nytimes.com/2011/02/01/family-court-counselor-sentenced-to-four-years-for-sex-assaults/?ref=nyregion.
4 . See 22 NYCRR §100.3(B)(1) ("A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.")
5. The Robing Room, http://www.therobingroom.com (last visited Jan. 19, 2011).
6. Fed. R. Crim Pro. 11(c) ("An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions….")
7. See Alain L. Sanders et al., Law: "The Wrath of Maximum Bob," Time Magazine, Nov. 06, 1989, http://www.time.com/time/magazine/article/0,9171,958966,00.html.
8. *U.S. v. Bakker,* 925 F.2d 728, 740 (4th Cir. 1991).
9. Id.
10. See "Bakker's Sentence Cut to 8 years; Parole Possible in 1 Year," Orlando Sentinel, Dec. 23, 1992, at A6. The article notes that Bakker parole date was ultimately reduced even further—to 8 years—in 1992.
11. *Bakker* at 740.
12. "Benjamin N. Cardozo, The Nature Of The Judicial Process 3" (Andrew L. Kaufman ed., Quid Pro Law Books 2010) (1921).
13. U.S. Sentencing Guidelines, Manual §5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.").
14. See e.g., *U.S. v. Campo*, 140 F.3d 415 (2d Cir. 1998) (reversing district court's refusal to consider government's 5K1.1 motion because of the prosecutors' refusal to recommend a specific sentence and remanding for resentencing by different district judge); *U.S. v. Doe*, 348 F.3d 64 (2d Cir. 2003) (reversing district court's sentencing decision because of concerns that the record "suggests that the sentence, specifically the extent of the departure, was affected improperly by [District Judge's] annoyance with the United States Attorney for failing to provide a specific recommendation that he would have then readily followed."; case remanded for resentencing by different district judge).
15. See U.S. Sentencing Guidelines, Manual §5K1.1.
16. *United States v. Cossey*, No. 09-5170-CR, 2011 WL 257441 (2d Cir., Jan. 28, 2011).
17. Id. at 5.
18. See 22 NYCRR §100.3(B)(1) ("A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.").