

What To Do At Federal Sentencing: 4 Lessons From McDonnell

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On Jan. 6, 2015, former Virginia Gov. Bob McDonnell was sentenced to two years in prison following his public corruption conviction for using the governor's office to help a dietary supplement executive in exchange for loans and gifts, including a Rolex and a joy ride in a Ferrari. The sentence was significant because it marked a large reduction from the 10- to 12-year sentence recommended by the U.S. Probation Office and the six- to eight-year sentence that the court calculated using the sentencing guidelines. While this high-profile public corruption case garnered a great deal of publicity, the sentence handed down by U.S. District Judge James R. Spencer warrants particular attention given the lessons that can be drawn from how Judge Spencer got to that result.



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1. Character Letters Count

In conjunction with their sentencing memorandum, the defense submitted more than 440 character letters on McDonnell's behalf. But it wasn't the quantity of the support — which was clearly overwhelming — that was important; rather, it was the content of most of the letters that had an effect on Judge Spencer.

Character letters are critically important to show the human side of a defendant, to convince the court that the criminal conduct was an aberration, and to establish that the likelihood of recidivism is low. Here, the submitted letters presented the former governor as a decent, faithful, and charitable man, who has shown great remorse for his conduct and is unlikely to reoffend. Character letters can also be instrumental in demonstrating the collateral consequences of the conviction. Here, McDonnell's supporters informed Judge Spencer of the numerous ways in which McDonnell has already suffered significantly for his crimes. For instance, several letters noted that had McDonnell not engaged in this misconduct, he would have been a contender for president of the United States.

However, it's important to make sure character letters don't negate one of the key factors at sentencing: acceptance of responsibility. Casting blame elsewhere or denying culpability is a sure-fire way to irritate the court. According to reports, Judge Spencer specifically noted that, although many of the letters were moving, some "continued to cast blame on others or to see conspirators behind every tree." Although they didn't backfire for McDonnell, they can certainly draw a judge's ire and detract

from the other strong and poignant letters within a defendant's sentencing submission. Thus, counsel should be sure to review and make sure that the sentencing submission to the court does not include letters that reflect denial or failure to accept responsibility.

2. Character Witnesses May Help, Too

The answer to the question of whether to call a character witness to testify on a defendant's behalf is often: "It depends." Character witnesses may prove unhelpful or even harmful at sentencing if they are not properly prepared, and particularly if they don't know the full extent of the underlying criminal conduct or the harm that the defendant may have caused. But McDonnell's defense team called 11 witnesses to the stand to help further paint the picture of McDonnell as a good human being.

It appears, at least in the eyes of defense counsel, that the character testimony mattered, particularly that of former Democratic Gov. Doug Wilder. Defense counsel described Wilder as "one of the best defense witnesses I have ever seen." While we can't all have former governors testify as character witnesses (not to mention a prominent former governor who was the first African-American governor of any state since Reconstruction), the stature of the witness is far less important than the content of the testimony. Thus, counsel should be sure to meet and properly prepare character witnesses before they are called at sentencing.

3. Remorse, Remorse, Remorse

Although the prosecutor concluded his sentencing argument by stating that the former governor had "shown no true remorse in this case for these crimes," the former governor convinced the court otherwise. McDonnell stood up and asked for mercy for his wife (who is facing sentencing on Feb. 20), and then accepted responsibility for his actions and said he would dedicate the rest of his life to help others. This colloquy from the defendant, in conjunction with the submitted character letters, powerfully portrayed McDonnell's regret and hope to atone.

This point is, of course, critically important. The sentencing factors set forth in 18 U.S.C. § 3553(a), require the court to consider fashioning a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. The sentencing judge is to take into account, among other things, the "history and characteristics of the defendant" and the need to "protect the public from further crimes of the defendant." By showing true remorse (with both words and deeds), a defendant may turn these factors in his favor.

4. The Sentencing Guidelines Are Sometimes Out of Whack, Particularly in White Collar Cases

Judge Spencer noted that the guidelines range of seven or eight years, "would be unfair, it would be ridiculous, under these facts." The sentencing guidelines, which calculate sentencing ranges based upon various factors, including the severity of the crime (which takes into account the financial loss to victims), the defendant's role in the offense, and the defendant's criminal history, are now only advisory, but they provide the initial framework for the court's sentencing determinations.

Yet the guidelines have steadily (and not necessarily slowly) increased over the years for white collar criminal offenses, resulting in lengthy sentences for first-time criminal defendants convicted of economic crimes. When the Sentencing Commission adopted the original guidelines in 1987, it sought to ensure that white collar offenders faced "short but definite period[s] of confinement." U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice*

System is Achieving the Goals of Sentencing Reform, at 56 (Nov. 2004). The Commission, however, has abandoned its original goal of ensuring definite (if short) sentences and has, instead, steadily ratcheted up the prison sentences for certain white collar offenses. See Alan Ellis, John R. Steer, and Mark H. Allenbaugh, At a “Loss” for Justice: Federal Sentencing for Economic Offenses, American Bar Association Criminal Justice, Vol. 25, No. 4 (Winter 2011).

Judge Spencer is not alone in criticizing the sentencing guidelines calculations in certain white collar cases. Southern District of New York Judge Jed Rakoff has declared that “the arithmetic behind the sentencing calculations is all hocus-pocus — it’s nonsensical, and I mean that sincerely.” See Leah McGrath Goodman, Nonsensical Sentences for White Collar Criminals, Newsweek (June 26, 2014). Eastern District of New York Judge John Gleeson has remarked that “over the past 25 years, the way the political winds were blowing, whenever there was a change, it was a change to add severity.” *Id.* Moreover, in November 2014, the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes — a group composed of judges, practitioners, professors, and observers from the U.S. Department of Justice and federal defenders — issued a report recommending an overhaul of the fraud guidelines, including a cap on sentences for “non-serious offenses by first-time offenders.”

Judge Spencer recognized that “a price must be paid” and that “unlike Pontius Pilate, I can’t wash my hands of it all. A meaningful sentence must be imposed.” But looking at the totality of the circumstances — and thanks to the defense’s skillful use of sentencing letters and witnesses, as well as the governor’s clear articulation of remorse — the court refused to impose the lengthy sentence that the guidelines suggested. Good sentencing advocacy that incorporates and expands upon the lessons from the McDonnell case may go a long way toward helping your clients achieve a similar result.

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