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Getting the Last Word In: Risks and Rewards of Allocution

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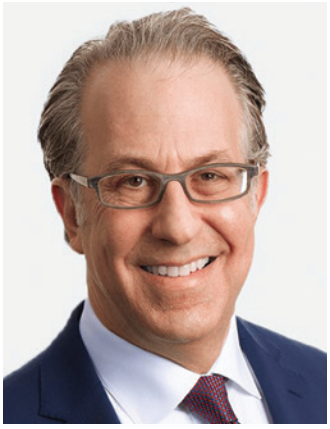
More than 90 percent of federal criminal convictions arise from a plea deal. Consequently, for almost every convicted defendant, the sole opportunity to address the court and share his or her story comes during the allocution phase at sentencing. Allocution (unlike the guilty plea colloquy) offers a chance to humanize the defendant, yet many defense lawyers may not adequately prepare their clients for this potentially important moment. This article will explore the legal framework relating to allocution as well as some strategies defense counsel should consider at sentencing in white collar cases.



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Federal Rule of Criminal Procedure 32

Allocution dates back at least to 1689, when English courts first held that a defendant in a capital case had a right to be heard before punishment was imposed. In the United States, although allocution was not guaranteed in the Constitution, the practice historically found widespread acceptance in state and federal courts and was formally codified by Congress in 1944 in the Federal Rules of Criminal Procedure.

Specifically, the current version of Rule 32(i)(4)(ii) provides that the court, before imposing sentence, must "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence." As the Supreme Court, in *Green v. United States*, 365 U.S. 301 (1961), noted regarding the process, it is not enough for courts to afford counsel an opportunity to advocate at sentencing, because even "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."

Allocution is designed to temper punishment with mercy in appropriate cases and to ensure that sentencing reflects individualized circumstances. The rule also serves an important public policy purpose in preserving the appearance of fairness in the criminal justice system by maximizing the perceived equity of the process, because the defendant is given the right to speak on any subject of his choosing prior to the imposition of sentence.

Limitations and Violations

Like so many other procedural protections, the right of allocution has significant limitations. Judges, for example, retain wide discretion in terms of controlling the length and content of an allocution,

including refusing to allow defendants to contest matters previously raised and decided, declining to hear statements *in camera,* requiring a defendant to be sworn before speaking, and prohibiting him from veering away from the subject of mitigation to explore irrelevant topics.

In *United States v. Kellogg*, 955 F.2d 1244 (9th Cir. 1992), for example, the court upheld a sentencing judge who cut short a long-winded allocution by a defendant speaking about "giant loopholes" in the tax laws, the incompetence of the IRS, his work experience with Standard Oil, the problem of the national debt, and the fall of Eastern Europe. *See also United States v. Covington*, 681 F.3d 908 (7th Cir. 2012) (interruption does not in itself amount to denial of defendant's right of allocution where court was attempting to refocus statement on mitigation rather than terminate the allocution completely).

But judges must not interrupt without justification. In *United States v. Feng Li*, 115 F.3d 125 (2d Cir. 1997), the district court terminated a Chinese immigrant's emotional allocution in which the defendant insisted she had not known her conduct (food stamp trafficking) was unlawful. After noting "I don't think I have time to listen to the entire trial again," the judge initially allotted her fifteen minutes, but eventually gave her "three minutes to finish up, otherwise I am going to terminate it," adding, "you have a right to an allocution but not to talk all day."

On appeal, the Second Circuit found that the defendant's right to allocution had been impermissibly limited as to require resentencing. The court noted that "the sentencing judge's repeated interruptions – the first after only nine lines of allocution – and what seems to be a repeatedly shrinking time allotment given to [the defendant] created an atmosphere that obviously rendered it difficult for her to present an effective and potentially persuasive allocution."

Similarly, most appellate courts hold that when a judge announces or reveals the defendant's sentence conclusively prior to allocution, it impermissibly sends a message that the allocution was essentially an empty gesture, in violation of Rule 32. *See, e.g., United States v. Slinkard*, 61 F.4th 1290 (10th Cir. 2023) (ordering resentencing where district court, in child pornography and sex abuse case, stated "there is no way in good conscience that I could ever allow this defendant to be among the public or near any child" prior to inviting defendant to make a statement).

But the law also does not require the sentencing judge to have a totally open mind until the defendant has spoken. It is generally not improper in most Circuits, for example, for the district court to offer its *tentative* non-binding views on the applicable Sentencing Guidelines, section 3553 factors, or objections to the Presentence Report, as such disclosures may help a defendant in framing his allocution statement. *But see United States v. Walker*, 74 F.4th 1163 (10th Cir. 2023) (although district court stopped short of conclusively announcing sentence, it erred in stating it would grant government's motion for an upward variance which implicitly denied defendant the opportunity to argue for a sentence within the Guidelines).

Potential Pitfalls for Defendants

While allocution is designed to help a defendant, at times a statement may have exactly the opposite effect on the ultimate outcome. For the most part, appellate courts are unwilling to intervene on defendants' behalf when things go sideways.

In *United States v. Clemmons*, 48 F.3d 1020 (7th Cir. 1995), for example, the defendant Clemmons maintained his innocence and lack of criminal intent throughout the trial and at sentencing. In response to Clemmons reiterating his lack of intent during allocution, the judge remarked that "I was set to be sympathetic for a plea to the low end of the Guidelines but I don't think you deserve that now. And I intend to sentence you to the maximum because I

don't think you learned a thing…I would feel differently if you had appeared before me and you admitted up to what you had done, but you haven't done that."

On appeal, Clemmons argued his right to allocution had been infringed because he had been penalized based on the content of his statement. The Seventh Circuit disagreed. On the one hand, "the right to allocution and to present any information in mitigation of punishment is undermined if a convicted defendant risks an increased sentence by maintaining his innocence in an honest effort to mitigate his sentence." But, the court found, "[b]alanced against this chilling effect on the right to allocution is the broad latitude afforded judges to impose a sentence within a guideline range." The court held that the district judge therefore could properly consider "the attitude and demeanor of the defendant during allocution" when considering an appropriate sentence.

A defendant also must deal with potential questions from the court after the allocution is complete. Once the door to a topic is opened, courts are loath to insulate the defendant from reasonable follow up from the bench. *See e.g. United States v. Carter*, 87 F.4th 217 (4th Cir. 2023) (court did not violate defendant's Fifth Amendment rights when it asked him during the allocution to name his accomplice and he refused, leading judge to impose harsher sentence); *United States v. Ricardo Mathews*, No. 11-2392, slip op. at 4 (6th Cir. 2013) (court did not violate defendant's Fifth Amendment rights when it elicited additional information about drug trafficking during his allocution). But generally, a district court will not permit the prosecutor to question the defendant about his allocution *See, e.g., United States v. Moreno,* 809 F.3d 766 (3d Cir. 2016) (Rule 32 violated when prosecutor engaged in a vigorous and lengthy cross-examination of the defendant immediately following his allocution).

Practice Pointers

Defense lawyers often treat the allocution as a mere formality, if not a total waste of breath. While it is certainly true that most judges come into the courtroom at sentencing with their minds made up, a compelling allocution could make the difference, for instance, in getting the bottom (instead of the top) of the Guidelines range, potentially sparing the client months or years of punishment. Of course, as noted above, in some situations a defendant inadvertently may talk himself into additional jail time.

According to a survey of more than five hundred federal district court judges,[1] the most effective allocutions convey genuine and credible remorse, realistic and concrete plans, an understanding of the seriousness of the offense, and a sincere apology to the victims. Conversely, judges were most turned off by defendants asserting they were victims of circumstance, claiming to have found religion, blaming others, promising never to commit another crime, and thanking the prosecutor and agent. In cases where defendants continue to maintain their innocence or hope to appeal a conviction, or where the defendant is facing a mandatory minimum, clients and counsel may want to consider waiving allocution altogether.

Judges surveyed also stressed the need for defendants to speak in their own words, maintain eye contact, ask for leniency as opposed to forgiveness, and (perhaps most importantly), keep it brief and to the point. Never forget that when all is said and done it is the judge who always gets the last word.

1 *See* M. Bennett and I. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala. L. Rev. 735 (2014).