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[Home](#) > How One Lawyer Learned to Make Money Gaming the Prison System in His Clients' Favor

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How One Lawyer Learned to Make Money Gaming the Prison System in His Clients' Favor

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The *Federal Prison Guidebook* ^[4] provides a series of listings for each of the 178 U.S. federal detention centers, organized much like the college guidebooks littering the cluttered desks and bedroom floors of America's high school seniors. Highlights include the United States Penitentiary in Terre Haute, Indiana. The first American penitentiary built without a wall, Terre Haute comes complete with a miniature golf course, vocational training in both electronics and barbering, and a sweat lodge for Native American religious purposes. For felonious anglers, the Camp at Federal Correction Institution-Texarkana would seem the ideal place. It boasts a well-stocked pond on whose banks the inmates might while away an afternoon pleasantly casting and reeling. Apropos of very little, given the Texas locale, there is also a bocce court.

The Guidebook is the work of an attorney named Alan Ellis, and its 576 pages offer more than a simple facilities checklist. Take for example Ellis's scholarly examination of Congress's 1995 Zimmer Amendment (later passed as part of the 1997 Federal No Frills Prisons Act). The Amendment effectively bars inmates in new prisons from activities deemed unrelated to their penance, like watching NC-17 movies or playing the electric guitar. Ellis also explains the 108 mitigating factors impacting "downward departure," a colorful term that, sadly, only means a reduced sentence. Notions open to judicial consideration include whether the convict sold narcotics of "low purity" or attempted to cooperate with the IRS; or manifested "super" acceptance of responsibility; or had been shot at the time of arrest; or survived the Holocaust. Ellis reviews the 2005 Supreme Court decision in *United States v. Booker*, which made judicial sentence guidelines advisory. This case involved one Freddie J. Booker, a drug dealer found in possession of 566 grams of crack cocaine. Booker received a thirty-year sentence for his crime, rather than the twenty-two years called for by the prevailing guidelines. The Court set new precedent when it upheld the ruling. Booker has proved a great boon to defense attorneys who, with the strict guidelines weakened, may now seek shorter sentences for their clients.

Lengthy sections are devoted to the intricacies of the Pre-Sentence Investigation Report, a document Ellis respectfully refers to as the "Bible." The glossary of prison terms contains words prospective jailbirds will need to know, like "gig," meaning any "deviation from acceptable standards of sanitation or housekeeping." (As in: my homicidal cellmate has "gigged" the toilet by converting it into an ersatz whiskey still.) Included, too, are features catering to the spouses, partners, family members, and criminal associates of the incarcerated: prison phone numbers, addresses of nearby lodgings, and

clearly printed contact information for Ellis's bicoastal practice.

Ellis first published the Guidebook in 1998, six years after the demise of Facilities, a rudimentary predecessor published by the Bureau of Prisons, which fell victim to budget cuts in 1992. But its genesis actually dates to some twenty years earlier, when Ellis began to learn the bleak outcomes faced by federal indictees. To wit: 94 percent of federal criminal prosecutions result in a guilty plea; defendants who opt for trial lose more than 75 percent of the time; of those convicted, 83 percent go to prison. Ellis, then a young attorney fresh from the rigors of law school and what he describes as a wildly unsuccessful stint as a professor in California, closed his criminal defense practice in State College, Pennsylvania, and set out to transform himself into an expert in a new legal sub-specialty he dubbed "post-sentence negotiation." He abandoned the losing arithmetic of the adversarial judicial formula, and eventually established a successful practice representing white-collar corporate convicts for whom choosing an institution in which to pay their societal debts in style and ease was important. Ellis, as noted on his website, provides his "full-service" ability to "develop strategies that obtain the lowest possible sentence for clients, and if it's one of incarceration, to be served at the best facility possible, with the greatest opportunity for early release." Please do not confuse this legal specialty with plea-bargaining; it has little if anything to do with the horse-trading so beloved by our judicial system and the scribes of Law & Order. All attorneys cut deals for their clients in exchange for shorter sentences--few attorneys only cut deals for them. In fact, almost none do; Ellis pioneered a rare legal niche, one in which, even today, he has few peers.

Which makes the fact that the Guidebook dispenses little service value highly interesting. Ellis's book provides reams of information but none of the skill necessary to exploit it. This falls to Ellis alone. A convict (or his hapless attorney) who opts to use the Guidebook rather than hiring Ellis stands little chance of securing placement in, say, U.S.P.-Florence, Colorado, home to a fine "industrial housekeeper, institutional cook, baker, and cook service manager" apprenticeship program. The convict unimpressed by such matters might do well to remember the Federal Detention Center-Sea Tac in Seattle, Washington, which, according to Ellis, offers no vocational or apprenticeship programs. Time passes slowly in places such as these.

The Guidebook, then, must be viewed as something other than a book: it is, in fact, an advertisement, marketing the splendors of Ellis's particular legal expertise. Which is fine -- Ellis is free to tout his wares in whatever forum he sees fit. But why do it? The legal profession, as discussed later, frowns on the advertisement as a means toward what Ellis calls "client development." Putting the book together also seems a great deal of effort to sell just three thousand copies per year -- Ellis gives at least that many away, at conferences and lectures, or to prisons, where jailhouse attorneys put them to what good use they can find (it's also a favorite among transferring corrections officers) -- particularly when Ellis acquires most clients via attorney referrals. Much more effective to practice well and wait for word of mouth to do the trick. Locating a single rationale that would explain Ellis's willingness to self-promote despite the labor and the disapprobation of his peers requires movement beyond a strict cost-benefit analysis. To understand Ellis and his book, one must first accept his membership among a longstanding cadre of traditional Americans: that of the huckster.

A clear understanding of what is meant by the word huckster is crucial. Traced to the Medieval German *höker*, it translates as a "stooper" or "one stooping under a pack." Dictionaries define the huckster as a "mercenary" (Oxford New English), comparable to both to an "Arab" and a "cheap-jack" (Merriam-Webster). In the American national imagination, however, the word takes on a more humorous and less nasty connotation, conjuring up an image of the much-revered, never-trusted, fast-talking, go-go, salesman-type; the dubious motivational speaker; the snake-oil purveyor; and yes, the bullshit artist; Ellis, then, is something like the Tom Sawyer of legal negotiation, with a dash of P.T. Barnum added, plus a light dusting of Edward Bernays, the self-styled "Father of Public Relations."

Huckster though Ellis may be, I should add one major caveat: he actually can do the work. Ellis served a term as president of the National Association of Criminal Defense Lawyers, earned the highest peer rating available from Martindale-Hubbell, a national legal database, and has been quoted or profiled as

an expert by the New York Times, the Washington Post, CNN, NPR, the Journal of the American Bar Association, and the Corporate Crime Reporter. If Ellis's qualifications had been lacking, he wouldn't actually be a huckster in the way the word will be used here. He would be a shyster, or that individual professionally unscrupulous in the practice of law, a term whose derivation comes, again, from the German, and the word Scheisser (literal translation: defecator). Ellis is no shyster. He provides a legal, if borderline-ethical, service to clients willing and able to pay for it. It's simply that he cannot help himself; like many of his fellow Americans, he must always be closing.

The road Ellis traveled from a fledgling attorney hoping to earn his living in Constitutional law to one who boasts of his offices in "the hot tub capital of the world" (Marin County, California) begins, as mentioned earlier, in State College in 1977. Ellis had only recently hung his shingle from a storefront office on College Avenue, squeezed in among the co-ed bars and the gift shops hawking oversized We Are Number One! Styrofoam fingers and framed glamour photos of Joe Paterno. One evening, into this tranquil oasis of collegiate cheer, sprinted a man who was to become one of Ellis's clients, in a state of such hallucinogenic enthusiasm that he was actually chasing an undercover police officer down the town's main thoroughfare, trying to sell him LSD as the cop fled.

Most of Ellis's charges were of this stripe, undergraduate drug dealers arrested in possession of items both felonious and recreational. Ellis could usually secure the release of the now-contrite youths (good kids all, high morals, excellent grooming, fortunate enough to have their legal expenses covered by middle-class parents residing in the dying steel towns of Altoona and Lewisburg and Wilkes-Barre) by acting upon the errors of local enforcement officials who neglected to follow basic legal guidelines for search and seizure, or who chanced to leave an uncrossed T on the pages of an arrest warrant.

Defending this young man was more difficult, however, because "the guy was nuts," as Ellis put it. "I couldn't communicate with him." It was Ellis's wife, a psychiatric social worker, who suggested he preemptively offer to plead the boy guilty, and then try to have him serve his sentence in a rehab center instead of prison. Ellis was dubious at first. "I didn't even know what a drug treatment program was," he said, let alone how to get someone sentenced to it. But Ellis, who says he really never enjoyed going to trial, did like to talk. He arranged a meeting with the judge and the prosecutor and talked up his compromise for as long as he could. When he was finished, to his surprise, they bought it.

Ellis claims that this single incident opened his eyes to a key flexibility within the system. He began pleading out more and more clients in exchange for shortened sentences and cushy prison assignments. He discovered a latent talent for negotiation, and soon enough, other lawyers began contacting him with white-collar federal clients they didn't know how to help, ones with deep pockets who wanted no stone left unturned ("the lawyer's magic words," Ellis said). At some point -- he doesn't quite remember when -- Ellis realized he had slipped the bounds of conventional legal work and begun doing something wholly different; that is, understanding his finely honed skills as a distinct brand that could be conveyed from market to market like soda pop, sporting shoes, and personal computers. He expanded his practice nationally, began writing articles, and published his book; riches, admiration, and television interviews followed, as was his due.

Ellis's actions mesh well with the American admiration of self-aggrandizement, salesmanship, and service-provision (Steve Jobs, anyone?). Fitting him into the traditions and norms of his profession remains more difficult. The American Bar Association (ABA) banned legal advertising in 1908. The public rationale for the prohibition was rooted in the belief -- prevalent at the time -- that advertising was somehow linked to an increase in the divorce rate. Another, more likely justification has less to do with marriage than immigration, as the predominantly WASP lawyers of the late-nineteenth century were reluctant to compete with the hordes of new counselors brought to these shores by war, famine, and the Industrial Revolution. The ad proscription made for a handy exclusionary tool, as these outsiders had no other way to build their practices. American legal advertising actually dates to before the Civil War, when even the most prominent attorneys utilized it. Consider the August 10, 1839 edition of the Sangamo, Illinois Journal, which contained the following ad:

Stuart & Lincoln

Attorneys and Counsellors at Law, will practice jointly, in the courts of this Judicial Circuit Office No. 4e Hoffman Row, upstairs.

The Lincoln of this partnership was, in fact, the future two-term President of the United States, freer of slaves and wearer of tall hats, Abraham Lincoln.

The ad ban lasted sixty-nine years, until the so-called Bates Decision of 1977, in which the Supreme Court found that lawyers had a First Amendment right to advertise. Despite the ruling, the Court remained lukewarm to the prospect of its colleagues hawking their services on the open market. Supreme Court Chief Justice Warren Burger, in his 1993 essay, "The Decline of Professionalism," said legal ads were "sickening" and called any lawyer who placed one a "huckster-shyster" of "low standing." Harsh as this judgment might appear, it is in tune with the prevailing views of the profession. Before Bates, for example, the Bar defined legal advertising in the broadest terms. A lawyer wearing jewelry embossed with the word "lawyer," or the use of a postage meter to stamp "Ask A Lawyer" on outgoing mail could be considered advertising, and thus forbidden. By today's standards, these oblique promotional attempts seem quaint. Take the New York firm Fitzgerald & Fitzgerald, whose subway ads feature a fighting Irish leprechaun sporting red boxing gloves, posed next to the slogan, "We Fight For Kids With Brain Injuries!" Or the two personal injury attorneys in Fort Lauderdale who secured the telephone number 1-800-PIT-BULL for their offices. Or lawyer Frank Tedesso of Chicago, whose Yellow Pages listing urged an armed criminal wearing a balaclava to "Call 24 Hours." Or Mark E. Seitelman's ad for his Accident Victims specialty, which depicted a \$750,000 check from the "ABC Insurance Co." made out to "Your Name Here."

These displays bear little resemblance to Ellis's understated publicity efforts, which project a more staid brand of slickness. His website, for example, has but one glint of huckster-flash -- the photo of Ellis displayed on the home page. It shows Ellis in half-profile, displaying his stern, tight-lipped mouth and suitably serious beard. He radiates assurance as he stares into the Internet ether, his arms tightly folded in front of his lawyerly blue suit, half-strangling the edges of his gray pocket square. To dispel any possible doubts about his character, the header at the top of the page presents a quote from a Ninth Circuit Court of Appeals decision that describes him as a "Nationally-Recognized Expert."

And he is; and, to an extent, the legal profession's disdain for advertising forces skilled attorneys to adopt a false, neo-Pickwickian pose of altruistic amateurism, in which the learned counselor accedes to the Bar for some higher purpose than making money. Viewed in this light, Ellis's embrace of advertising represents a refreshing rejection of the lingering influences of the Victorian concept of careerism.

It seems obvious that more than the simple combination of talent, hard work, and opportunity led to the invention of Ellis's variant of huckster-lawyer. A number of other external factors played a role. The conservatism of the federal judges appointed over the last thirty years helped. So, too, did the increasing acceptance of law as yet another consumer product. The ascendancy of a media culture desperate for "expert content" didn't hurt, either. Ellis evolved in part, then, merely by keeping pace with cultural change.

In that light, the logical next step for Ellis would be the globalization of his product. He has already made brief forays into Mexico for transfer treaty work to help Americans, mostly small-time drug offenders convicted abroad, to serve their sentences in

U.S. prisons. Ellis knows nothing about Mexican law, and he speaks not a word of Spanish ("it's all I can do to order a burrito down there"), but he knows enough to help. His next area of development will be Asia. Ellis hopes to establish a transfer treaty practice in Hong Kong, but he will forsake the backpack tourist busted with a kilo of hashish for the more lucrative interests of Chinese-American businessmen sloppy with a bribe. In the future, he intends to extend his reach to include the corporate lawbreakers of Vietnam, China, Thailand -- anywhere the prospects for capitalism, judicial review, and

illegality seem brightest. For Ellis -- as with the best salesmen, the ones with something good to sell -- the sky is, as ever, the limit.

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[5]

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[prisons alan ellis](#) [11]

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