



## Does Money Play Too Large a Role in Federal Sentencing?

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Does money, specifically the dollar loss that victims suffer from a fraud or other crime, count for too much in federal sentencing?

A recent American Bar Association conference on federal sentencing guidelines saw a top Justice Department official and a federal district judge sharply disagree about whether the U.S. Sentencing Guidelines involve unfair discrimination in white-collar cases by adding to the length of a sentence because of loss calculations. Speaking at the Nov. 5, 2010, event were Jonathan Wroblewski, the Director of the Office of Policy and Legislation of DOJ's Criminal Division, and U.S. District Judge Jed Rakoff of the Southern District of New York.

Judge Rakoff's comments echoed the arguments made [in our earlier posting](#) and by other blogs [like this WSJ blog posting discussing the huge impact of financial loss in the pending sentence for former KB Home CEO Bruce Karatz](#) that the guidelines take the amount of loss into account far more than they should.

Judge Rakoff, himself a former federal prosecutor of financial crimes, said he recently sentenced two white-collar defendants very differently. One got a relatively lenient sentence because he "was a very decent human being who towards the end of a fraud perpetrated mostly by other people, became involved and made a mistake and covered it up." The other was "an evil person, who spent his whole life doing bad things and culminating in a fraud that he was totally the centerpiece of and he deserved to rot in jail a much longer time."

As Judge Rakoff correctly pointed out: "The fact that the guidelines - because of their huge overemphasis on loss calculations - can't distinguish those two cases in a meaningful way but gives them both life in prison, in my mind spoke to the crock of the guidelines."

Wroblewski replied that the starting principle is "that similar offenders who commit similar crimes should be treated similarly, and frankly we don't think that is a radical notion." He



said, however, that that is “not what we are getting when it comes to high-loss fraud cases.” In fact, he recently wrote a letter to the U.S. Sentencing Commission saying, “More and more, we are receiving reports from our prosecutors that, in many federal courts, a defendant’s sentence will be determined by the judicial assignment of the case: i.e., which judge in the courthouse will conduct the sentencing.”

Of course, it seems obvious that similar offenders who commit similar crimes should be treated similarly. However, that is a rather simplistic argument because there is rarely a “similar offender who commits a similar crime.” All defendants have multiple factors, backgrounds, and nuances that contribute to their sentence. That is part of the reason why, instead of simply have some computer coldly calculate the sentence of a defendant, our justice system has human beings judge each case. That is why there is always a separate sentencing hearing in each case.

Although the amount of money lost by victims of a white-collar crime can serve as a rough proxy for the magnitude of the crime and thus should play some role in sentencing, it is not the only important factor, and too much attention to dollar loss can distort the sentence.

*Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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