

Sentencing Mitigation Techniques

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I. General Tips:

- Start early. Begin gathering information as soon as your first meeting with you client. Mitigating evidence developed early in the case can be used to obtain a more favorable plea agreement.
- Go Slow. Don't be in a rush. It takes time to build trust with your client, and spending time with your client builds trust.
- Take time to Listen. If you're doing all the talking, you're probably doing it wrong.

II. Food for thought:

- Don't be afraid to let your personality and your humanity show. It can put your client at ease if they are approached in a natural, personable way.
- Structured interviews may be counterproductive. Don't approach your meeting with the client like a fill in the blank question/answer session. Have a conversation. Review the checklist before the meeting and put it away.
- Ease into it. Start with background information and ease your way into the difficult topics. Don't jump into sensitive issues before you've spent any significant time with your client.

III. Developing Mitigating Evidence

A. The Basics

Family history: Name, age and contact information for parents, step-parents, siblings and other significant relatives.

Employment History:

- Find out where your client has worked, names of supervisors, dates of employment, explore reasons for gaps in employment.
- Any previous employers/supervisors who would speak well of the client?
- Prior military service, including name, branch, dates, rank obtained/rank at discharge, reason for discharge. Was client ever

- rejected for service? Why?
- Did your client have any significant military experiences?
(Remember that the way you ask a question can impact the answer you receive. “What stands out to you when you remember being in the army.”)
- Did client suffer any injuries in the military. Was he or she able to obtain care?

B. Identify Medical Concerns:

- What medications was client taking when arrested.
- Ever been hospitalized?
- Significant accidents? Head Trauma?
- Does client receive social security? Disability?
- Family members with an illness or major injury. What was that like?

C. Identify possible mental health or mental disability issues

- Age when client started school
- Number of times client changed schools
- Did they participate in any clubs or sports
- How were their grades
- Did they graduate from highschool.
- Ever have any counseling or mental health treatment?
- Ever have a mental health evaluation? (previous case or otherwise)
- Did client have trouble learning to read and write
- Did client have to repeat a grade.
- Were they in special education classes
- What did teachers say about him.

Consider interviewing family members on some of these points, but be mindful that they may suffer from the same impairments as client)

Remember that clients with intellectual deficits might try to mask them. If all you ask are yes/no questions, you can spend hours with a client and never realize they haven't understood the concepts you discussed. Try asking open ended questions. Ask the client to tell you what he or she thinks a concept means in their own words. Revisit issues you've previously discussed to make sure the client understood and retained the information.

If you suspect significant mental, emotional or cognitive disabilities, GET AN EXPERT – not just to identify the issue, but to educate the court why its relevant

in terms of culpability and sentencing needs.

D. Abuse.

Be aware that some victims of abuse do not identify their own experiences as “abuse.” Avoid the labels and ask questions designed to get your client talking. Try something like --

- What was it like growing up in your family...
- Tell me about your childhood...

If you want to be more conversational, say things like –

- I’d like to hear about. . .
- Tell me about. . .
- It must have been hard. . .

Violence in the home? Ask questions like –

- How did you parents/siblings show affection in your home?
- What about anger?
- How did your mother/father handle it when you did something wrong.
- How were you disciplined? Were your brothers and sisters treated the same?
- What was your relationship like with your siblings:
- Did anyone ever run away from home?
- How were birthdays celebrated in your house?
- Was anyone in your family arrested?
- Were the police (or social workers) ever called to your house when you were growing up? Tell me about it.

E. Drugs and Alcohol Use

- Tell me about the first time you ever heard about alcohol? Drugs?
- Did anyone in your home growing up use drugs or alcohol. What do you remember about it?
- What makes people do drugs?
- Tell me about the first time you ever used alcohol or drugs.
- How did you feel when you were using alcohol, drug?
- What do you think is the reason you used . . . ?
- What is an addict? Alcoholic?
- Did you prefer to use alone or with other people? Why?
- During the times that you were not using, what kept you from using?

F. Identify Environmental Concerns

- Where did you grow up? What neighborhood?
- Did you think it was safe or dangerous?
- What made it dangerous, do you think?
- Was your family ever evicted from an apartment/home?
- How many times did you move?
- Who lived in the home?
- What did you do when you were not in school?
- Were the police called to your neighborhood a lot?
- What do you remember about it?
- Have you lost someone in your family? Who? How? How did it change or affect your life and your family?

G. Court History

- Has client been on supervision, probation or parole? What were the terms? Did the client successfully complete them? Would their PO say positive things about client? Build support for the argument that your client can do well on supervision.
- Is client ordered to pay child support? Has she or he been complying? If so, let the judge know about it.

H. Community History

Participation in any civic organizations?

Charitable events

Church

What does client do in spare time?

IV. Make a Plan: Consider exploring the following with your client.

Where will you live when released?

Who do you expect will be there for you when you are released?

What relatives are you closest to?

Where will you work?

What are your short term goals?

What are your long term goals?

How can you achieve your goals?

Who can help you reach them?

Where do you want to be in 1 year/5 years/etc.?

What do you want to do with your life?

What skills do you have? What skills would you like to gain?

Do you want to learn a skill, a trade? How will you pay for it?
Is substance abuse treatment necessary?
What will be different this time?
What different things will he or she will do to make a change?

V. Submit a Sentencing Memorandum

A. Begin with positive information you have gathered.

i. Identify strengths & achievements such as:

Positive jail behavior
Positive employment record
Military service
Other accomplishments

If your client is on bond, point out positive things he or she has accomplished while the case has been pending such as AA, anger management, education, & work.

ii. Identify clients support network and use specific quotes from the letters of support

B. Discuss obstacles your client has faced such as:

Substance use
Mental or medical health issues
Abuse
Family instability
Poverty

C. Follow it up with his or her plan for the future.

D. Explain why the sentencing guidelines should not be applied in client's case. Deconstruct the guidelines if you think it will be helpful and or address factors relevant to your client's case that were not taken into account in the guidelines.

E. Ask for a specific sentence and explain why its appropriate in the context of the 3553 factors.

VI. Allocution

A. Allocution has been recognized at common law and by the courts for over 300 years. Pursuant to Rule 32 of the Federal Criminal Rules, prior to imposing

sentence, the court must address the defendant personally and permit him or her to speak or present any information in mitigation of the sentence.

B. Why allocute?

- It gives the Court a better understanding of who the client is.
- It gives the defendant an opportunity to participate in the process.
- It is often the only time the defendant gets to address the Court directly.
- It can be an opportunity for the defendant to apologize to the victims and acknowledge the effects of her actions.
- It is an opportunity for the defendant to make a direct plea for leniency.

C. What influences judges?

i. A survey of federal judges found that, when it comes to allocution, these factors resonate:

- genuine remorse
- sincerity
- realistic and concrete plans for the future
- acknowledge of and apology to victims
- understanding of seriousness of the offense

*****Most important: recognize the harm their crime has done.

According to the survey responses, genuine remorse was a dominant factor, followed by concrete plans for future and reducing chances for recidivism.

ii What do judges find the least impressive:

- Claiming to be a victim of circumstance
- Finding religion
- Promising never to commit another crime
- Thanking the prosecutor or the agent
- Apologizing to the court
- Saying I can't change the past
- Talking about what they will miss in their families' lives
(this seems narcissistic)

D. Where to start:

- Allocution shouldn't be afterthought for you or a sentencing day surprise for your client. It should be the result of careful consideration.
- An effective allocution will reflect REMORSE, EMPATHY, and RESPONSIBILITY. It will be FORWARD THINKING.
- The goal is to let the judge see that your client has thought seriously about her behavior, how it affected others, and how she plans to move forward.
- Discuss the § 3553 factors with your client. Make sure he or she understands that the judge will consider them at sentencing. Consider using the factors as a guide for allocution.
- We don't always have clients who can articulate what it means to accept responsibility or be remorseful. Help them by exploring these themes with them.

E. Sample questions for developing allocution themes:

Remorse and Empathy:

- How do you think your actions have affected others?
- Who did it affect and how?
- How do you think the victim feels?
- How would you feel if you were in the victim's place?
- What would you say to the victim(s)?
- How is your sentence going to affect your family? What can you say to them?
- How can you demonstrate taking responsibility for your actions?
- How have your actions affected you?

Seriousness of the offense/Just Punishment –

- How serious do you think your offense is?
- How does leniency (or a specific sentence) reflect the seriousness of your offense?
- What do you think is a just punishment for your offense and why?

Respect for the law –

- Do you respect the law?
- How would the requested sentence make sure that you respect the law in the future? How would leniency promote your respect for the law?
- How would leniency promote other people's respect for the law?

Rehabilitative themes –

- Do you need educational or vocational training? What kind?
- How would leniency provide you educational or vocational training?
- Do you need medical care? What kind?
- How would leniency provide you with medical care?

Deterrent –

- Why should the judge believe that you will not commit crimes in the future?
- How would giving you a lenient sentence protect the public from further crimes by you?
- Will giving you leniency cause other people not to break the law as you did?

Forward thinking

- Have you thought about what brought you here? Why are you a better person now?
- What have you learned from this?
- What will be different this time?
- What different things will you do to make a change?
- What are your short term goals?
- What are your long term goals?
- Where do you want to be in 1 year/5 years/etc.?
- How can you achieve your goals?
- Who can help you reach them?
- Who do you expect will be there for you when you are released?
- What relatives are you closest to?
- Who do you consider to be your closest friend?
- What can you do to improve yourself now and in the future?
- What will you do with the reduced sentence if the judge is willing to give you a break?

Miscellaneous Good Questions:

- What would I be surprised to know about you?
- What would you be doing if you were at home right now?
- What are you best at? What do you do really well?
- What would you tell the judge if he or she was in the room with you right now?
- What is the best day of your life?
- What was the worst day?
- What are 5 things you want the judge to know about you?
- What are your best accomplishments? What have you done that you are most

- proud of?
- What are your best attributes?
 - What makes you different from other defendants who have committed similar crimes?
 - Why should the judge give you a break?

Remember, you help the client develop and express these themes, but the ideas and the feelings come from the client. It has to be genuine.

Consider a written allocution.

F. Do's and Don'ts of Allocution:

DON'T put words in your client's mouth. It needs to come from her and be sincere.

DON'T be formulaic. Try not to use "I take full responsibility for the actions I committed" or other rehearsed-sounding language that has no real substance.

DO review your client's statement in advance to avoid unfortunate surprises such as a diatribe of the court or the judicial process. Allocution is also not the time to re-argue the facts.

DO encourage your client to speak from the heart (while avoiding extreme emotional outbursts).

DO let your client know that it's OK to show emotion, nervousness and fear.

DO practice allocution with your client, and encourage them to practice on their own. Let them know they don't need to memorize it. Consider using bullet points or note cards.

DO advise your client her statements can be used against her, that the judge can ask her questions and that she should avoid admitting guilt if she plans to maintain her innocence on appeal.

G. Advice for the Client:

- Be sincere; be brief; be honest.
- Use your own words.
- Own up to your crime. Recognize the harm it has done.
- Acknowledge the victims.
- Explain in a concrete, specific way how you will change your life.
- Be realistic.

- Do not make excuses or blame other people for your conduct.
- Avoid cliché lines like “I take full responsibility for my actions.” (What does that really mean? How, specifically, are you taking responsibility?)
- Don’t whine.
- Don’t talk about yourself or your own family before you apologize to the victims.
- Look at the judge when you are speaking.
- Don’t apologize to the court, but you can ask for mercy.
- Don’t say “you will never see me again;” it can sound like an empty promise.

H. Should your client allocute?

Think carefully about whether your client should allocute – will it do more harm than good? Allocation is a right, not a requirement.

A. Allocation might be a BAD idea –

- If the defendant cannot convey sincere remorse
- If she intends to deny guilt or be defiant
- If she is prone to angry outbursts or will launch into a diatribe against the system, etc.
- If she will not accept responsibility and will jeopardize her reduction under § 3E1.1
- If she will blame others or make other counterproductive statements
- If there is a mandatory minimum sentence and there is no good reason to make a statement

B. Allocation when you client asserts innocence.

- Advise the judge that you have instructed the client not to talk about the facts, the trial or to the victim.
- Client can still talk about their plans to use this experience as “a moment for positive change” and how their future will be better than their past.
- Example, “I am responsible for living a lifestyle that would put me in a position to be believed guilty of this offense.”

Remember, allocation is NOT a substitution for well-prepared arguments by defense counsel. According to the survey of judges referenced above, statements by defense counsel are of greater effect on the sentence than allocation.

VII. Family Members at Sentencing:

Consider asking supporters to attend the sentencing. It can help the judge see your client as a person – a father, an uncle, mother or sister– but think twice before you bring children. Prep

family and friends on how to dress and act. In addition to asking for mercy, family members who address the court – either in person or by letters of support– should acknowledge the harm the defendant has caused and demonstrate understanding that their must be consequences to criminal conduct.

Sources

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