

# ***Defending After Conviction: Criminal Sentencings***

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Criminal cases and clients come in all types and sizes. When cases are bigger and stakes are higher, and a client is found guilty of a crime, the sentencing can be the mother of all battles in the case.

Defense lawyers and advocates often read through a court ordered pre-sentence report that seems helpful to the client, and then panic when they see the sentence recommendation. Proposing a credible alternative sentence recommendation to the pre-sentence report or a defense sentencing recommendation to the court depends on two main factors:

- 1) the complete development of an alternative sentencing plan
- 2) the presentation of the plan

How well defense teams complete these two steps determines effectiveness, and the quality of legal representation and client advocacy.

The development of the alternative sentencing plan involves several phases. The first phase is gathering social history information on your client. This history should include several areas, including the client's past and present treatment needs (alcohol/drug use, mental health, medication use), academic achievement ability (i.e. does the client have a learning disability, learning style of client), past and present employment, family support, and the client's strengths and weaknesses. Obtaining the client's past record assists in identifying the client's treatment needs and referring the client to the appropriate treatment services.

Knowing community resources is the second phase of developing an alternative sentencing plan. Establishing a good working relationship with community members who can make those resources available cannot be overstated. Defense advocates need to know the referral process a community resource requires and the funding source for the resource. County funding, SSI, Medical Assistance, and Department of Corrections contracts are funding possibilities. The treatment needs of a client should be matched to a specific community resource. Using a resource that can address the client's particular treatment needs is necessary to an effective alternative sentencing plan.

The third phase of developing the alternative sentencing recommendation is devising the sentencing plan so it meets the factors required of the court at sentencing. Developing the client's community network (family, church, education, employment) can effectively address individual deterrence. It is beneficial to have the persons from the community network in attendance for the sentencing hearing. The plan should include incentives for the client to achieve to promote adaptive behavior. For example, propose an amount of imposed jail confinement, stayed for electronic monitoring, dependent upon the client obtaining satisfactory academic achievement or a set amount of consecutive employment days. Build in opportunities for the client to develop competency based skills. Using restorative justice concepts of specific, measurable ways, for an offender to repay the community is useful. Compare and contrast the plan to other options; community programs versus prison programs, costs of the options, and immediacy of receiving services.

Once an alternative sentencing plan is developed, the defense team must reach a final sentencing proposal and present the plan to the court in a persuasive and effective manner. Something that is often overlooked is the importance of devising the sentencing presentation with the full cooperation of the client - the defense team that truly has the client on board with the plan and the recommendation will look much better. After the social history is completed and the community resources and network are accessed, defense teams must do more than simply advocate for what the client wants as a sentence. Effective defense teams bring the client to the point where the proposal is feasible, inclusive of interests other than the client's, and ultimately credible. The client needs to be educated on the range of penalties, the sentencing hearing factors, and the dynamics in the courtroom during the sentencing hearing. It takes a good amount of work and time with the client to complete the process of integrating the client's desires, feeling, fears, and hopes into a reasonable legal proposal at the sentencing hearing.

Clients are all different - the methods used in preparing different clients' sentencing proposals vary - but lengthy discussion, tough questioning, and detailed notes are always part of the process. Clients must be asked the hard stuff before the hearing - it is better to hear hard questions for the first time from one's own lawyer than at the hearing from the judge. Educating the client about confidentiality is essential here; the client must know that the defense team is really a filter for all information, good and bad. The client meeting should be a learning process for the lawyer. Talk about the case in great detail, and in plain language. Make lists of things the client says. Talk about other things with the client. Discuss influential people, current events in society, important things that happened to the client, childhood memories, family relationships, details about prior jobs, aspirations for the future, and how those aspirations may have changed. Write it down, look it over, and follow up. This work will show at the hearing, making the presentation more persuasive.

The sentencing hearing is the time for the lawyer to really speak *for* the client. Allocution is important, and the defense team must prepare the client for that right. However, the client will not be able to say everything during allocution. This is the time for counsel to

use those things and words that were written in the defense team's notes during the client contacts. It is the time to tell the judge the client's exact words when he spoke one evening at the jail about why he stole money, or is addicted to drugs. It is time to tell the judge what the client said about hurting someone, spoken when the client was not in the nervous setting of a courtroom and was really being thoughtful and candid. Two minutes during allocution will not always capture this - the effective defense team will.

The sentencing hearing is highly specialized and focused. The stakes are high, and the lawyers should be there to litigate. The tools that lawyers use at trials, including common sense, reason, emotion, and professional, crisp presentation, should also be employed at the sentencing hearing. Know your judge - anticipate the questions that your particular judge may have about the proposal, and provide the answers during the presentation. This makes for a more persuasive pitch. Provide a reason for everything proposed. Tell the court how each thing requested relates to the sentencing hearing factors (deterrence and public protection, character of defendant and rehabilitative needs, and nature of offense). If the hearing is contested, attack the prosecution's recommendation. Explain why the prosecution's proposal does not relate to the sentencing hearing factors. If the defense recommendation is in agreement with the prosecution's recommendation, stress this for the judge. Joint agreement by the parties is important in the adversarial system. If witnesses or testimonials are offered, prepare their questions or remarks carefully.

The sentencing hearing is often the only contested hearing in a criminal case. The easier path of pulling together information gathered during the pre-trial proceedings and presenting the client's wishes in an informal manner should be resisted. No criminal case is too small in today's environment to integrate some of these techniques. Defense team members who continue to truly litigate through the sentencing hearing will reach the best results for their clients.

Craig Mastantuono and Barb Gorman will offer their theories in a presentation titled How to Develop and Present Creative and Reasonable and Sentencing Recommendations on Thursday, January 27<sup>th</sup>, at 11:15 a.m., at the Bench & Bar Conference, Wisconsin State Bar Midwinter Convention, at the Midwest Express Center in Milwaukee.

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