Writing a Sentencing Memorandum

In many cases you can advance your sentencing argument by presenting a sentencing memorandum to the judge. In those cases where your client's circumstances or the circumstances of the case lend themselves to mitigation or where the guidelines routinely call for excessive sentences, a sentencing memorandum will help organize your thoughts and will give you an opportunity to effectively present your argument.

It isn't possible to catalog all of the factors that lend themselves to mitigation, but there are some that you'll see most often. They are:

Circumstances Unique to the Client

- age and physical health
- mental health
- low intellect
- family responsibilities
- crime was an aberration
- prior good deeds
- client on the verge of success
- client overcame significant obstacles
- rehabilitation
- drug or alcohol abuse
- client made restitution or amends
- disadvantaged upbringing[1]
- military service

Circumstances of the Offense

- crime was committed in an unusually benign way
- client played a small role in a bigger crime
- client's actions were the product of unusual pressure
- little or no harm was caused by the offense

The guidelines that are most susceptible to the claim that they produce unreasonably harsh

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[1]It seems to me that the argument about a disadvantaged upbringing is most effective when you can argue that the client has overcome a difficult start in life or that there is reason to believe he will be able to do so.

sentences are those applicable to career offenders (USSG § 4B1.1), child pornography cases (USSG § 2G2.2), and unlawful reentry defendants (USSG § 2L1.2).

While there is no one way to write a sentencing memorandum, there are principles that apply universally. Here they are:

Be accurate. Don't guess at the circumstances upon which you are relying and do everything you can to confirm them. Your client would not be the first to overstate his difficulties or minimize his conduct.

It's better to understate your claim than to exaggerate. The goal, here, is to avoid debates over the facts. It is hard to imagine anything that could undermine a sentencing argument more than a showing by the prosecutor that your argument is based on misleading, inaccurate, or false information. Documentation goes a long way toward avoiding the problem of accuracy.

Documentation. Federal sentencing guru Alan Ellis has written about the importance of documenting claims made in a sentencing memorandum:

> Document, document, document. Rather than merely asserting the existence of mitigating factors, the defense attorney should provide as much supporting evidence as possible. For instance, if the client has a physical or mental impairment, or a drug or alcohol dependency issue, the attorney should corroborate that fact with a doctor's letter or report and with medical and treatment records . . . [S]imilarly, if the client has a military service record or a history of good works, counsel should provide appropriate documents or testimonials. Judges will not necessarily take the client's word on anything. He is, after all, a convicted felon. Even if the court does accept a client's word, evidentiary documents will flesh out and add weight to the sentencing presentation.

Alan Ellis, "Federal Sentencing Tips," The Champion, April, 2013, at 40.

You can find examples of this sort of documentation on our web page at www.fln.fd.org. There you'll find a link to "Sample Sentencing Memos" and a collection of memoranda. In the November 19, 2013, memorandum, you'll see references to various exhibits, all of which are mental

health records. The exhibits are not made part of the sample memorandum on the web page, but they were part of the memorandum filed in court. Note that memoranda that include sensitive information or material covered by the court's redaction policy should be filed under seal. Alternatively, you can, as was done with the November 19th memorandum, file the memorandum as you would any document, but file the attachments under seal.

Don't limit your exhibits to formal reports. In the November 22, 2013, sample memorandum, you'll see where character letters are attached as exhibits. The May 24, 2012, memorandum included school records as exhibits. Medical records can be important, too, although it is far better to hire a nurse or other qualified individual to summarize the records than to include handwritten or jargon-laden reports that can't be understood. Police reports attached as exhibits can help you establish the facts. I recommend, too, that you cite to the applicable paragraphs in the presentence report if you are relying on facts contained in the report.

Cite Authority. Many sentencing memoranda that I see consist solely of the sort of argument that would be made at sentencing. Your memorandum, though, will be more compelling if you can show the sentencing judge where other judges have relied upon similar circumstances or present other authority in support of your argument. You will see that all the sample memoranda on the web page do just that. Years ago, it was harder to write these memoranda because much of the research came from primary sources - published studies and law review articles. The best example was probably Assistant Federal Public Defender Troy Stabenow's paper in which he reviewed the development of the child pornography guideline and demonstrated that the guideline was not based on empirical evidence, but on the unsupported judgment of Congress and the Sentencing Commission. The arguments, though, have now largely filtered their way into court opinions. Judge Joseph Bataillon,

for example, has recently written an opinion that summarizes much of the criticism of the child pornography guidelines, United States v. Mallatt, 2013 WL 6196946 (D. Neb. Nov. 27, 2013); Judge Myron Thompson has written about the consideration of mental illness, United States v. Ferguson, 942 F.Supp.2d 1186 (M.D. Ala. 2013); and Judge Mark Bennett has discussed the flaws in the career offender guideline, United States v. Newhouse, 919 F.Supp.2d 955 (N.D. Iowa 2013).

You can also find social research and case law on the website maintained by the Training Division of the Defender Services Office, www.fd.org. Two articles that are, unfortunately, fast becoming dated, are still especially helpful. One is under the link of "The Law of Sentencing Under Booker and It's Progeny" - *Departures and Variances,* by David Hemingway and Janet Hinton; and the other under the heading of "Useful Reports, Testimony and Other Materials" - *Federal Public Defender's Office Sentencing Resource Manual: Using Statistics and Studies to Redefine the Purpose of Sentencing,* by Jennifer Coffin, Sarah Gannett, and Molly Roth. You will need to update the material in those two articles, but they remain a good place to start.[2] Then, too, the sample sentencing memoranda on our web page include research that you can use. Look for cases that cite the principle and for cases where other judges have relied upon the same grounds in imposing a below-guideline sentence. You'll find the most useful opinions in cases from district courts where judges have explained the reasoning for their sentences.

Tie Your Argument to 18 U.S.C. § 3553(a). Although maybe not as important as it once was, it is still important to tie your argument into the parsimony principle and the considerations in 18 U.S.C. § 3553(a). The parsimony principle, of course, requires that courts "impose a sentence

[2]As is always true, too, make sure to read the cases cited in the article to make sure it applies to your case.

sufficient, but not greater than necessary to comply with the purposes . . . " of sentencing set out in the statute. You will see that almost every one of the sample sentencing memoranda on our web page begins with that principle. You'll see, too, that nearly all the memoranda make some reference to the statutory purposes of sentencing. That's not to say that you need to address each of the categories set out in the statute, but you shouldn't ignore them altogether. In that November 19, 2013, memorandum, for example, you'll see there's mention of the need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," the need "to afford adequate deterrence to criminal conduct," the need "to protect the public from further crimes of the defendant," and the need to "avoid unwarranted sentencing disparities." I've mentioned them in a fairly summary fashion, but they are mentioned.

Organization. This is one area where there are no hard and fast rules. Lawyers organize these memoranda in all sorts of ways. Here's the method I've used.

If you look at the sample sentencing memoranda, I begin each one with a paragraph that sets out the circumstances that I rely upon in asking for a reduced sentence. My thinking is that the method serves two purposes: (1) it provides some clarity in that the judge can see from the first paragraph the basis for the argument; and (2) the message gets delivered while, presumably, you still have the judge's attention.[3] That first paragraph, too, typically includes mention of the parsimony

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[3]Bryan Garner, the author of a number of books and article about legal writing, stresses the importance of the opening paragraph:

> One rule of structure is ironclad: the capital importance of the openers. The opening paragraph must engage readers, make them want to stay the course. A weak opener weakens all that follows.

Bryan Garner, The Elements of Legal Style 60-61 (2nd Edition 2002).

principle.

From there, I discuss in detail the mitigating circumstances, be it something about the client or the offense. It's in this section that I typically cite to the exhibits or other documentation. Generally, I follow that with references to cases or other authority that explain why a reduced sentence is appropriate and a listing of examples where other judges have chosen to rely on the same circumstances. Finally, there's mention of the § 3553(a) factors and a conclusion. I often find it helpful to use subheadings to designate the different portions of the argument. Here, again, I think it adds clarity and helps organize the argument.

Brevity. Legendary Supreme Court Justices William Story and Oliver Wendall Holmes had advice about brevity. Justice William Story wrote: "Who's a great lawyer? He, who aims to say the least his cause requires, not all he may." Joseph Story, Memorandum - Book of Arguments Before the Supreme Court, 1831-32 in *Life and Letters of Joseph Story* 2:90 (William W. Story, ed. 1851). Justice Holmes once said "One has to try to strike the jugular and let the rest go." Oliver Wendell Holmes, *Speeches* 77 (1934).[4] There is, then, much to be said for a concise memorandum. Many lawyers have written superb sentencing memoranda that go on for twenty, thirty, or even more pages. Nonetheless, judges have limited time and, like any reader, are prone to pay less attention as the argument goes on. Most of my memoranda are somewhere between eight and twelve pages. That works for me and will probably work for you in most cases.

Remember, too, that the Supreme Court decided United States v. Booker, 543 U.S. 220 (2005), nine years ago, and judges know they have the authority to impose sentences below the guideline range. Judges are busy, and there is a limited window of attention they will devote to your

[4]Both quotes come from United States v. Battle, 163 F.3d 1, 1 (11th Cir. 1998).

memorandum. Don't waste it on a long recitation about Booker.

Get the memo to the judge at least a week ahead of the hearing. Surely most judges reach a tentative sentencing decision once they've reviewed the final presentence report. Wouldn't it be a wonderful thing if you could be there with the judge and make your argument as he was reaching that tentative decision. And that, of course, is the beauty of the sentencing memorandum. If the judge has it at the same time he or she is reviewing the presentence report and making the tentative decision, you can exert some influence at that critical time. The task becomes harder when a tentative decision is made without your input, and you later have to try and convince the judge to alter the initial decision.

Judge Tjoflat of the Eleventh Circuit Court of Appeals has suggested that sentencing memoranda should be presented to the court "after the PSI, and any addendums to the PSI, are in final form" and "well in advance of the sentencing hearing." United States v. Irey, 612 F.3d 1160, 1241 (11th Cir. 2010) (Tjoflat, J. concurring). It is helpful to see the final version of the presentence report before you file the memorandum. Nonetheless, I don't think it's a necessity. If there are disagreements about the scoring, you can mention that those matters are still unresolved. Then, too, the presentence report may reach the judge only a week before sentencing, so, at the very least, you'll need to have most of the work done on the memorandum by then. Regardless, though, of whether you file the memorandum before or after the final version of the presentence report, the point is to get it to the judge in sufficient time so that he or she can read it and at a time that it will have its greatest impact.

File a Memorandum if the Case is Deserving of One. Part of this is deciding in which case to file a sentencing memorandum. I had one public defender from another district tell me that they

file one in every case. It's not something, though, that I recommend. It seems to me that there are many cases where the guideline range is reasonable and there, frankly, is not much of an argument to be made. I don't think there is anything to be gained by putting an unconvincing argument into writing. Over the last calendar year, I filed an actual sentencing memorandum - one directed, not at disputing the guideline calculations, but one regarding the sentence - in 45% of my cases.

There are, then, sometimes reasons not to file a sentencing memorandum. The one reason I urge you to reject is the conclusion that it won't do any good. If there is a good argument to be made, you should make it. Our job is to present the most convincing case that we can. If the judge wants to reject it, that's up to the judge, but we will have at least done our job. Then, too, even if you don't convince the judge, your memorandum might influence the prosecutor or the probation officer, which, in turn, might help secure a lesser sentence. Finally, the views of judges, like the views of anyone else, don't change overnight. Sometimes it is a long process, but it's a process that does not take place if no one is willing to begin it. Your sentencing memorandum can be that beginning.

Randy Murrell
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