

CHAPTER 16

MITIGATION

by

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16.01 INTRODUCTION

With the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), federal sentencing practice has returned to its roots in mitigation -- the presentation of facts and argument to explain the “whys” of a case, as in: why the client is special; why, nonetheless, he or she committed a crime; and why the defense sentencing proposal, combined with the client's personal characteristics, will prevent him or her from committing future crimes. The legal principles governing mitigation at sentencing are discussed in detail in Chapter 17, Federal Sentencing. This chapter will discuss how to develop and present that mitigation.

16.02 WHAT IS MITIGATION?

The mitigation in your case is limited only by your imagination and your investigation. You can brainstorm potential mitigation from several angles. Think about what inspires you about your case and your client. Ask your friends and family what interests them about the case and the client. Consider what kinds of circumstances -- either about an offense or a defendant -- have led your judge to grant leniency in other cases. And, ask your client and his or her friends and family what kind of sentence they think he or she deserves and why.

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Some examples of mitigators include the defendant's: lack of intent or imperfect self-defense or duress; lack of educational or vocational opportunity; emotional or mental health problems; impact on the lives of others; and post-offense rehabilitation. A more comprehensive list of potential mitigating factors, with supporting case law, can be found on the Booker/Fanfan Resources page of the Office of Defender Services, at <http://www.fd.org>. See Michael R. Levine, *128 Easy Mitigators: Cases Affirming or Suggesting Mitigating Factors* (2006), available at http://fd.org/blakely_main.htm. Keep abreast of how courts respond to the various kinds of mitigating arguments by regularly consulting websites like www.fd.org and Douglas A. Berman's Sentencing Law and Policy Blog, available at <http://sentencing.typepad.com>.

16.03 INVESTIGATING MITIGATION

Under an advisory guideline system, a comprehensive mitigation investigation is an essential part of an attorney's obligation to her client. When the Sentencing Guidelines were mandatory, sentencing investigation was very circumscribed. Attorneys were obliged only to learn about the offenses charged and the client's criminal history, and to inquire about the narrow list of downward departures available under the Guidelines. Under *Booker*, with its emphasis on the all-encompassing sentencing factors outlined in 18 U.S.C. § 3553(a), sentencing investigation must cast a wider net. Following a discussion of the duty to investigate, this section provides suggestions for effective mitigation investigation.

16.03.01 The Duty to Investigate

The ABA Standards for Criminal Justice require defense counsel to “conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case *and the penalty* in the event of conviction.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1(a) (3d ed. 1993) [hereinafter “ABA STANDARDS, DEFENSE FUNCTION”] (“Duty to Investigate”) (emphasis added). The Supreme Court has long referred to these standards as “guides to determining what is reasonable.” *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). When counsel fails to follow these standards, and that failure contributes to an increased sentence for the defendant, counsel has been ineffective. *Glover v. United States*, 531 U.S. 198, 198-99 (2005). It does not matter how small the increase in the sentence may be. *Id.* (“This Court’s jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.”). Furthermore, “defense strategy” does not justify a failure to investigate. *Cf. Wiggins v. Smith*, 539 U.S. 510, 537-39 (2003). Counsel thus has a clear duty to investigate in preparation for sentencing.

16.03.02 The Client Interview

One of the best sources of potential mitigation is the client. After all, the client probably knows his or her personal background and the details of his or her crime better than anyone. Developing a strong lawyer-client relationship is critical to accessing this information. The client is far more likely to share with you if he or she believes you are truly interested in him or her.

Meet with the client as early and as often as possible. Several interviews are usually required to establish the kind of trust and rapport that will allow your client to fully open up to you. The more the client sees you, the more he or she will believe that you are sincere and trustworthy. Appendix A contains a list of ideas for effective client interviewing, both topics and techniques. Some are common

sense, but reviewing them from time to time is helpful nonetheless.

As Appendix A illustrates, many topics need to be covered in a comprehensive mitigation investigation. Although you may be tempted to decide that some areas of inquiry are not relevant in your client's case, such assumptions are dangerous. You will sometimes be surprised both by what your questions yield and how the answers inform your theory of the case. If your resources are limited, consult the "Triage" section of this chapter for ideas on how to focus your work.

In interviewing, try to use open-ended questions. Traditional, closed-ended questions seldom elicit the unique details and experiences needed to support effective mitigation. For example, instead of asking, "were you a normal kid?" ask, "when you were a kid, what were your dreams and hopes?" Instead of asking, "did your dad abuse you?" ask, "tell me about a time your parents got really mad at you?" or, "what's the worst thing that happened to you as a kid?" Instead of asking, "was your mom an alcoholic?" ask, "when was the first time you remember seeing alcohol?" For further reading on effective interviewing, see James Tibensky's "Interviewing Tips," available at <http://www.nlada.org/DMS/Documents/1143128703.03/InterviewNLADA.pdf>.

Always have your client sign authorization forms for release of records. School records, hospital records, and employment records -- among others -- are extremely valuable sources both of information that your client may not have shared, and corroboration for what he or she has shared. Appendix B contains sample release forms.⁴ Request your records as early as possible, as it can take weeks or months to receive answers. Do not hesitate to follow up on your requests if you do not receive a prompt response. Often, recipients are overwhelmed with paperwork, and a friendly call can move your request to the top of the pile.

16.03.03 The Family Interview

By knowing your client's family well, you can further develop and corroborate your mitigation case. Family members often have a broader or different perspective on your client's life than he or she does. Family members may also know or remember things that your client does not. They frequently have access to records, photographs, certificates or awards, and other documentary mitigation. And, they may help you persuade a recalcitrant client to share his or her story with you.

Reach out to family members early in the case. Sometimes, you will meet family members at the initial appearance. Introducing yourself, updating the family on the case, and expressing an interest in getting to know them will go a long way toward promoting a relationship with them. If you do not see family members at the initial appearance, contact them as soon as possible thereafter. As with your client, it will take some time to earn a family's trust. If you can, identify one family member -- the family "ambassador" -- to be your main contact, so you can focus on developing rapport with him or her. Once that relationship is established, your ambassador can gather mitigation materials for you, arrange meetings with other family members, and communicate information about the case to them.

⁴ Please note: Federal, state and local law place restrictions on the dissemination of some material. It is best to check applicable law before filing requests for information. If you do not have the resources to conduct this research, do not let that keep you from making requests. Often, if you have not met the requirements for release of information, the agency will return your request with instructions on how to proceed.

Often, “family” means something different to our clients than their mother, father and siblings. Some clients will have been raised by a grandmother, an aunt or an older sister. Others may have spent their childhood in foster care, group homes, or juvenile detention facilities. For some, a neighbor, teacher, or coach have been the most important person in their young lives. As a result, in addition to asking clients for their genetic family tree, ask them questions like, “who was the most important person to you when you were a child?” or, perhaps, “to whom would you turn in an emergency?” and, certainly, “who should I contact about your case?”.

If they are willing, have family members sign authorization forms for release of records. Sometimes, family members have privacy rights in your client’s records or records that bear on your client’s development and history. For example, you will need your client’s mother’s authorization to retrieve her prenatal records, your client’s birth records, and any social services or family court records. If a family member is deceased, you can obtain records by having the next of kin (often your client) sign an authorization for release of records, as long as you provide the custodian of records with a copy of the death certificate.

16.03.04 Community Investigation

Investigating the community in which your client and his or her care-givers have lived and worked will help you understand the client’s world and explain to the court, prosecutor, or probation the myriad influences on his life. Community data can help tell the story of your client in ways a witness cannot; it is objective, verifiable, and often broader-based. Potential sources of information include:

- *Agencies that interacted with your client and his family or may have collected family data:* educational, medical, employment, social services, child welfare, juvenile justice groups, social security, military, worker’s compensation, unemployment, churches, civil courts (divorce, custody, bankruptcy and other civil actions), criminal courts (charges, convictions, restraining orders), credit reporting agencies, etc.
- *Organizations and agencies that compile data or study communities:* U.S. Census Bureau (e.g., child poverty data, educational attainment, employment); state and local school boards (school performance measures); local non-profit organizations (especially those devoted to issues related to families and children); police departments (crime statistics); real estate commissions, health departments (e.g., lead paint and other health hazards to children); Superfund data (hazardous material sites in the community); and schools of social work, community planning groups, and correctional agencies.
- *Organizations and agencies that compile data on or study human rights and international relations* (if your client is from another country): e.g., the United Nations, Amnesty International, and Human Rights Watch.

Much of this data is available on-line or through phone calls without any special authorization. You also may need to submit state or federal Freedom of Information Act requests, or serve subpoenas for data or reports.

16.03.05 Victim Outreach

Traditionally, defense counsel avoid victims, fearing that victim involvement in the case would make things worse for our clients, not better. This wholesale avoidance, however, is an outdated approach. The current legal environment increasingly awards victims the right to participate in the criminal justice process, so their involvement is virtually inevitable. *See* Chapter 23, Crime Victims' Rights Act, for more on this topic. Moreover, research and experience indicates that victim participation in the process may actually *assist* our client's cause at sentencing.

Like any person, victims appreciate the opportunity to be heard -- whether it is a prosecutor or defense lawyer who listens -- but many victims are also receptive to hearing our clients' stories. Often victims come from the same communities as our clients and can relate to their backgrounds and experiences. Consider, for example, robbery cases in which the victims are from the clients' own neighborhoods. Many victims have siblings or children who have been in our clients' position. If we help those victims relate to our clients, it will be harder for them to pursue harsh prison sentences.

Victim outreach may also incorporate components that are directed at meeting victims' needs. This concept is called "restorative justice," the idea being that victims are restored to some degree -- emotionally and/or financially -- through some action by the defense. If we can help ameliorate the harm victims have experienced, it may diminish their anger and even turn them into allies. For some victims, the knowledge that our clients are remorseful and that we are attempting to fashion a sentence that will achieve both punishment and rehabilitation, is comforting. It gives them reassurance that some benefit to their communities may come out of the trauma inflicted on them. For instance, the victim of a hate crime may want to see your client publicly accept responsibility or perform community service. Other victims may have more practical needs. Consider, for example, fraud cases, in which victims have an interest in being compensated for their loss. If a client can begin to make payments, the victim may be inclined to advocate for a non-prison sentence so that payments can continue uninterrupted.

Consider incorporating restorative justice options into your plea agreement or sentencing proposals. While not all cases lend themselves to restorative justice, the practice of seeking to meet the needs of victims has much to commend it. For more information on restorative justice, see generally HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002).

Of course, victim outreach must be conducted with great caution and careful planning. Counsel may choose to consult with a specially-trained defense victim outreach specialist to determine when and how to approach victims. Often, victim outreach specialists, unaccompanied by other team members, approach the victim, preserving a little distance between the client and defense counsel and the victim, which can be more comfortable for victims.

16.03.06 Triage & Funding

While counsel's duty to investigate mitigating information is often stymied by limited time and resources, counsel may nonetheless take steps to identify those mitigation themes with the best likelihood of success at sentencing. Throughout your investigation and preparation, keep in mind the two questions most judges ponder: why did your client do it, and will he or she do it again? Also keep in mind the purposes of sentencing set out in 18 U.S.C. § 3553(a). If you consider the judge's concerns and the purposes of sentencing in connection with the needs and desires of the victim and the client, you

will be able to assess quickly what you need to do and how best to do it.

As discussed above, the answers to these issues often flow from a thorough understanding of the whole client and his or her psychological, emotional, financial, familial, educational, vocational, and medical needs. Although you will only be thinking about “triage” if you feel short on time, part of effective triage is promptly assessing your case -- it takes time to develop relationships, gather data, and decide on the best plan. You will spend more time trying to catch up if you wait until the last minute to begin. Here are some ideas about getting started, in order of priority.

- *Start with a thorough social history interview of your client and his or her family.* The interviews should be done as soon as possible after representation begins. Aim to learn enough about the client so that you can help bring his or her world into the courtroom at sentencing. If you have nothing else, this will at least help the judge understand your client and help your client feel as if he or she has had his or her day in court.
- *Start gathering records.* Obtain comprehensive releases for information from the client and all family members. Records can help you focus your later investigation, if you have the time, and provide powerful corroborative evidence, if you do not. Some records -- especially social services, medical and educational records -- may tell your client’s story on their face, without any additional investigation or explanation.
- *Become proficient in online research, or find someone who is.* A vast amount of information relevant to mitigation is available over the internet. Sentencing presentations that rely on such data can be just as persuasive as the testimony or affidavit of an expert, and much less expensive. THE FEDERAL AND COMMUNITY DEFENDER’S SENTENCING RESOURCE MANUAL: USING STATISTICS AND STUDIES TO REDEFINE THE PURPOSES OF SENTENCING, available at www.fd.org, is a good place to start. It contains references to government-sponsored studies and other scholarship that supports common defense sentencing themes.
- *Assess the needs and abilities of your client.* To thrive in the community, people need a strong foundation including education, employment, social relationships, and health and sobriety. Deficits in any of these areas may have contributed to the client’s commission of his or her crime and may affect his or her likelihood of recidivism. See generally, Mark Sherman, *Reducing Risk through Employment and Education*, SPECIAL NEED OFFENDERS BULLETIN (2000). Although designed to address women’s needs, the Women’s Prison Association’s *Success in the Community: A Matrix for Thinking About the Needs of Criminal Justice Involved Women*, available at http://www.wpaonline.org/pdf/Success_in_the_Community_Matrix.pdf, provides a helpful framework for thinking about the needs of all of our clients and how to meet them. Identifying these needs should help you explain why your client committed his or her crime and formulate a sentencing proposal that will put your client on the road to rehabilitation and reintegration into the community. See Christopher T. Lowenkamp, *Adhering to the Risk and need Principles: Does it Matter for Supervision-Based Programs?*, 70 FEDERAL PROBATION (2006).

- *Arrange for services that will help your client meet his immediate needs and solve problems that may have contributed to the crime.* Your client may need referrals for mental health or addiction treatment, medical care, housing, food stamps, civil legal services, educational or vocational programming, employment, etc. Pretrial Services may be of assistance in arranging for these services. Take advantage of this. The judge will likely see your client's early success at rehabilitation under pretrial supervision as a good predictor for future success post-sentencing.

Finally, do not forget that the government can sometimes wittingly or unwittingly be of assistance. Discovery and *Brady* requests can produce important documents and witnesses of which you were unaware. See Chapter 3, Discovery, for further discussion on this subject. In addition, the law enforcement officers in the case may provide helpful information during an interview that is not reflected in their reports of investigation. Finally, if the prosecutor is open to mitigation, consult with him or her early and often about mitigation themes, sentencing options, and your client's strengths. This may help you work out a more favorable settlement or an agreed-upon sentence.

Because adequate investigation implicates the Sixth Amendment right to effective assistance of counsel, courts are obligated to provide funding to CJA counsel for these basic investigative tasks;⁵ however, many courts do not understand this obligation, and need to be educated. Counsel may opt to use their requests for funding as an opportunity to remind the court about the ethical and constitutional implications of their failure to provide funding. Even in courts where counsel feel confident that their requests for funding will be denied, such requests should be filed to preserve the appellate or post-conviction record for the client.

16.04 MITIGATION RESOURCES

16.04.01 Effective Use of Staffing Resources

Because mitigation investigations are time- and labor-intensive, you may want to delegate some of the tasks and responsibilities to others on your team. Although counsel must remain responsible for directing the investigation, here are some suggestions for sharing the work:

A properly trained administrative assistant can help you identify sources of records and other data; make record requests; review, organize, and summarize information; and conduct general internet research.

Undergraduate or graduate programs in social work, psychology, sociology, community planning, and related fields may be able to help you find a student or intern who can offer inexpensive (or free) professional insight. Legal interns also may be able to assist.

⁵ Under 18 U.S.C. § 3006A(a), each United States district court, with the approval of the judicial council of the circuit, must create a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. "Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation." *Id.* "Investigative, expert or other services necessary to adequate representation, as authorized by subsection (e) of the Act, shall be available to persons who are eligible under the Act, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services." *CJA Guidelines*, provision 3.01(A).

Your client and his or her family can help collect employment information, character letters, and other community-based information. Your client's family is also a valuable source of anecdotes and stories, which may reveal a hidden strength of your client or otherwise shed light on his behavior. Families also have photos, letters, artwork, music, poetry, and other items that can highlight the unique attributes of your client. Often the "emotional center" of your mitigation presentation is hidden in this family history, so do not underestimate the value of this resource.

An investigator may help you gather records and conduct interviews, provided they are trained in, or willing to learn, mitigation interview techniques. Mitigation interviews, unlike fact investigations, require reflective listening skills, empathy, patience, and an open-ended style of questioning. Be sure your investigator is prepared to conduct such interviews before sending him or her out to see witnesses. If you anticipate that your fact investigator may need to testify at trial, then you may want to limit the scope of his or her investigation into your client's background. Mitigation investigations may uncover unfavorable information about your client, including past bad acts. In such situations, it may be best to divide functions so that your fact investigator can testify without exposing bad sentencing themes.

Some cases may require help from a "mitigation specialist" -- a person trained, through education or experience, to gather information about your client's biographical/psychological/social history, interpret its relevance, and package it for presentation to the court. Mitigation specialists are commonly used in capital cases, but less commonly used in non-capital cases. Often, they are social workers in private practice. Because of the expense of hiring a mitigation specialist (typical fees are \$50-100 per hour), you may wish to reserve this option for those cases involving a complicated offense, significant mental health problems or cognitive impairment, addiction, or a history of trauma.

16.04.02 Using Mitigation Specialists and Other Experts

Although traditional investigators are often capable of conducting mitigation investigations, sometimes, a mitigation specialist or other expert may be helpful. This is most often when the case involves significant fact investigation, consuming the traditional investigator, or when the social history issues are especially complicated -- substance abuse, mental illness, cognitive impairment, gang affiliation, child abuse, or other similar issues. Just as the court should approve funding for traditional investigation of a case, it should approve funding for mitigation investigation, which has been a fundamental part of effective representation since *United States v. Booker*.

Knowing what kind of specialist or expert you need for your case requires some prior understanding of the issues involved. This sounds counter-intuitive, as defense counsel would like to turn to specialists or experts to answer the question, "what issues are involved?" Without knowing the issues involved, however, defense counsel cannot know who to hire and how to use that person effectively. One excellent resource for educating yourself is David Freedman's Guide to Mental Health Mitigation, available at <http://www.fd.org>. You may also wish to refer to Chapter 7, Mental Health Issues in Federal Criminal Practice, which, although it is tailored to the guilt/innocence phase of the case, contains information on mental health issues that may also be relevant at sentencing.

At a minimum, to effectively evaluate your client, an expert needs to have some background about your client and his or her case. Tell the expert what you have observed about your client, and what your theories are about his or her mental health problems. Provide the expert with discovery, records, witness contact information, and any other information he or she will need to make an evaluation that

will stand up in court. Remember, anything you give your expert may be discoverable by the government, but also remember that if you hold back too much, your expert will be subject to impeachment. Check in with the expert to determine what additional information he or she may need. This will help keep the expert on track and help you refine your goals for the evaluation.

Understanding the distinctions between experts is critically important -- choosing the wrong type of expert will waste your money and time. You will be able to choose the right expert for your case only if you understand your client's social history and symptoms. For instance, the signs of bipolar disorder and encephalopathy from liver disease can look similar -- irritability, mood swings, etc. If you gather your client's medical records or talk to a family member about his or her medical history, you will know whether he or she has liver disease, and therefore whether you need a medical specialist (psychiatrist or other person with an M.D.) as opposed to a psychologist (who holds a Ph.D). Here are some of the types of experts whose help you may wish to enlist:

- *Mitigation Specialist:* A "mitigation specialist" is usually a social history generalist, and is most appropriately used to assist in understanding the client's family and background. Many have backgrounds in social work, so are able to help counsel identify potential mental health issues, although they usually do not make formal diagnoses or develop treatment plans. They are often able to refer counsel to other experts, such as psychologists or psychiatrists, who can make those diagnoses and treatment plans.
- *Psychiatrist:* A psychiatrist is a mental health professional with a medical degree. Psychiatrists treat mental illness using a biomedical approach, often involving prescription of medication. They may conduct medical examinations and order medical tests like EEGs, MRIs, etc.
- *Psychologist:* A psychologist specializes in evaluating a client's mental health and providing treatment through psychotherapy. They may conduct psychological testing on your client, including personality testing, intelligence testing, and brain-function testing.
- *Neuro-Psychologist:* A neuro-psychologist has special training in understanding brain function. He or she is a specialist in conducting tests that identify cognitive impairments.
- *Social Worker:* A social worker is trained to assess, treat and manage clients with mental illness. In some states, social workers may make diagnoses. In other states, they will refer a client to another expert for formal diagnosis.

Many experts specialize -- for example, in addiction, trauma or learning disabilities. Talk to colleagues, look at the literature, surf the internet, and then interview potential experts to find out who's who in the field in which you are interested. The "go-to-person" in one type of case may not be right in another.

Be as clear as possible with your expert about what you need. One way to do this is by drafting a "referral question." Here are some examples:

- Client has trouble assimilating information I give him, seems to struggle with reading, left ninth grade at seventeen, and mother says was in special education. No history of

head injury. Please evaluate for organic brain damage and/or learning disabilities.

- Client has 10-year addiction to PCP. Please evaluate his addiction and discuss the impact of that addiction on neurological function and impulse control.
- Client exhibits anxiety, irritability and mood swings, which family says began in his early 20s. Please assist in identifying the source of these symptoms.

Think carefully about whether to put the question in writing for your expert; anything you give the expert likely will be cited as in the expert's opinion and thus be available to the prosecution and the court.

Be clear with the expert about whether you want a written report. Consider consulting with the expert before he or she commits an opinion to writing. Some experts will work with the attorney in crafting the report. If you interview the expert in advance and check his or her references, you will know how easy it is to work with him or her.

Be wary about agreeing to any testing of your client. Make sure you understand the test, its purpose, and whether it has been validated for individuals like your client before permitting an expert to administer it. A good expert should be willing to provide this orientation, along with references for additional study. It almost never helps to have any kind of personality testing. This testing is not designed for a forensic setting, and almost always results in the application of negative labels to our clients – for example, anti-social, narcissistic, etc. Those labels are inaccurate due to the use of the tests in a setting for which they were not intended. Unfortunately, however, those labels tend to stick. A good source for educating yourself about psychological testing is MURIEL LEZAK'S NEUROPSYCHOLOGICAL ASSESSMENT.

16.04.03 Internet Resources

Many internet resources are available to counsel. These may be used for learning about a client's community, understanding a particular illness, getting tips on conducting an investigation, and locating a specialist or expert for a given case, among many other things. A list of internet resources is included in Appendix C to this chapter. Defense counsel should also consult the Office of Defender Services, Training Branch website for helpful internet resources. Office of Defender Services, Training Branch, Internet Websites for Mitigation Information, *available at* http://www.fd.org/odstb_MitigationSites.htm (last visited December 15, 2009).

16.05 USING AND FASHIONING ALTERNATIVE SENTENCES

Defense counsel is ethically obligated to explore alternative sentencing options. ABA STANDARDS, DEFENSE FUNCTION, Standard 4-8.1 ("Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs."). This obligation cannot be underestimated under an advisory sentencing guideline scheme, which provides defense counsel with an opportunity to propose creative sentencing alternatives to the court. The Sentencing Commission itself concedes that effective alternative sanctions are important options for the criminal justice system:

For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.

U. S. SENTENCING COMM'N, *ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 20 (Jan. 2009).

The alternatives are limited only by counsel's imagination and community resources. Here are some points to keep in mind. 18 U.S.C. § 3553(a) provides the court with considerable flexibility to fashion a sentence that attempts to meet the treatment, vocational, education or other needs of your client while also being punitive -- e.g., weekends in jail, halfway house, home detention with or without electronic monitoring, in-patient care, or an outpatient program. The sentencing "zones" in the Guidelines are advisory only. Even if your client's advisory guideline falls within Zone C or D, where a probationary sentence was traditionally prohibited, the court may nonetheless impose a sentence of probation if it complies with the provisions of 18 U.S.C. § 3553(a).

Show the court why your alternative sentencing proposal meets your client's needs (medical conditions, mental health treatment, employment, educational opportunities, drug/alcohol counseling) better than the Bureau of Prison's (BOP) programs. In convincing the court that the BOP cannot adequately meet your client's needs, you may need to retain prison experts and/or obtain correctional audits, congressional reports, Inspector General audits, and other information documenting funding, staffing, and other problems in BOP programs.

Present data and research on why imprisonment promotes racial disparity, unfairness, and does not serve the purpose many think it does. Also present data and research on why your proposal will be effective. See *THE FEDERAL AND COMMUNITY DEFENDERS' RESOURCE MANUAL: USING STUDIES AND STATISTICS TO REDEFINE THE PURPOSES OF SENTENCING*, available at http://www.fd.org/odstb_SentencingResource3.htm. The manual includes citations to studies on subjects ranging from substance abuse to recidivism to immigration to sex offender treatment.

Consider incorporating restorative justice options into your plea agreement or sentencing proposals. While not all cases lend themselves to restorative justice, the practice, discussed at Section 16.03.05, "Victim Outreach," which seeks to meet the needs of victims, has much to commend it.

Whatever your sentencing proposal, make it as concrete as possible so that the court understands the client's needs, the plan, and the likely outcome of the sentence.

16.06 EFFECTIVE SENTENCING PRESENTATION

Effective sentencing presentation means bringing a client's life and story alive in the courtroom. Judges sentence many, many defendants every year, and it is easy -- especially for those who have been on the bench since the Sentencing Guidelines were mandatory -- for them to generalize about our clients and to assume that they understand what brings our clients before the court. Sentencing under those circumstances can become abstract and formulaic, despite the commandment in § 3553(a) for individualized sentencing. Counsel must find a way to animate each client's case in a manner that makes

it hard for the judge to treat it as “just another case.”

The most important thing counsel can do to achieve an effective sentencing presentation is to identify the emotional centers and themes of the case. Like the best books or movies, the best sentencing arguments involve a good story, compelling characters, and powerful images. Almost every case has these features, they are just easier to find in some cases than others. Be alert for potential sentencing themes from the outset of your case. Sometimes, a potential theme for sentencing will come from an unlikely place -- e.g., law enforcement officers testifying at a detention or suppression hearing about your client’s cooperation during arrest, extensive statement to police, or providing consent to search. That testimony can be melded with the § 3553(a) factors important to the judge (punishment, rehabilitation, offender accountability, deterrence) to create a strong case for a lesser sentence.

16.06.01 Tactical Considerations in Presenting Mitigation

In deciding how best to present mitigation information, you should keep in mind a variety of potential pitfalls and formulate your strategy accordingly. Here are some of the most common tactical considerations involved:

16.06.01.01 Using the Presentence Report (PSR) to Present your Position

Because courts generally view information presented through the PSR as more reliable and accurate, you may want to consider providing mitigation information to the probation officer during the presentence investigation. Some probation officers, armed with persuasive information, can be effective advocates for reduced sentences. On the other hand, some probation officers will aggressively seek out information to rebut your mitigation or find ways to use it against you. Sharing information early in the process also gives the government a preview of your case and provides them with a greater opportunity to investigate and rebut your sentencing package, if so inclined.

16.06.01.02 Using Mental Health Evaluations

Expert evidence regarding your client’s mental condition is necessary for some sentencing arguments (e.g., diminished capacity) and helpful in others (e.g., developmental disability, major mental illness, learning disability), but before you decide to use such an evaluation, you should consider the following:

- *Will your expert write a formal report?* If so, is the expert willing to speak with you about his or her evaluation before issuing a final report? Experts vary considerably on their willingness to work with defense counsel in crafting a report. If you anticipate that your expert will be inflexible about editing a report once it is written, then you may wish to engage him or her in extensive discussion before hand. Even if your expert is amenable to editing a report, keep in mind that earlier drafts of the report may have to be turned over to the government.
- *Will the government demand discovery of information provided to the expert?* In responding to defense mental health evaluations, some prosecutors aggressively pursue discovery of all information provided the defense expert, including discussions with counsel, witness interviews, social history summaries, and documents. Size up the risk

that your prosecutor will pursue such information and be extremely careful what information you convey to your expert. As a rule of thumb, if you want to keep information hidden from the government, do not give it to your expert.

- *Will the government request a reciprocal exam?* Many courts permit reciprocal government mental health examinations, either by analogy to Federal Rule of Criminal Procedure 12.2, which provides for evaluations in capital sentencing proceedings, or under the court's inherent authority to control discovery. Not consenting to a reciprocal exam casts doubt on the reliability of the defense expert's evaluation. If confronted with a government request for a reciprocal evaluation, consult the law relevant to mental health evaluations in capital sentencing to be sure that the government gets no more than that to which it is entitled.
- *How is your client likely to respond to a government evaluation?* If your client is generally cooperative and follows advice, he is much more likely to get through a government exam without doing any additional harm to his cause. An "obstructionist," "uncooperative," or a less than honest performance from your client increases the risk that he or she will be labeled anti-social, a psychopath, or a malingerer.
- *Can you limit the terms of the government's exam?* If the government seeks to perform a reciprocal mental health exam, the scope of the evaluation should be limited to that necessary to directly rebut the defense expert. For example, if your expert has performed a substance abuse assessment, the government expert should not be permitted to assess future dangerousness or brain function. Be particularly aware of unnecessary intrusions on your client's Fifth Amendment rights against self-incrimination. If your expert has not discussed the offense or other criminal acts with your client, then the government's expert should not be permitted to do so either.
- *Should you be present at the government exam?* It is generally a good idea for a representative of the defense team to be present during the government exam. Defense presence at the exam may make your client more at ease and will ensure that the exam stays on track and is recounted accurately in any report or testimony. In addition to attending, you may also consider audiotaping or videotaping the exam, particularly if you think such taping will facilitate your mitigation presentation to the court.

16.06.01.03 Using Sentencing Memoranda

Whether to submit an extensive written sentencing memorandum is another strategic question that does not admit an easy, "one size fits all" answer. Some questions to consider:

- Will a lengthy memo provide the prosecutor with a greater opportunity to rebut your presentation?
- Will the court read your memo in advance?
- Will the court perceive you as "sandbagging" if you do not give the prosecutor advance notice of your arguments?

- Is a written presentation the most effective means of communicating the themes in your case?

16.06.01.04 Using Audio and/or Video

As discussed further below, use of audio and video in your sentencing presentation can help to animate your case for the court. As with expert reports, however, the government may be entitled to review all of your recordings if you present any in court. Thus, careful preparation is required before any taping. Also, keep in mind the hazards of editing. Use the “rule of completeness” as a guide. You do not want to present something so skewed in your client’s favor that it can be turned against him or her by the government.

16.06.02 Tools for Mitigation Presentation

Traditionally, defense counsel submit *written memoranda* to the court in advance of sentencing, requesting a particular sentence and giving the rationales for that sentence. Assuming that you have decided to write a sentencing memo after considering the pros and cons of doing so, *see* Section 16.06.01 “Tactical Considerations in Presenting Mitigation,” above, you want to make it as persuasive as possible. A persuasive memo should tell a riveting story, not simply recount facts, details, and legal arguments. It should explain why the client is before the court and why his or her future will be different than his past. While memos often recount the horrors of our clients’ lives, a memo should also focus on their strengths, resilience, and the positive forces in their lives. You do not want the court to conclude that criminal activity was inevitable for your client; you want the court to think that things could have been different, and will be different in the future. Many of the techniques of nonfictional narrative storytelling work well for sentencing memos: setting, character, plot, conflict, and theme.

There are many other methods for presenting your mitigation to the court, which may be used together or in place of a sentencing memorandum. One often-overlooked source is your client and his or her family. You may wish to have the client *write a letter* to the court, explaining what he or she has learned from this case and what he or she hopes for his or her future. Judges are often moved when a client thinks out his or her predicament and prospects, finds the words to express them, and takes the time to hand-write them in letter form. If your client is a good speaker, you may wish to reserve that story for allocution. Or, you may wish to have the client both write and allocute. If your client plans to speak at sentencing, be sure to prepare him or her carefully. Even a minor misstep can have significant consequences at this stage. A good resource for preparing your client’s letter to the court or allocution can be found on the Office of Defender Services, Training Branch web site. *See* Tony Lacy, 3553(a) *Allocation Pleading* and *The Story Behind the Allocation Pleading*, available at http://www.fd.org/pdf_lib/allocution%20pleading.pdf and http://www.fd.org/pdf_lib/The%20Story%20Behind%20the%20Allocation%20Pleading.pdf.

Similarly, a client’s family, friends, employer and others can tell the client’s story to the court, either in a character letter or at the hearing. This requires the same advance thinking and preparation as a client’s sentencing letter or allocution. Think about choosing representatives from different segments of your client’s life, so that these witnesses fully supplement the story you are telling. You may wish to call on a client’s spouse, employer, AA sponsor, former teacher, or any other person who had a meaningful influence on, or was witness to, the client’s life. Make sure these witnesses understand the role you envision for them and how they can fulfill it. Attached at Appendix D is a memorandum

on writing a character letter that may help your client's family and friends more effectively express themselves on his or her behalf.

You may choose to present your client's story in pictures. This is particularly true when you believe that some aspect of your client's life is better shown than told. For example, when your client's offense was motivated by drug addiction, and you can depict the neighborhood where he or she lived and used, the treatment center where he or she recovered, and his or her new life living sober. Or, if your client is supporting a family, and you want to show the court the children he or she is raising, the home he or she has made for them, and the job that allows him or her to do so legally.

One effective way to use pictures is by video. Producing sentencing videos is not difficult, as long as you have a camera, a decent computer, and some editing software. Editing software is available online, often on a trial basis, and quite affordably (some programs cost under \$50.00). You simply shoot the film, load it to your computer, and cut and paste it into whatever order is appropriate. You can add documents and still photos, and use narration or music. While a simple, rough-cut film can be more compelling than something fancier, you may consider hiring a professional who specializes in producing these sort of short videos, if you have the funds available.

If moving pictures are not necessary, you may want to consider a slide-show, perhaps narrated by your client or one of the primary figures in his or her life. Or, you might simply present documents or photographs using the court's projection system. In addition to documents and photographs, consider constructing family trees, time-lines or other charts to depict important themes in your case, such as a history of mental illness or substance abuse in the family, the client's traumatic childhood, or the client's various efforts to seek employment. Any of these things can also be inserted in sentencing memoranda, either in the text (using a chart or a picture box) or as an exhibit.

Craft your approach to be engaging, informative, and persuasive. Whatever the merits of your mitigation case, if it is not easily received and understood by the court, it will not be effective.

16.07 CONCLUSION

When you have questions about developing or presenting mitigation in your cases, consider contacting your local Federal Defender office, the Defender Services Training Branch in Washington, D.C. (see <http://www.fd.org> for contact information), one of the Federal Defender mitigation specialists, or the Sentencing Resource Counsel Project.

APPENDIX A

SOCIAL HISTORY: A TOPICAL CHECKLIST⁶

In developing mitigation for post-*Booker* sentencings, our clients are often our best and most-accessible source of information. In the abstract, the mitigation possibilities seem endless, and it may be difficult to decide what to ask our clients and how to ask it. This checklist is designed to give you some guidance. Although it is not intended as a script for client interviews, it may be useful for attorneys to review the checklist in connection with each case as a brainstorming tool. Of course, these same topics may also be addressed with your client's family and friends and other witnesses.

In collecting information from clients, remember two important principles. First, try not to be too result-oriented. Sometimes, you just have to listen and let the client take the interview where he or she wants it to go. You will not elicit much useful information if you exert too much control in the conversation. Second, be alert to verbal and non-verbal cues suggesting abuse, mental illness, or cognitive impairment. See Deana Logan, *Learning to Observe Signs of Mental Impairment*, MENTAL HEALTH AND EXPERTS MANUAL (6th ed. 2002), ch.17, available at <http://www.dpa.state.ky.us/library/manuals/mental/Ch17.html>. Sometimes, your client will not be able to tell you what is mitigating, but you will discern it through careful observation.

If you have any questions about a client's response to questions or a behavior you observe, you may want to consult the attached bibliography of materials on mental health issues in criminal cases and conducting mitigation investigation. Also consider consulting a social worker, a mitigation specialist, or a mental health professional.

Initial Interview

This basic information should be collected early on (at the initial appearance, if possible). These are the questions asked at intake by Assistant Federal Public Defenders. The answers provide the basis for establishing a "family liaison" (a close friend or family member of the client who can become an ally for the attorney during the investigation & litigation), and beginning the investigation (ordering basic documents such as educational, criminal, and medical records).

- Charged name
- Legal name
- Other names used
- Age
- Date of birth
- Place of birth
- SSN
- Immigration status
- Address
- With whom living

⁶ This checklist is adapted from materials prepared by the Office of the Federal Public Defender for the District of Maryland, Scharlette Holdman, and the Louisiana Capital Defense Project.

- Marital status
- Name/address/phone of spouse
- Name/address/phone of children
- Name/address/phone of other relatives/friends

- Employment
- Name/address/phone of employer
- Military record
- Schools attended
- Highest grade completed

- Current medical needs

- Pending cases
- Detainers
- FTAs
- Probation/Parole (& supervising officer)
- Past arrests/convictions

- Arrest date/time/place
- By whom arrested
- Circumstances of searches/seizures (consent, warrant, auto, etc.)
- Witnesses to arrest
- Others arrested
- Circumstances of any statements (oral, written, read rights, invoke rights, length, place, method of interrogation)
- When taken to magistrate

At the initial meeting, also have the client complete release of information forms, so you can easily retrieve records now and later on.

Subsequent Interviews

During subsequent interviews, you will have the chance to get to know your client and his or her history. When you visit to discuss an upcoming court date or a development in the case, try to take the time to ask how the client is doing and to make some simple observations about his or her condition. Also try to introduce one or more of the topics listed below. Try to cover all of these areas over time so that you can be sure you have done a thorough mitigation investigation.

As follow-up to your client interviews, gather information from other sources, including friends, family, teachers, neighbors, employers, coworkers, coaches, counselors, etc. Records also contain invaluable information and frequently corroborate information obtained from the client or witnesses. Consider gathering medical records, school records, jail and correctional records, juvenile records, social welfare records, military records, court records, arrest records, and attorney files.⁷

⁷ The investigators and support staff at the Federal Public Defender have developed a wealth of knowledge on how and where to obtain records. They may help you short-circuit what can be a time-consuming

You may not be able to do a complete social history investigation on each client, but be careful about deciding that it is not worthwhile in any individual case. Many attorneys have received sentence reductions in a case that, at first glance, appeared relatively ordinary.

Current Condition

Checking in on the client's current condition is a good way of building a relationship with the client, while at the same time identifying possible mitigation. You may see signs of cognitive impairment or mental illness, or you may learn good character mitigation, such as that the client is serving as a "trustee" on his cellblock or participating in a "Reality" program for school-kids.

- How are you feeling?
- Do you have any complaints?
- How are you getting along with the guards?
- Any guards having problems with you?
- How are you getting along with other inmates?
- How are you sleeping?
- Are you getting any exercise?
- What have you had to eat?
- Did you get a shower?
- Are you making any phone calls?
- Do you have any visits?
- How do you spend the day?
- Have you seen the doctor/nurse?
- Are you taking any new medication?

Observations of Client

- Skin (clear, acne, pale, abrasions)
- Eyes (dilated, rapid movements, dull, normal)
- Hygiene (unclean, clean, food, drool, chapped lips, feces/urine, odor)
- Appearance (disheveled, neat, unshaven, gaunt, tired)
- Mood (crying, lethargic, sad, agitated, hopeless, unpleasant, manic, irritable, clinging)
- Speech (monotonous, loud/soft, incoherent, tangential, shifting, derailment, flighty, stuck on single subject, pressured, minimal)
- Thought (delusion, hallucination, paranoia, preoccupation, extreme, confabulation, inflated sense of self)
- Feelings (fear, shame, remorse, giddy/silly, anxious, normal)
- Movement (touching, licking, rocking, drumming fingers, leg shaking, pacing, slow/fast)
- Tics (snorting, clearing throat, grimacing, head twitches, verbalization)

Social History

These topics are presented in rough chronological order, but you should feel free to pursue them in whatever order seems appropriate with a given client. Some clients will be unwilling to talk about

process.

their childhood at first, but may become more willing after they see the way you handle a discussion of their criminal history, hobbies, or employment background. If your client will not or cannot answer a question, try asking your “ally.”

Birth, Growth & Development

- Any known complications with mother’s pregnancy (bleeding, toxemia, smoking, alcohol, drugs, physical abuse, depression, accidents, illness)
Sample Q: How was your mother’s health during her pregnancy with you?
- Any complications at birth (premature, respiratory difficulties, jaundice, known defects)
Sample Q: Did your mother ever complain about her labor and delivery?
Sample Q: What does your mother say about the day you were born?
- Approximate age at which developmental tasks accomplished (responsive smile, rolling over, crawling, pulling to stand, walking, speaking, self-care)
Sample Q: What has your mother told you about what you were like as a baby? As a child?
- Relationship with parents (emotional support, nurturing, expressions of love, discipline, infliction of physical harm or pain, sexual abuse, sexual modeling, displays of nudity, invasions of privacy)
Sample Q: Tell me about your mom?
Sample Q: How did your mom handle it when you did something wrong?
- Relationship with others in household
- Relationship with peers in school and neighborhood
Sample Q: What did you do when you weren’t in school?
Sample Q: What were your friends like? How did others treat you?
- Police or social workers ever come to house
- Client or siblings ever run away

School History

- Age began school
- Schools attended (dates, addresses, reason for changing schools)
- Progress from one grade to next
- Placement (advanced, special education)
- Behavioral difficulties
Sample Q: Did you like school? What did you/did you not like about it?
- Lateness, attendance
- Performance
- Significant teachers/coaches
- Parental involvement in school
- Highest grade completed

- Extracurricular activities, clubs, sports

Environmental Factors

- All addresses where client lived
- Name, age, current address of all people with whom client lived
- Physical conditions in which client grew up (type of neighborhood, housing conditions, availability of heat, number of rooms, number of people in residence)
Sample Q: Tell me about where you grew up?
- Exposure to toxins (smoking, lead, folk remedies, solvents, glue, industrial area, agricultural area)
Sample Q: Where did you play when you were small?
- Client, family, or caretaker ever in an occupation at risk for neurotoxic exposure (agricultural, chemical, pharmaceutical, degreaser, dry cleaner, dental hygienist, electronics, plastics, painter, printer, rayon, steel, transportation, foundry, scrap metal)

Medical & Mental Health History

- Kind of health care child/family received (ER, doctor, clinic)
- Injuries, accidents, illnesses, including during childhood
- Head trauma (blows, car accidents, falls, sports injuries)
- Fevers, headaches
- MRI, CAT scan, PET, EEG, x-ray of head, neuropsych or psych testing
- Hospitalizations
- Emergency room visits
- Alcohol/drug use
Sample Q: Tell me about the first time you ever used drugs or alcohol?
- Alcohol/drug treatment (where, when)
- Mental health evaluations (court-related or otherwise)
- Mental health treatment (where, when, who treated)
- Medications

Military History

- Ever rejected for military service
- Name, branch, and dates of service
- Highest rank obtained & rank at discharge
- Type of discharge
- Significant military experiences
Sample Q: What stands out to you when you remember being in the Army?
- Vaccinations, overseas experience, special training
- Veteran's care, post-military trauma or illness

Court History

- Prior juvenile or criminal charges (jurisdiction, disposition, name of attorney, date of offense, date of arrest, character of offense, length and place of incarceration or juvenile placement, name of parole/probation officer)
- Prison and/or probation record (disciplinary record, compliance with rules, ever granted privileges, work history, participation in programs, ever evaluated or treated, medications administered, noteworthy relationships)
- Plaintiff or defendant in civil case
- Witness in any court proceeding
- Bankruptcy proceedings
- Child support proceedings
- Paternity proceedings

Contact with Government Agencies

- Arrests, other police contact
- Benefits (food stamps, disability, unemployment, social security)
- Child welfare
- Veteran's Administration
- INS or ICE

Employment History

- Employment record (name, address, supervisor, dates of employment, reasons for leaving)
- Problems with employers/co-workers
- Lengthy periods of unemployment (why, collect benefits)
Sample Q: What did you do when you weren't working? How did you pay the bills?
- Worker's compensation claims

Religious Background/Community Activity

- Attendance as child/adult (where, name of church, personnel, activities)
- Other community groups/service

Hobbies

- What client likes to do in spare time

Friends & Family

- Name, age, address of parents, step-parents, grandparents, siblings, and other relatives
- Name, age, address of friends or mentors
Sample Q: Who are your three best friends/favorite teachers/closest family members?
- Nature and quality of relationships with friends
- Name, age, address of boyfriends/girlfriends, current & former spouses
- Nature and quality of relationships with "significant others"

- Family/caretaker ever diagnosed (or treated or suspected) with mental illness, other illness, injury
- Family/caretaker have seizures, memory loss, uncontrolled temper/rages, “crazy behavior,” signs of retardation, etc.
- Use of drugs/alcohol by family member/caretaker
- Criminal records of family/friends
- Court involvement of family/friends
- Family/caretaker receive government benefits, have contact with child protective services or other social service agency

APPENDIX B: RELEASE FORMS**AUTHORIZATION FOR DISCLOSURE OF PROTECTED HEALTH INFORMATION**

Patient's Name: _____

Social Security Number or Patient Record Number: _____

1. I authorize the following person(s) and/or organization(s) to discuss and release any and all materials pertaining to my medical care, including but not limited to all past, present and possible necessary future medical treatment:

Name: _____

Organization(s): _____

Address: _____

with the following person(s) and/or organization(s):

Name: _____ Title: _____

Address: _____ Phone _____

Fax _____

for the following purposes: _____.
 (Describe purpose—may include “at my request” if authorized by individual on whom PHI is kept)

2. The authorization herein granted is for permission to discuss and release my recorded (in any form) or oral health information, including, but not limited to, any or all records regarding my past, present, or future physical or mental health, condition, or treatment (i.e. drug abuse treatment records, drug therapy records, reports of physical and/or mental disorders, reports of psychiatric treatment, psychiatric records, and prescribed medication records). This includes records that the disclosing person(s) and/or organization(s) received from another health care provider, where redisclosure is not prohibited.
3. This authorization will expire on: _____
 (Expiration date/event, which may be no longer than one (1) year)
4. I understand that I may revoke this authorization in writing at any time except to the extent that the disclosing person(s) and/or organization(s) has(have) already taken action in reliance on this authorization.
5. I understand that information disclosed pursuant to this authorization, may be redisclosed by the

recipient and no longer be protected by the Standards for Privacy of Individually Identifiable Health Information, set forth at 45 C.F.R. Parts 160 and 164. I hereby authorize [my attorney] to redisclose my medical records as needed for use in: _____.
(Provide case name and number)

- 6. I understand that this authorization is voluntary. I understand that my treatment, payment for my health care, and enrollment or eligibility for benefits will not be affected if I do not sign this form.
- 7. A photocopy of this release may be honored. You may discuss fully my health record with [my attorney] by facsimile or mail.

Signature of Patient or Patient’s Representative

If Patient’s Representative: Relation To Patient

Date

Patient’s Name (Please print)

Patient’s Date of Birth

AUTHORIZATION FOR DISCLOSURE OF EMPLOYMENT/PERSONNEL RECORDS

Employee's Name: _____

Social Security Number or Patient Record Number: _____

1. I authorize the following person(s) or organization(s) to disclose any and all records maintained in my employment personnel file:

Name: _____

Organization(s): _____

Address: _____

to the following person(s) and/or organization(s):

Name: _____ Title: _____

Address: _____ Phone: _____

Fax: _____

for the following purposes: _____.

(Describe purpose—may include “at my request” if authorized by individual on whom PHI is kept)

2. The authorization herein granted is for the release of any and all records maintained in my employment personnel file, including but not limited to employment applications and qualification verification, written test results, physical fitness test results, oral interview records or notations, background investigation records, security clearance records, payroll/benefit information, performance appraisals/reviews, attendance records, protected medical and mental health information, drug testing results, disciplinary actions or commendations, training records, correspondence (via email or otherwise), photographs, supervisor/co-worker complaints or positive recognitions, as well as termination or resignation documentation. This includes records that the disclosing organization received from other organizations, including but not limited to health care providers, where redisclosure is not prohibited.
3. This authorization will expire on: _____
(Expiration date or event, which may be no longer than one (1) year)
4. I understand that I may revoke this authorization in writing at any time except to the extent that the disclosing organization has already taken action in reliance on this authorization.

- 5. I understand that information disclosed pursuant to this authorization, may be redisclosed by the recipient and no longer be protected by the Standards for Privacy of Individually Identifiable Health Information, set forth at 45 C.F.R. Parts 160 and 164. I hereby authorize [attorney] to redisclose my medical records as needed for use in:

(Provide case name and number)

- 6. I understand that this authorization is voluntary. I understand that my medical treatment, payment for my health care, and enrollment or eligibility for benefits will not be affected if I do not sign this form.

- 7. A photocopy of this release may be honored. You may send copies of my employment/personnel records, which may include protected health records, by facsimile or mail.

Signature of Employee or Employee's Representative

If Employee's Rep.: Relation To Employee

Date

Employee's Name (Please print)

Employee's Date of Birth

AUTHORIZATION FOR DISCLOSURE OF PSYCHOTHERAPY NOTES

Patient's Name: _____

Social Security Number or Patient Record Number: _____

1. I authorize the following person(s) and/or organization(s) to disclose my protected health information:

Name: _____

Organization(s): _____

Address: _____

to the following person(s) and/or organization(s):

Name: _____ Title: _____

Address: _____ Phone: _____

Fax: _____

for the following purposes:

(Describe purpose—may include “at my request” if authorized by individual on whom PHI is kept)

2. The authorization herein granted is for the release of my psychotherapy notes recorded (in any medium) by a health care provider who is a mental health professional, documenting or analyzing the contents of conversations during a private counseling session or a group, joint, or family counseling session. This includes records that the disclosing person(s) and/or organization(s) received from another health care provider, where redisclosure is not prohibited. This authorization does not cover the disclosure of psychotherapy notes, or parts of psychotherapy notes, that relate to and identify other persons in group or family therapy absent authorization from those identified persons or their representatives.

3. This authorization will expire on: _____
(Expiration date or event, which may be no longer than 1 year)

4. I understand that I may revoke this authorization in writing at any time except to the extent that the disclosing person(s) and/or organization(s) has(have) already taken action in reliance on this authorization.

5. I understand that information disclosed pursuant to this authorization, may be redisclosed by the recipient and no longer be protected by the Standards for Privacy of Individually Identifiable Health Information, set forth at 45 C.F.R. Parts 160 and 164. I hereby authorize [attorney] to redisclose my medical records as needed for use in:

(Provide case name and number)

6. I understand that this authorization is voluntary. I understand that my treatment, payment for my health care, and enrollment or eligibility for benefits will not be affected if I do not sign this form.

7. A photocopy of this release may be honored. You may send copies of my health record to by facsimile or mail.

Signature of Patient or Patient's Representative

If Patient's Representative: Relation To Patient

Date

Patient's Name (Please print)

Patient's Date of Birth

**AUTHORIZATION FOR DISCLOSURE OF PROTECTED
CHILD WELFARE INFORMATION**

Subject's Name: _____

Social Security Number is: _____

1. I authorize the following person(s) and/or organization(s) to disclose my protected child welfare information:

Name: _____

Organization(s): _____

Address: _____

to the following person(s) and/or organization(s):

Name: _____ Title: _____

Address: _____ Phone: _____

Fax: _____

for the following purposes:

(Describe purpose—may include “at my request” if authorized by individual on whom PHI is kept)

2. The authorization herein granted is for the release of my recorded (in any form) or oral child welfare information, including, but not limited to, any and all records, including, but not limited to, notes, consultations, memoranda, and/or reports of child abuse, child neglect, malnutrition, child abandonment, emergency medical care, parent-child or family counseling or mediation, emergency child placements in temporary or permanent foster care or other settings, correspondence with schools and/or child care programs regarding disciplinary and/or related issues, recommendations and/or approvals for income-gap or other financial assistance, professional referrals to other agencies, and other records pertaining to_____.

3. This authorization will expire on: _____
_____ (Expiration date or event, which may be no longer than one (1) year)

4. I understand that I may revoke this authorization in writing at any time except to the extent that the disclosing person(s) and/or organization(s) has(have) already taken action in reliance on this authorization.

5. I understand that information disclosed pursuant to this authorization, may be redisclosed by the recipient and no longer be protected by the Standards for Privacy of Individually Identifiable Health Information, set forth at 45 C.F.R. Parts 160 and 164. I hereby authorize [attorney] to redisclose my child welfare records as needed for use in:

(Provide case name and number)

6. I understand that this authorization is voluntary.

7. A photocopy of this release may be honored. You may send copies of my health record by facsimile or mail.

Signature of Subject or Subject's Representative

If Subject's Representative: Relation To Subject

Date

Subject's Name (Please print)

Subject's Date of Birth

AUTHORIZATION FOR RELEASE OF INFORMATION OF DECEDENT

I, [client] , hereby authorize my agent, [attorney] , to request and receive any and all documents, reports or information relating in any manner to my relative, [name of relative] (deceased). I further release custodians and possessors of such information from any and all liability for its disclosures to my agent. The authority herein granted includes, but is not limited to, educational, employment history, credit, financial, drug abuse, treatment, drug therapy, medical reports of physical and/or mental disorders, psychiatric treatment, psychiatric records, prescribed medication, Internal Revenue Service, Selective Service, Military, Veterans Administration, and law enforcement information. The authority includes, but is not limited to, the inspection, copying, and receipt of documents, photographs and all other written or recorded information and the receipt of oral information.

I hereby request that all persons cooperate fully in providing [attorney] such information. A photostatic reproduction of an executed copy of this "Authorization for Release of Information" will accompany any request for information or documents.

Date: _____

Patient Name

Patient SSN: _____

Patient DOB: _____

Patient DOD: _____

Signature of [Client]

Printed Name

Witness: _____
Print Name

APPENDIX C

QUICK GUIDE TO INTERNET RESOURCES

This Guide is intended to give readers a sense of the internet resources that address issues of concern to defenders, including sentencing mitigation. It is by no means exhaustive, but hopefully will get readers started on productive research paths.

<http://circuit9.blogspot.com> (Circuit by Circuit blogs—insert your Circuit’s number)

Searchable blogs organized by circuit tracking recent case law and offering litigation strategy. The most developed of these is www.circuit9.blogspot.com, which has much useful information even for practitioners outside of the Ninth Circuit.

www.criminaljustice.org (National Association of Criminal Defense Lawyers website)

Features free, searchable archive of articles from *The Champion*, an excellent resource for practice guides on all areas of litigation.

www.fd.org (Defender Services Training Branch website)

Includes publications, practice guides, sample briefs, and internet links on a variety of topics from appeals to firearms cases to sentencing.

www.sentencingproject.org (The Sentencing Project website)

Provides criminal justice policy analysis, data, and program information. Focuses on over-incarceration and prison alternatives.

www.ussc.gov (United States Sentencing Commission website)

Searchable site offering all sentencing guideline manuals, commentary, and minutes from debates. Also includes all Commission reports, including the recent *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing*. Offers updated sentencing statistics for each circuit and district.

<http://sentencing.typepad.com/> (“The Berman Blog”)

A comprehensive, searchable national blog following all manner of *Booker* issues. Includes sentencing mitigation case law and commentary and links to many useful websites and blogs.

www.usdoj.gov (United States Department of Justice Website)

Searchable site makes available many federal government agency reports on issues relevant to sentencing, many of which actually rebut common assumptions about crime and defendants. Includes links to the Bureau of Justice Statistics website (www.ojp.usdoj.gov/bjs), which contains useful data on such topics.

www.bop.gov (Bureau of Prisons Website)

Contains information about Bureau of Prisons policies and programs as well as an inmate locator, to help you find your clients. Searchable.

www.pubmed.gov (National Library of Medicine website)

Searchable database provides over sixteen million citations to scientific and medical journals, including links to full-text articles. A good place to research mental health or medical mitigators. Also a good place to locate experts.

www.afte.org (National Association of Firearm & Toolmark Examiners website)

A good resource for locating information about firearms examination and crime lab standards. Searchable.

www.groups.yahoo.com/BOPWatch (“BOPWatch”)

Yahoo group devoted to understanding and monitoring BOP policies and practices. Great source for answering tricky questions about BOP. Join the group for regular email updates and to access searchable archives.

www.vera.org (Vera Institute website)

Research on topics like the relationships (or lack thereof) between race, immigration, youth, sentencing, and crime. Searchable.

www.cwla.org (Child Welfare League of America website)

Child welfare organization that offers information on child protection, juvenile justice, mental health, housing and homelessness, domestic violence, and other issues that infuse our cases. Also offers information about the impact of incarceration on the children of our clients and on parenting from prison. Searchable.

www.justicepolicy.org (Justice Policy Institute Website)

Reports addressed at ending reliance on incarceration and providing rehabilitation and other alternatives. Recent report on drug treatment vs. incarceration.

www.nlada.org/defender (National Legal Aid and Defender Association website)

Offers practice tips, a forensics library, an immigration work-group, and resource lists for locating experts. Also a good place to locate mitigation specialists.

APPENDIX D

WRITING A CHARACTER LETTER

You are being asked to write a character or reference letter for [Client]. [Client] has [pled guilty to] [been convicted of] a crime. Your letter may be of great importance in obtaining fair and just treatment for him. I have set out a few pointers on character letters below.

HOW TO START YOUR LETTER

Your letter should be addressed to:

The Honorable Judge
United States District Judge
c/o [Attorney's address]

The letter must be easily readable. If you can type the letter, please do. Otherwise, please write as neatly as possible. Your letter should include your address at home or work, whichever you prefer. Please sign the letter in ink.

NOTE: **Although your letter is addressed to the Judge, it should be forwarded to [Attorney], at the above address.**

IDENTIFY YOURSELF

The best character or reference letters often begin by saying who the writer of the letter is and what he or she does. You should also explain how long and under what circumstances you have known [Client]. What is your relationship to [Client]? How well do you feel you know him? It is important for the Judge to see that you have some basis for stating an opinion about [Client].

TELL THE FACTS ABOUT [Client]

At this point, you should give your honest opinion as to [Client]'s character. Some of the areas that you may want to discuss are listed below:

1. Is he a thoughtful person? Do you know of any kindness he has shown toward others? Does he have good relationships with his friends and family?

2. Is he a productive member of society? Do you feel that he will be a productive member of society after this case is over?
3. Do you believe that this offense is out of character for [Client]? Is it unlikely he will violate the law in the future? Why do you think so?
4. Has [Client] been a hard worker and loyal employee? Does he show career promise?
5. Do you think that this experience has taught [Client] any lessons? What lessons and why?

These are just suggestions. You should write about whatever you think is most important.

THERE IS NO REASON TO IGNORE THAT A CRIME WAS COMMITTED

There is no need to ignore the fact that [Client] has been charged with a violation of the law. If you believe his character is basically good despite your hearing of a charge against him, then you should not hesitate to say so.

I have found that you can most effectively express yourself if your letter not only states your opinion, but also explains why you hold that opinion. It is often very helpful to include an example of some praiseworthy incident or conduct by [Client] that you have witnessed or heard of to show how he has behaved well in the past.

Naturally, all of the above suggestions are very general. If you have any questions, please feel free to telephone [Attorney] at [phone number]. Thank you for your help.