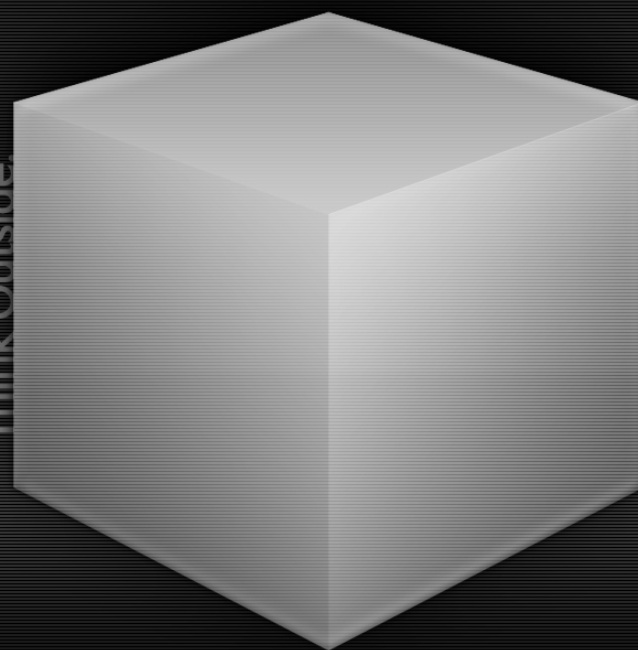


Developing Persuasive Theories and Themes

Think Outside.



**Sentencing Advocacy Workshop
Administrative Office of the U.S. Courts
Office of Defender Services Training Branch**

**DEVELOPING A SENTENCING THEORY
AND A PERSUASIVE STORYLINE
FOR SENTENCING ADVOCACY**

Materials developed by:
Ira Mickenberg, Esq.
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
FAX: (518) 583-6731
iramick@worldnet.att.net

Materials modified by:
Office of Defender Services Training Branch

I. Why Do We Win (or Lose) Cases?

Our job as sentencing advocates is to persuade judges (or in some states, jurors) to impose a favorable sentence on our clients. Even though these judges are not social workers, and are often more cynical than the average person, we often assume that the judge will be persuaded by the same ideas and language that appeal to us. For example, many sentencing advocates and defense attorneys act as if phrases and concepts such as “mental retardation,” “broken home,” and “dysfunctional family” will persuade a judge to impose the sentence we want. We believe that if we can just stress these ideas enough, the judge will “get it,” and we will earn the sentence we deserve. This is a serious mistake

To sentencing judges, words like “mental retardation,” and “dysfunctional family” are buzzwords that really mean, “He did it, but he’s really screwed up.” Judges do not care whether the defendant has had a difficult life. For sentencers, the key questions are:

- (1) If I let him out, will he commit more crimes?
- (2) If I send him to jail, how long should I keep him there?
- (3) How can I justify my sentence to the public, which has been trained to demand the harshest possible penalty for everybody who commits a crime?

In short, judges impose sentences based upon whether they believe the defendant is factually deserving of that sentence. As sentencing advocates, how then can we prepare pre-sentence reports, and testify at sentencing hearings in a way that will persuade the court to answer these questions favorably to our clients?

Good defense lawyers know that to effectively litigate the guilt/innocence portion of a trial, they need a theory of defense that will explain why their client is not guilty, and will answer any questions the jurors may have about the evidence. The key successful sentencing advocacy is to adopt the same technique for litigating issues of punishment. We must devise a theory of defense for sentencing that addresses these questions in particularized, factual terms. We must then use that theory of defense as a guide to litigating every aspect of sentencing.

II. What is a Sentencing Theory?

A paragraph of four or five sentences that summarizes the factual, emotional, and legal reasons why the court should impose a favorable sentence. It tells your client’s story of mitigation, rehabilitation, or reduced culpability, and it resolves any problems or questions the judge may have about imposing the sentence you want.

Let’s look at what this definition really means for putting together a sentencing case:

A. A Sentencing Theory is a paragraph . . .

It is important to actually go through the exercise of writing out your sentencing theory paragraph. Often we assume that we know our sentencing theory, when we really have no more than a generalized idea of what it is and of how we are going to use it to solve problems at sentencing. Forcing yourself to articulate the theory on paper will ensure that you know exactly what your theory is.

Also keep in mind that your sentencing theory paragraph is not something you will file with the court or read to the judge. It is a tool you have created to guide you as you plan the tactics and strategy you will use at sentencing.

B. A Sentencing Theory is factual

The most important aspect of a sentencing theory is that it is factual. Judges, like all people, are persuaded by factual arguments. A good sentencing theory will take into account all of the facts of your client's life. It will help you figure out ways of highlighting the most favorable facts, and dealing with the supposedly unfavorable facts.

It is essential to realize that a sentencing theory is not a collection of buzzwords or interchangeable gimmicks. It is different for every case, and is dictated by the facts of each individual case. For example, the following are **NOT** sentencing theories of defense:

Poverty
Mental Retardation
Single-parent family
Homelessness

While each of these phrases conjures up certain images in the mind of the sentencing advocate and defense lawyer, they have no real meaning for the judge. They certainly say nothing about whether your particular client should be put on probation or sent to prison, or why the court should take any particular view of your case.

By contrast, the following is an example of a good theory of defense paragraph for a homicide case, where the defendant was charged with shooting a man who was beating up the defendant's brother in a bar fight:

Michael K is 26 years old, employed, and has no prior record. He lives with his 19 year old brother, Bobby who Michael has cared for ever since their parents died 7 years ago. Unlike Michael, Bobby has had a trouble life, and has a drinking problem. On the night of the crime, a friend told Michael that his brother was drinking in a local bar. Michael went to the bar, to make sure his bother did not get in trouble. Two or three times, Michael intervened in arguments that Bobby got into, and

tried to get Bobby to leave. When the bouncers wanted to throw Bobby out, Michael again intervened, and convinced his brother to leave with him. Bobby stayed in front of the bar while Michael went to get his truck, which he parked in a lot across the street. When Michael arrived with the truck, Bobby was fighting with two much larger men. Michael tried to break up the fight, could not. He then went to the truck and got his gun. He fired four times at the men, hitting and killing one of them. After the shooting, and before he turned himself in the next morning, Michael went to his minister, and asked to pray with him for the life of the man who was shot. Because he repeatedly tried to play peacemaker, did not want to kill anyone, and was trying to defend his brother, and only shot as a last resort, Michael is deserving of the minimum sentence for manslaughter.

Note that this paragraph is almost purely factual, and provides excellent guidance about how defense counsel will have to deal with:

(1) the facts that it will be important for the defense to introduce (the events of the crime that show a reluctance to use violence; the defendant's lack of a record and history of taking care of his brother); and

(2) the facts that the defense must be prepared to neutralize (that the defendant had a gun at the ready, that he fired four times).

C. A Sentencing Theory of Defense is emotional . . .

Every sentencing theory must be driven by emotional themes. By emotional themes, we mean fact-based reasons that will make the judge *feel* that it is doing the right thing by leniently sentencing your client. The emphasis here is on *feeling*. In most instances, an emotional theme is something that makes the judge aware of an injustice that is being done to the defendant, or of unfairness in the way the case was investigated or prosecuted. In the Susan Smith child drowning case, for example, a major emotional theme of the sentencing was that the defendant was an abused, emotionally distraught woman, who had simply reached the end of her tether. Some of the emotional themes worked into the Michael K theory are:

(1) That the defendant was the peacemaker, and did everything possible to avoid violence.

(2) That the defendant is a responsible person, caring for his brother alone since their parents died, and still looking out for his troubled brother today.

D. A Sentencing Theory of Defense tells a story . . .

Authors, journalists, and educators have long known that the best way of persuading people is with a compelling, factual story. Sentencing advocates and lawyers must consciously adopt this technique. A good sentencing theory tells a moving story that explains how and why your client should get the sentence you are requesting. By telling this story, the theory of defense

also guides you to the facts and evidence that you will need to tell that story at trial, and to persuade the judge to accept your recommendation.

When you begin to think about how to present your client's case, consciously ask yourself how to tell it as a story. Although there are many things that go into telling a story effectively, begin by concentrating on these three factors:

(1) Who are the characters in this story, and how will I portray them?

(2) Where is the story set? Where do the scenes take place?

(3) In what sequence should I tell this story? Where does it start? Where does it end? Remember, you don't always have to tell it in the chronological order of the client's life, criminal history, or events of the crime.

Bear in mind that the language you use for your story is crucial to developing a sentencing theory that the court will accept. Do not use pretentious "social work-speak" or "legalese." Use short sentences. Use graphic, colorful language. For example, in the Michael K theory of defense, the phrases "peacemaker," and "took care of his troubled brother," are graphic ways of communicating the core of your defense, and are much more persuasive than talking about "absence of criminal intent," "no-parent home," or "failed defense of others."

E. A Sentencing Theory resolves problems and questions judge may have . . .

The sentencing theory addresses all of the facts of your case. It does not ignore the other side's case, or pretend that the court will ignore it. This permits you to figure out a way to deal with the State's case, and to explain the so-called "negative" facts in a way that makes them fit within your theory, or even support your theory.

III. A Sentencing Theory of Defense is Dynamic and Co-operative

A. Your sentencing theory will change as you investigate, obtain discovery and learn more about the facts of your client's life. This is OK. You should adapt your theory as you become more knowledgeable about your client's life story. Remember, sentencing theory is not a goal in itself -- it is a means of achieving your ultimate goal of a favorable sentence.

B. Don't try to develop your sentencing theory by yourself. Consult with others. Show it to other people, particularly non-lawyers, and ask them if it is believable. Ask them what parts of your theory they have difficulty accepting. Remember, the purpose of the sentencing theory is to persuade judges, not social workers or defense lawyers. Listen to the opinions of others, and enlist their help in developing and improving your theory of defense.

IV. How You (and the Defense Lawyer) Can Use Your Sentencing Theory

The sentencing theory should be used to guide every aspect of your sentencing advocacy:

1. What do you need to investigate further?
2. What experts will be needed?
3. What pre-sentencing motions does the lawyer need to make?
4. What should be the focus of your pre-sentence report?
5. What witnesses should the defense call at the sentencing hearing, and what should they be asked?
6. What should your testimony be at the sentencing hearing? In what sequence should you say it?
7. What should the State's witnesses at the sentencing hearing be cross-examined about?
8. What objections should the defense be prepared to make to the State's evidence and arguments at the sentencing hearing?
9. What objections by the State must defense counsel be prepared to meet in order to make sure that you can introduce the evidence you need to establish your sentencing theory.