

SENTENCING ADVOCATES ENHANCE REASONED COURT DECISIONS

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Abstract

The role of the sentencing advocate may vary by jurisdiction and by local court practices, but most often sentencing advocates assist counsel by conducting an investigation of the background and circumstances of the client, including an examination of the factors contributing to the client's involvement in the offense and developing a sentencing plan that addresses the various goals of sentencing as well as the needs of the client. Judges look at such factors as the defendant's background and circumstances; prior criminal history and correctional experiences; the nature and circumstances of the offense, including the aggravated nature of the offense; the degree of the defendant's culpability; acceptance of responsibility and remorse; the rights of the public; and the treatment and rehabilitative needs of the defendant.

Full Text

Sentencing is the most neglected part of the criminal case, often ignored both by defense attorneys and by prosecutors until it is too late - after the guilty verdict has been returned or the plea agreement negotiated. Sentencing factors are seldom used by defense attorneys to negotiate plea agreements with the prosecution. And when little time is spent preparing for sentencing, defense attorneys and prosecutors often rely on information and recommendations in the presentence report without verification or augmentation.. Sentencing advocates are specialists whose knowledge, experience, and expertise focuses on available and practical sentencing alternatives and on gathering and analyzing historical facts relevant to sentencing. The sentencing advocate can play an important role in achieving fair and costeffective sentencing.

With more than two million citizens incarcerated nationally at huge expense to the states and the federal government, one of the promising changes proposed by many experts is greater implementation of alternatives to incarceration. (The 2009 Criminal Justice Coalition, Smart on Crime: Recommendations for the Next Administration and Congress, November 2008, available at <http://www.brennancenter.org>.) Although increasing the number of programs available to courts is a key element in making this change, it is also necessary to provide information to courts so they can make reasoned and effective sentencing decisions about defendants. An important source for this information is the defense-based sentencing advocate.

Role of the Sentencing Advocate

The sentencing advocate is a member of the defense team and an agent of the attorney. The role of the sentencing advocate derives from the duty of counsel to render zealous and effective representation to clients at all stages of the criminal justice process, including at sentencing. The sentencing advocate gathers and analyzes information and develops a sentencing plan so that counsel may take all reasonable steps available to enhance the possibility of a final disposition most favorable to the client. Through the sentencing advocate's investigation, counsel is able to ensure that the sentencing decision is based on accurate and complete information, and that all reasonably available mitigating and favorable information is presented to the court. (ABA Standards for Criminal Justice, Defense Function, (3rd ed. 1994), available at www.abanet.org.) The sentencing advocate develops a specific plan that counsel presents to the court. This plan might include recommendations regarding employment, education, job training, treatment, residence, restitution, and community service. In some cases, the plan may include a period of jail or prison time based on the seriousness of the offense, any prior offense history, and the need to protect the community. At the inception of the case, the attorney and the sentencing advocate discuss and define the roles and responsibilities that the sentencing advocate will perform in the case.

Sentencing advocates, working on behalf of clients at the request of counsel, have the knowledge, training and skills, not generally possessed by attorneys, to investigate the client's background and circumstances, assess the client's need for treatment and rehabilitation services, and develop appropriate sentencing plans. Competent sentencing advocates have an understanding of human development, including factors that influence personality and behavior. They have the ability to identify indicators of significant factors such as mental and cognitive impairments; substance abuse; and child maltreatment, including sexual, emotional, and physical abuse and neglect. Sentencing advocates understand the role that environment plays in influencing the development and behavior of the individual and provide details about the client's specific circumstances. For example, a defense attorney might make a sentencing argument that lack of job opportunities contributed to the criminal conduct of a particular defendant. This argument can be enhanced by the sentencing advocate providing detailed, documented information about the specific community including unemployment rates, job discrimination, and lack of public transportation. Other types of environmental factors that might be presented include poverty rates, exposure to violence, poor public schools, and exposure to neurotoxins in the specific community in which the client lived.

The role of the sentencing advocate may vary by jurisdiction and by local court practices, but most often sentencing advocates assist counsel by conducting an investigation of the background and circumstances of the client, including an examination of the factors contributing to the client's involvement in the offense and developing a sentencing plan that addresses the various goals of sentencing as well as the needs of the client. The advocate conducts interviews with the client and other significant persons in the client's life, locates and obtains relevant records, and identifies the need for expert assessments. The sentencing advocate may assist in locating appropriate experts and in providing social history information to enable the expert to conduct a competent and reliable evaluation. Among the types of experts that might be retained are psychologists, psychiatrists, neuropsychologists, substance abuse experts, trauma, and abuse experts. Based on an analysis of the information obtained, the sentencing advocate identifies the client's need for treatment and rehabilitation services, and develops a plan for services, including making referrals to appropriate programs. The sentencing advocate may prepare a report with relevant background information, findings, and recommendations that provides guidance to courts in the sentencing decision.

The plan and report of the sentencing advocate takes into account the goals of sentencing and factors that the court must consider in determining the sentence. In general, the goals of sentencing include general and specific deterrence, incapacitation, retribution, and rehabilitation. In determining a specific sentence, the court must consider the seriousness of the offense, the protection of the public, and the needs of the defendant. In most cases, courts are now required to consider the impact of the offense on victims. Judges look at such factors as the defendant's background and circumstances; prior criminal history and correctional experiences; the nature and circumstances of the offense, including the aggravated nature of the offense; the degree of the defendant's culpability; acceptance of responsibility and remorse; the rights of the public; and the treatment and rehabilitative needs of the defendant.

Most jurisdictions have provisions for conducting formal presentence investigations, generally by probation or parole officers. The courts give consideration to the information contained in these reports and the recommendations made in determining the appropriate sentence. Counsel has a duty to ensure that information in the presentence report is adequate, accurate, and relevant. Presentence reports often follow the defendant into the criminal justice system. They are provided to correctional facilities and probation and parole offices, and can affect classification and placement, level of security, and access to programs within the correctional system. Counsel should verify, corroborate, challenge, and mitigate information in the report. This can only be done if counsel conducts, or has someone else conduct, an independent investigation. In some cases, the person conducting the presentence investigation may be open to input from counsel, and may even agree to include information provided by defense counsel in the official report. It is the sentencing advocate who is best able to gather the information that enables counsel to fulfill these obligations.

The following example illustrates the role the sentencing advocate plays in achieving an informed and balanced sentencing decision.

Darla Wilson was 17 years old when she was charged with selling cocaine. Through interviews and records, the sentencing advocate learned that from age three to seven, Darla and her mother lived with her mother's boyfriend who was abusive toward Darla. When Darla was seven, her mother left the boyfriend and they moved into a shack without running water and electricity. The shack was located in a rural agricultural area where toxic chemicals were spread on the fields. Darla did not attend school regularly because she had no clean clothes. The school had no counselors or social workers and no special education services, so Darla's learning disability was not addressed and her unhealthy home environment was not discovered. When Darla was 14 she and her mother moved to a housing project in a poor urban neighborhood where she was exposed to crime, violence, and drugs on a daily basis. She soon dropped out of school. Darla began using drugs to self-medicate her undiagnosed depression. She then began selling drugs to pay for her own use.

While the case was pending, Darla turned 18 and the sentencing advocate helped Darla apply for disability. As part of the disability assessment, Darla was evaluated by a psychologist who diagnosed Darla as being depressed and learning disabled.

The sentencing advocate prepared a report linking Darla's poor school performance to her early childhood experiences and the lack of services in her school. The sentencing advocate also presented information about Darla's urban neighborhood, including reports by neighbors about teen activity in the housing project and the availability of drugs, especially for teens who drop out of school. The report included interview summaries of several neighbors who said they knew Darla was a drug user but expressed surprise that Darla was selling drugs. One neighbor said he believed that Darla was not savvy enough to be a drug dealer and that she was not a major player in the drug trade.

Because of Darla's disability, she qualified for educational services and she enrolled in a GED program through her school district. The sentencing advocate arranged for transportation to the program. The sentencing advocate referred Darla to a free clinic that could treat her depression with medication and counseling. The sentencing advocate also found a women's residential program that provided drug treatment and described the program in the court report. Because of Darla's interest in animals, the sentencing advocate arranged for Darla to work at the animal shelter and recommended to the court that Darla complete 40 hours of community service.

The judge placed Darla on probation with three months' jail time that could be served in the residential program. He ordered that Darla either remain in school or work and that she participate in drug treatment. He also ordered that Darla complete 40 hours of community service. Darla successfully completed probation and now has her GED. She continues to work part-time at the animal shelter.

Duties of the Sentencing Advocate

At the inception of the case, the sentencing advocate obtains information from counsel regarding the charged offense, the evidence in the case, the range of potential dispositions, and the current circumstances of the client. Early involvement of the sentencing advocate can facilitate the development of a plan for pretrial release. This enables the client to get involved in programs and services, including treatment, work, education, or training that may enhance the likelihood of probation as a final disposition. Even if the client is not released, it is sometimes possible to obtain services in the jail, and referrals for programs in the community can be made prior to sentencing.

The sentencing advocate interviews the client to obtain detailed social history information and to identify additional sources of information. Information obtained may include early developmental history; family structure and relationships; health history, including mental health; residential history; educational history; significant relationships, including spouse or significant other and children; employment or training; significant developmental experiences; alcohol and drug history; prior criminal or juvenile offense history; prior correctional experiences; and military history. The social history investigation may include exploring such areas as cultural and environmental factors, religious influences, trauma, exposure to violence in the community, and sexual development and behaviors.

The sentencing advocate also interviews collateral sources to supplement and corroborate the information obtained from the client. These sources may include immediate and extended family, teachers and educational staff, employers and coworkers, health care providers, military officials, correctional staff, and treatment providers. The sentencing advocate locates and reviews records. While some records may be obtained from the attorney as part of discovery materials, other records must be obtained from other sources. Some sources of records that may be relevant are criminal and juvenile courts, probation departments, hospital and clinics, schools, social services agencies, places of employment, the military, jails and prisons, and treatment centers. Sentencing advocates should be familiar with procedures and requirements to obtain records, including use of release forms or subpoenas, HIPAA requirements for health records, and FOIA requests.

When cases present unique issues such as cultural influences, trauma-based issues, or childhood developmental issues, these special issues should be researched and documented by the sentencing advocate through review of literature, record review, or collateral interviews. In some cases, an expert in a specialized area, such as mental or cognitive impairments, trauma, substance abuse, or cultural influences, may be retained by counsel. The sentencing advocate is often instrumental in identifying the need for expert evaluations, and providing social history information to the expert to enable the expert to conduct a valid and reliable assessment.

The sentencing advocate analyzes the information obtained and maintains ongoing consultation with counsel, keeping counsel informed of results of the investigation and the implications of findings for case strategy. The sentencing advocate develops a sentencing plan that addresses relevant issues and reduces the potential risk of reoffending. This plan usually includes rehabilitative treatment, restitution, community service, supervision, and appropriate and

constructive consequences to foster offender accountability. In some cases, incarceration is necessary to ensure the safety of the community or to address the seriousness of the offense. Sentencing advocates can provide courts with information that will assist the courts in differentiating between those defendants who require incarceration, and those who pose limited risks to the community. In incarceration cases, they can assist courts in determining the sentence length necessary to achieve the goals of sentencing. Information presented can affect not only the length of sentence, but the level of security and conditions of confinement, including access to treatment and rehabilitative services. Sentencing advocates can also provide research on risk for reoffending as well as sentencing practices in other jurisdictions.

The format used to convey the results of the sentencing advocate's findings to the court is decided by counsel in consultation with the sentencing advocate. Formats frequently used are court report, sentencing memorandum, record summary, and/or testifying. The court report generally includes a description of the offense and circumstances surrounding the offense, social history, an assessment, and a sentencing plan. A court report is often used when the presentence report is not available, is inadequate, contains inaccurate information, or when the case requires significant explanation regarding many aspects of the client's life. A sentencing memorandum is a report on a specific aspect of the case that is relevant to sentencing. A sentencing memorandum sometimes includes footnoted research and literature summaries. A sentencing memorandum is frequently used when the court has accurate information about the client's background but may need additional information about a specific issue that is relevant to the sentencing decision. Record and interview summaries are reports written by the sentencing advocate that summarize particular records or interviews. These reports are used when the information in the records or interviews explains an important aspect of the case and do not require interpretation by the sentencing advocate. On occasion, sentencing advocates do not prepare reports prior to sentencing and only provide testimony. This format is often used in cases that are uncomplicated and able to be decided fairly without prior consideration from the court.

The sentencing advocate should be brought into the case as early in the process as possible. This allows a more precise assessment of mental state at the time of the offense and allows the sentencing advocate to assist in monitoring and addressing bail conditions or conditions of confinement. Early referral increases exposure time to the client so that a relationship of trust and confidence may be built. Early referral allows the sentencing advocate sufficient time to complete interviews and obtain records, especially from sources that are significantly delayed in responding to requests. Early assessment may be helpful in referring clients to community and jail treatment programs, and in assessing the need for hiring other experts. The results of the sentencing advocate's investigation may be used in arriving at a negotiated settlement of the case.

From the time the sentencing advocate begins work on the case through sentencing, the sentencing advocate can assist the defense team in understanding the client's functioning and in communicating effectively with the client. In addition to providing information to courts at sentencing, the sentencing advocate may affect the client's conditions of confinement and secure placements and services while the case is pending.

Evolving Role of Sentencing Advocates

Although the role of the sentencing advocate continues to be grounded in the development of effective sentencing plans to present to the court, the work has evolved over the years. Because of the nonauthoritarian and noncoercive relationship between sentencing advocates and clients, sentencing advocates are in an excellent position to provide information to clients so they can make informed and responsible choices about their sentencing plans. They can discuss options with clients and provide information to clients about what is feasible in their cases based on their education and prior experience in other cases, their understanding of the clients' functioning, and upon their discussion with defense attorneys. They can engage others in the client's life in encouraging the client to make responsible and reasonable choices, both in their sentencing plans and in the changes necessary to remain crime-free.

Another role for the sentencing advocate that has evolved from the earlier days is that of providing the courts with research about specific client issues. With increased access to literature, sentencing advocates are able to research relevant topics in cases, such as risk of reoffense in sexual offender cases or the impact of cultural issues on offending, and present these findings to the court. Cultural issues include such areas as racial, religious, or ethnic influences. In particular cases a client's behavior may need to be understood in a cultural context.

The client, age 19, is charged in a restaurant robbery that he committed with several peers. The prosecutor is seeking a lengthy prison sentence based on several factors, including the client's past school problems, an unsuccessful stay in a juvenile institution, the presence of tattoos that are assumed to be gang-related, and his assault on an officer in the jail. The client is a Laotian refugee whose family was forced to flee their country when he was a young child, and who lived in a refugee camp before coming to the United States. The social history investigation reveals that the client was exposed to traumatic violence in the flight from Laos and in the refugee camp. The parents were depressed due to being forced from their homeland and separated from extended family. They never learned to speak English, and were unable to intervene in their son's behalf with the schools and juvenile justice system. The juvenile institution was based on the positive peer culture model, and the client repeatedly lost points for failure to make eye contact with adult staff, which is considered inappropriate in his culture. The tattoos were not gang-related. Rather, they were a manifestation of cultural beliefs in the "phi," or spirits, with the purpose of providing protection from harm. The assault on the officer in the jail was a reaction to being grabbed by the head by the officer. For the client, who is Buddhist, the head is a sacred part

of the body, and it is considered improper to touch or point at the head. The sentencing advocate provided important information regarding these cultural factors to counter the prosecution arguments for a lengthy sentence, and aid the court in understanding the client's behavior.

Recent work on brain development is another area of research that can be relevant to the sentencing decision. It is now understood that the human brain is not fully developed until a person is into their twenties. The male brain develops more slowly than the female brain. The last part of the brain to fully develop is the frontal lobe, which controls impulses, judgment, and decision making. Early childhood trauma can affect brain structure and development. This information is helpful in aiding the court to understand the motivations and behaviors of certain offenders. This increased knowledge about clients leads to more effective sentencing decisions based on the circumstances and characteristics of offenders.

Qualities of the Sentencing Advocate

The sentencing advocate must have an understanding of child and human development and the ways in which people are shaped by heredity, development, and their environment. The competent sentencing advocate has the training, knowledge, and skills to detect the presence of factors such as neurological impairments; cognitive impairments; physical, sexual, or psychological abuse; substance abuse; mental disorders; and other factors that influence the development of the client's personality and behavior. Sentencing advocates are skilled in addressing issues of denial, repression, shame, and a sense of privacy - factors that inhibit the ability to fully disclose critical information. The sentencing advocate should have the skills to document, develop, and analyze information in a manner that explains the client's behavior in light of the life history, including psychosocial and physical development. The sentencing advocate possesses the necessary knowledge and skills to assess what specific factors influenced the commission of the offense and how these factors can be addressed in a sentencing plan that will reduce the risk of reoffending. The sentencing advocate must be empathetic, nonjudgmental, respectful, flexible, and resourceful. The sentencing advocate must have integrity, be a good communicator, and have a strong commitment to improving sentencing decisions.

Issues

As the field of sentencing advocacy continues to evolve, some issues related to their role have surfaced.

Confidentiality. Communication between sentencing advocates and their clients is considered confidential and can only be revealed with the consent of clients. Because the source of the referral or retainer is the defense attorney, the sentence advocate is an agent of the attorney, and both the attorney-client and work-product protections of that relationship are extended to the sentencing advocate. The materials generated by the sentencing advocate are considered work

product and carry the same protections as the work of the attorney. When the sentencing advocate provides a report to the court or testifies, the information obtained by the sentencing advocate is no longer privileged, and may be disclosed and subjected to cross-examination.

Duty to Report Child Abuse. Some sentencing advocates, by virtue of their education, training, or title, are mandated reporters of suspected child abuse. When the sentencing advocate is brought into a case by counsel, he or she is an agent of counsel and subject to the same ethical responsibilities as the attorney. A conflict between the duty to report and the protected confidentiality of the client's relationship with counsel and defense team members can arise. While attorneys generally take the position that the privilege supersedes the duty to report, this matter has not been legally resolved. At the start of the case, counsel should inquire as to whether the sentencing advocate is a mandated reporter, determine the specific reporting requirements of the jurisdiction, and discuss how any conflict will be handled.

Witness for Prosecution. In most jurisdictions, the sentencing advocate may not be called by the prosecution, and may not be required to disclose confidentially obtained information without the client's consent. Counsel and the advocate should discuss discovery practices in the jurisdiction at the inception of the sentencing advocate's involvement in the case.

Licensure. "Sentencing advocate" is not a protected title and sentencing advocates are not required to possess a license at this time. Many sentencing advocates are social workers by training, and may be licensed as such. In recent years, active debates about the advantages and disadvantages of certification have occurred among sentencing advocates, but the issue of certification has not yet been resolved. In the absence of licensing or certification, counsel has a duty to fully investigate the background, training, and experience of the sentencing advocate. Counsel should consult with attorneys with whom the advocate has worked, and can request samples of written work and transcripts of testimony. Counsel is responsible for the conduct of the case, and has the duty to ensure that persons who assist counsel are competent.

Reliability of Defense-Based Information. Sentencing advocates are required to provide accurate information to courts. Sentencing advocates may not be intentionally misleading, and assessments must be grounded in factual information. If their reports or testimony are not favorable to the defense goals, the defense attorney usually decides not to submit the report, and does not call the sentencing advocate to testify.

Calculating the Cost

The position of sentencing advocate originated in public defender offices. As the role developed and became accepted in the courts, independent sentencing advocates established private practices. Today, many public defender offices have persons on staff who provide these services. Outside of public defender programs, services are not limited to those who can afford to pay for them. Some defender programs have expert budgets that can be used to pay for services. Attorneys who represent indigent clients can apply to the court for funds to retain a sentencing advocate. Costs for services depend on the education, training, expertise, and experience of the

particular sentencing advocate. Hourly rates can vary from \$25 to \$100. The number of hours necessary to complete an investigation and report depends on the severity and complexity of the case, and can range from 30 or 40 hours to hundreds of hours.

Although sentencing advocacy services may not be warranted in every case, many clients can benefit from such services. Sentencing advocates provide a service to the criminal justice process by enhancing the probability that sentences are fair and reasonable, and are based on accurate and adequate information. At a time when incarceration rates are high, and correctional costs have increased dramatically, it is important to make carefully considered decisions about who can remain in the community under supervision, and who needs to be incarcerated, for how long, and under what conditions.

Sidebar

Until the lion has his or her own storyteller, the hunter will always have the best part of the story.

- African Proverb

Sidebar

HISTORY OF SENTENCING ADVOCACY

Sentencing advocacy can be traced back to the mid 19th century when John Augustus, a Boston shoemaker, intervened with courts for the release on bail of minor offenders from jail on humanitarian grounds. Believing that most offenders were not dangerous and would respond to treatment, his advocacy was the basis for the eventual development of state probationary services. (Charles Lindner, John Augustus, Father of Probation, and the Anonymous Letter, Federal Probation, Vol. 70, No. 1, June 2006.)

The Gideon decision, followed by the American Bar Association's recognition of the ethical obligations of defense attorneys to provide sound sentencing plans for their clients, moved sentencing advocacy from probationary services to the defense. Although probationary services continues to provide information, recommendations, and services to courts, its role has shifted from advocacy to neutrality to enforcement as it carries out the primary responsibility of supervising defendants.

In the late 1960s and early 1970s, defender organizations in Seattle, San Diego, Madison, Wisconsin, and Washington, D.C, hired social workers to help attorneys develop sentencing plans. In the late 1970s, G. Thomas Gitchoff and Jerome Miller developed the National Center on Institutions and Alternatives (NCIA), and documented their success in developing sentencing plans based on a method they called "thent specific planning." (Malcolm Young et al., Introduction to Defense Based Sentencing, Publication of the Sentencing Project, 1995 revised in 1996, available at <http://www.sentencingproject.org>.) In the 1980s, the Sentencing Project was established and it helped develop alternative sentencing programs in North Carolina, New Mexico, and Connecticut. Since that time, sentencing advocacy services have expanded

nationwide. Many public defender programs have sentencing advocates on staff. Services are also provided through independent organizations or persons engaged in private practices who are retained on a case-by-case basis.

In 1989, the first National Conference on Sentencing Advocacy was held, and from this conference a concept paper was written calling for the creation of a professional association to support the development of sentencing advocacy. (An Emerging Profession: White Paper on Sentencing Advocacy, March 1991, available at www.nlada.org.) The Sentencing Project agreed to sponsor the organization and the National Association of Sentencing Advocates was formed. The organization provided training, standards, and technical assistance for its members and for others who were interested in the profession. In 2005, the National Legal Aid and Defender Association agreed to take on the organization as one of its sections under its Defender Services. The organization changed its name to the National Association of Sentencing Advocates and Mitigation Specialists (NASAMS) to reflect the substantial membership and role of mitigation specialists within the organization. Currently NASAMS has about 250 members representing 36 states, the District of Columbia, and Canada.

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