



PROGRAM MATERIALS

Program #36138

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Criminal Mitigation in Practice: Building Persuasive Narratives to Humanize the Client

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We mute the realization of malevolence—which is too threatening to bear—by turning offenders into victims themselves.

– Anna C. Salter

Criminal Mitigation Pre-Plea and Pre-Sentencing Strategies:

HUMANIZING the CLIENT TOWARDS A BETTER LEGAL OUTCOME

BOOK RECOMMENDATION

Handbook of Mitigation in Criminal and Immigration Forensics: Humanizing the Client Towards a Better Legal Outcome. SEVENTH EDITION 2021

Psychosocial Evaluations and Consultation in Civil Litigation: Strategies to Understand and Humanize the Client. 2021.

Handbook of Mitigation in Criminal and Immigration Forensics

Humanizing the Client
Towards a Better Legal
Outcome

SEVENTH EDITION

MARK S. SILVER
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**PSYCHOSOCIAL
EVALUATIONS AND
CONSULTATION IN
CIVIL LITIGATION:**

*Strategies to Understand
and Humanize the Client*

MARK S. SILVER

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Free Sample Report

- For a free sample mitigation report please email me at: marksilver1@cs.com
- Put the word “complextrauma” and put your information to weed out spam, and I will send it back as an attachment.

SEMINAR OUTLINE

- I. SPECIALTY MITIGATION ISSUES
- II. STRATEGIC SHIFT FOR CRIMINAL DEFENSE LAWYERS
- III. LEGAL BASIS
- IV. PURPOSE OF MITIGATION
- V. KEY IDEAS TO CONSIDER IN MITIGATION
- VI. PSYCHO-SOCIAL EVALUATIONS

I. SPECIALTY MITIGATION ISSUES

Specialty Areas of Mitigation (separate CLEs)

- Inadequate PSI by Probation Officer
- White Collar Crime (traumatic background though appears healthy)
- Sex Crimes / Porn
- Complex Trauma
- Borderline Personality Disorder
- Adam Walsh Act
- Criminal mitigation for immigration defense
- Difficult Client who undermines his case / lawyer
- Domestic Violence

Mitigation is a Tool – not an end

- Mitigation is a Tool – not an end
- Mitigation expert and lawyer must use their respective specialties to better advocate for the client more holistically
- Complement one another
- ASSIST THE LAWYER (make her / his life easier)

II. STRATEGIC SHIFT FOR CRIMINAL DEFENSE LAWYERS

Definition of Criminal Mitigation

Mitigation is a bio-psychosocial evaluation of the client's social and psychological history informed by the facts of the criminal case with appropriate recommendations as a means to minimize the negative legal outcome either in court **or with a prosecutor.**

Mitigating circumstances reduces the degree of moral culpability or blame which in fairness, sympathy, or mercy may lead to a more favorable outcome for the defendant.

Why is this CLE Important?

Shift in Power

- There has been a major shift in power from the tripartite system of judge, prosecutor and defense lawyer to a unilateral system in which the prosecutor acts as prosecutor, judge, and jury while the judge twiddles his thumbs bored in an empty courtroom.
- This has had a major impact on evidence. Law school requires an entire course on evidence for good reason. However, today evidence cannot be fairly examined in a court of law because the cost and risk of going to court is just too high for the defendant.
- Paradoxically, *hearsay evidence* found in the PSI and mitigation reports have become crucial sources of information for determining sentencing.
- Understanding this shift in power is crucial in the advocacy process.

Trial Penalty

- The criminal justice system has been turned into a guilty plea factory
- So powerful is this penalty that even innocent persons will succumb to the threat of a worse outcome if they dare to risk the fundamental Sixth Amendment right to a trial
- The national Registry of exonerations has now identified 404 of 2200 cases in which individuals later determined to have been innocent had entered a guilty plea rather than face trial.
- www.law.umich.edu/special/exoneration/Pages/about.aspx
- Evidence is no longer important so discovery is unimportant so appeals are not possible

See -Norman L. Reimer. *The Trial Penalty: The Sixth Amendment on the Verge of Extinction and How to Save It*. The Champion. May 2018 Vol. XLII. No. 4, p. 9-10.

See – Andrew St. Laurent. *Anatomy of a Plea*. The Champion. June 2019. Vol XLIII. No 5. p. 42-47.

“Criminal justice today is for the most part a system of pleas, not a system of trials.” (Lafler v. Cooper, 566 U.S. 156 (2012)).

- coercive pressure to plea
- police and prosecutorial abuses that regularly produce false convictions
- plea bargain leads to hiding police misconduct from public scrutiny because rights violating officers rarely take the stand

vs: charge stacking, prosecutorial withholding of evidence favorable to the defense, manipulating witnesses, and making improper arguments to the jury

- Innocent plead guilty between 1.6 %and 8% of all felony convictions

Mitigation as a CRUCIAL TOOL

Because the vast majority of cases are settled with the prosecutor's office mitigation it is now far and away the most important element in criminal defense practice today.

The defense lawyer must use the mitigation evaluation and report in an effective manner early on in the process.

III. LEGAL BASIS

No Limitation Standard by Statute

18 USC 3661:

- No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Case Law Quotes

- In deciding what sentence will be ‘sufficient, but not greater than necessary’ to further the goals of punishment in 18 U.S.C. §3553(a), a sentencing judge must have a generosity of spirit, that compassion which causes one to know what it is like to be in trouble and in pain. Denny Chin. *United States v. Singh*, 877 F.3d 107,121 (2dCir.2017)
- It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Justice Kennedy. *Koon v. US* 518 U.S. 81,113 (1996).

Case Law Quotes Con't

- ...district courts should not hesitate to use their discretion in devising sentences that provide individualized justice. *U.S. v. Williams* 65 F.3d 301, 309-310 (2d Cir. 1995).
- *U.S. v. Booker*, 543U.S.220 (2005) stands for the proposition that the guidelines are now “effectively advisory” and mitigation has found its rightful place in jurisprudence. Moreover, the Guidelines “do not require a judge to leave compassion and common sense at the door to the courtroom.” *U.S. v. Johnson*, 964 F.2d 124, 125 (2d Cir.1992).
- The sentencing judge must give defense counsel the opportunity to present all non-frivolous arguments. The Supreme Court expects each individual’s sentencing to be subject to “thorough adversarial testing.” *Rita v. United States*, 127 S.Ct. 2457, 2465 (2007).

Case Law Quotes Con't

Imposing a sentence on a fellow human being is a formidable responsibility. It requires a court to consider, with great care and sensitivity, a large complex a facts and factors. The notion that this complicated analysis, and moral responsibility, can be reduced to the mechanical adding up of a small set of numbers artificially assigned to a few arbitrary selected variables wars with commonsense. Whereas apples and oranges may have but a few salient qualities, human beings in their interactions with society are too complicated to be treated like commodities, and the attempt to do so can only lead to bizarre results.

United States V Gupta 904 F. Supp. 2d 349, 350 (2012)

Case Law Quotes Con't

Surely if every man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in balance. This elementary principle of weighing the good with the bad, which is basic to all great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed the Courts to consider, as a necessary sentencing factor, the history and characteristics of the defendant.

United States v. Adelson, 441 F.Supp 2d 506, 513–14 (S.D.N.Y 2006).

Case Law Quotes Con't

- If the 600-plus pages of the most recent set of sentencing guidelines have taught us anything, it is that punishment cannot be reduced to an algorithm. *U.S. v. Myers* , 2005 WL 165314, *1 (S.D. Iowa Jan. 26, 2005).

Judge's Perspective

**“There is no guarantee of justice except the personality of the judge.”
Eugen Ehrlich. Quoted by Benjamin N. Cardoza in The Nature of the
Judicial Process 1921.**

- I'm not judging the person who committed the crime I'm judging a person who has changed who's in the court room today
- Modesty, minimize self-importance even in community work
- The judge does not like a loser. The judge wants to be on a winning team.
- The judge wants to be part of a team that fixes things
- An incremental process of continuing improvement, which would otherwise be interrupted by incarceration
- A reason to hang his hat on

Death Penalty Basis

Criminal mitigation in death penalty cases was made law by the Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), which found that a lawyer's failure to procure a psychosocial report explaining the troubled background of a defendant in a capital case was an error of counsel.

Guidelines History

In the two decades leading up to 2005, federal sentences were determined almost exclusively by the United States Sentencing Guidelines.

Promulgated under the authority of the Sentencing Reform Act of 1984, the Guidelines had the goal of creating honesty in sentencing and reducing unwarranted sentencing disparities prevalent in the indeterminate, parole-based scheme operating at the time.

The Guidelines replaced the indeterminate system greatly reducing judicial sentencing discretion by establishing narrow sentencing ranges based on a series of factors, including:

- the type of offense,
- characteristics of the victim and offender, and
- the defendant's criminal history.

Federal Sentencing Statute: Parsimony Principle

§3553(a) factors offer an incredibly broad range of possible mitigating arguments at sentencing.

Section 3553(a) begins with an overarching mandate: “[C]ourt[s] shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of the statute].”

Federal Sentencing Statute Con't

- The statute goes on to direct courts to consider almost anything related to the defendant or his potential punishment:
- The court shall consider—
- (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed —
- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Legal Basis for Mitigation

In the memorandum of law presented by the lawyer for sentencing purposes it is crucial to interweave the above criteria into key mitigation factors outlined in the mitigation report. This will truly afford the prosecutor and judge to consider and understand the client's psychosocial issues as *legal mitigating factors*, rather than simply background information established for the sake of general argument.

That is, criminal mitigation is not simply an effective tool for the sake of argument but a necessary factual underpinning to support the factors in 18 USC § 3553(a) and other relevant case law.

Outcome

- The Court now has unfettered discretion to consider any and all evidence at sentencing
- A wide range of arguments may now be considered and submitted at the sentencing phase

Is There An Obligation To Mitigate?

- ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the Supreme Court unanimously ruled that states are required under the Fourteenth Amendment to the US Constitution to provide counsel in criminal cases to represent defendants who are unable to afford to pay their own attorneys. The case extended the right to counsel, which had been found under the Fifth and Sixth Amendments to impose requirements on the federal government, by ruling that this right imposed those requirements upon the states as well.
- Should clients be told and afforded the opportunity for mitigation, especially in felony cases.

Services Provider Requirement

In 2012, the American Bar Association (ABA) House of Delegates adopted resolution 107C, which “formally urges criminal defense attorneys to address clients’ civil legal and nonlegal problems to linkages with other service providers.” The report accompanying the resolution “makes it clear that all defense lawyers are required to provide comprehensive representation,” including using “other service providers,” like social workers, when appropriate.

IV. PURPOSE OF MITIGATION

Purpose of Mitigation

- Humanize client through a sympathetic narrative
- Induce empathy for the reader
- Document client's life history
- Contextualize client's conduct
- Stress family's physical, psychological, and financial hardships
- Illustrate client's community, educational, employment ties
- Express client's remorse & regret

Purpose of Mitigation Con't

- Professional expression can replace self-expression
- Not just a mental health report
- Single document theory
- Peace offering
- Counter the the government's presentence report (PSR)
- Conceptual /strategic consult

Prosecutorial Bias / Prejudice

- Disabuse parties of bias / false assumptions / prejudice
- Dispel nonexistent patterns
- Anger / hostility because the client has squandered an envious lifestyle and wealth (“unforgivable”)
- It is unfortunate that people who strive throughout their lives towards educational excellence and hard work are penalized for their transgressions without regard for the excellent citizenship that they have provided the community until that point in time
- white-collar defendant is demonized for his actions

Prosecutorial Bias / Prejudice Con't

1. overconfidence – fluency
2. Belief perseverance – ignore or rationalize disconfirming facts
3. Confirmation bias – seek out only information that confirms your existing beliefs
4. Framing – how to present the decision and outcome

Emotional connection

- We are not thinking machines. We are feeling machines that think.

Antonio R. Damasio, neuroscientist.

V. KEY IDEAS TO CONSIDER IN MITIGATION

Key Ideas to Consider

- Aberrant decision / poor judgment – describe flaws of client
- Misguided behavior / Error in judgment – talked myself into believing it was not wrong
- Foolish conduct (dumb mistake, no animus) – BUT OWN MISTAKES
- Diminished capacity / Unthinking moment
- Life stressors - cumulative / complex traumas
- Not evil, ie, not bad, but misunderstood or ill
- Cumulative assessment - Defendant's actions resulted from an unusual amount of outside pressure – people have breaking points
- Conscious avoidance – should have known
- REDEMPTION – Teshuvah – honest w myself and others, specific behavior and cognitive and emotional changes, inner transformation

Key Ideas to Consider

- Contrition / remorse and regret
- Rehabilitation / redemption / transformation
- Community supports – temple / social services
- Community service now somewhat cliché
- Family support – hands on involved father, prosocial support in family
- Extensive community services
- Risk of recidivism – psych issues recognized and addressed, a change in patterns of behavior
- Prison will interrupt a positive pathway of change for himself and his family

Judge's Perspective

**“There is no guarantee of justice except the personality of the judge.”
Eugen Ehrlich. Quoted by Benjamin N. Cardoza in The Nature of the
Judicial Process 1921.**

- I'm not judging the person who committed the crime I'm judging a person who has changed who's in the court room today
- Modesty, minimize self-importance even in community work
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- A reason to hang his hat on

How are Decisions Made?

- Emotions not rationality
vs. Richard Posner: Rational Player theory

Emotional connection

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Antonio R. Damasio, neuroscientist.

Mitigation Considerations

- What did the client's past look like?
- What role did the client play?
- Will the client likely repeat this behavior?
- Will incarceration promote deterrence (specific and general)?
- What will promote justice and promote respect for the law?
- What will the client's experience be like in prison?
- Does he require educational, vocational, medical, or psychiatric assistance?
- What kind of rehabilitation is needed and has it already started?

Mitigation Considerations Con't

- Has the client accepted responsibility for his wrongdoing (remorse and regret), and what to extent?
- Has restitution already started? Is it possible?
- What is a fit punishment? Has the client already been punished?
- What is the least harsh alternative?
- Are there alternatives to jail that would better serve the client, family, or community?
- Who will be harmed or protected by incarceration?
- What are the family's needs?
- What will the client's future look like?
- What are the cumulative Mitigation factors?

The Ten “R’s” of Mitigation

- Reality - facing a full narrative (**Accuracy Rather than Exaggeration**)
- Rhea- mens rhea / intent / volition
- Recency- when did the crime occur
- Repetition - examine client's overall record
- Rung - what level of seriousness is involved
- Restorative - has the client righted the wrong
- Rehabilitation - client has, can, or will change
- Remorse / Regret - does the client understand and accept his actions
- Roles – community role and behavior in crime (**prior good deeds**)
- Recommendations - what can be fixed who can be helped

Remorse and Regret

- Eve Hanan “Bias and the Remorse Discount.”
The Champion. May 2019. Vol XLIII No. 4 pp:
16-21.

When to Use Mitigation

- The advantage of pre-plea mitigation is that the prosecutor can consider mitigation early before prejudices set in. However, the advantage of utilizing mitigation after the plea in Federal cases is that the mitigation expert can review the PSR
- It's never too early and it's never too late (like voting in Chicago)
- Pre-plea for the Prosecutor (two uses for one price)
- Strategic Consult / Informational Use
- Parole / probation Hearings
- Clemency

Mitigation Specialist not Psychiatrist – or Both Perhaps

Mental health issues and psychosocial history with all mitigating factors must be interweaved and integrated into a coherent whole

Clients Who Most Benefit

- Mental health problems
- Extreme hardships
- Childhood traumas / abuses
- Inter-family dependence
- Poor language, communication, social, self-care, adaptive, or executive skills
- Fear of authority
- Case development & strategies

Psych Diagnosis without the Label

With mitigation it is possible to show the signs, development, and even symptoms of a psychopathology without the diagnosis itself

VI. PSYCHO-SOCIAL EVALUATIONS

Psychosocial Evaluations

The psychosocial evaluation is a **strategic and systemic** tool that provides an in-depth understanding about the client, his world , and issues. In turn, the lawyer may develop strategic avenues. The psychosocial assessment is conducted in order to understand the client with particular consideration for:

- childhood development, stressors, traumas, and challenges
- quality of relationships to immediate and extended family members (family dynamics)
- the individual's health (including psychopathology)
- interaction with home, environment, and community in the context of work, education, interests, and socialization
- motivation and decision-making (psychodynamics)
- perceptions of people and issues (object relations)
- humanize (psychodynamics) client's needs and issues

YOU CAN UNDERSTAND ALMOST ANYONE USING THIS

Issues Explored

- Family-Systems Analysis
 - Childhood Development
 - Social Skills & Peer Rejection
 - Sexual Development
 - Hobbies & Interests
 - Community Ties, Friends
 - Education & Employment
 - Finances & Poverty
 - Military Service
 - Self-care (ADL's)
 - Drug & Alcohol History
- Violence, Abuses, Trauma, War
 - Volunteer Community & Charity
 - Arrests & Criminal History
 - Languages - spoken/written
 - Role & Communication
 - Legal Issues
 - Religious Devotion
 - Support System/Caregivers
 - Cultural Issues & Role Models
 - Mental (DSM) & Medical Health
 - Racism & Prejudice

Evaluation Tools

- Neuro-psychological evaluation
- Psycho-sexual evaluation
- Psychological evaluation
- Psychiatric evaluation
- Social work evaluation
- Medical evaluation
- Psychodynamic evaluation
- **Mitigation evaluation**

Damage in Developmental Stages

- At one time it was believed that developmental milestones pertained only to infants and young children, however, today it is understood that development occurs throughout the lifecycle.
- Children must develop in a manner that permits them to gain a sense of well-being in a predictable, certain, safe, stable, and secure home and community environment WITH HEALTHY EMOTIONAL ATTACHMENTS and PHYSICAL BONDS.
- Without which, it is simply impossible to achieve normal developmental milestones, such that the individual will find that his development is fundamentally undermined and his future jeopardized in a profound way prohibiting normal and healthy functioning and interaction with others in his community.

Adverse Childhood Experiences (ACE)

Maladaptive risk behaviors emerge from negative life experiences:

- Physical abuse
- Sexual abuse
- Emotional abuse
- Physical neglect
- Emotional neglect
- Intimate partner violence
- Mother treated violently
- Substance misuse within household
- Household mental illness
- Parental separation or divorce
- Incarcerated household member

(See – “A Handful of Aces: Another Approach Under §3553 (a).” By David B. Savitz
The Champion. January / February 2019 pp. 34-43).

Criminality in Context: The Psychological Foundations of Criminal Justice Reform. Craig Haney. American Psychological Association (2020)

Effects of Complex Trauma

- If you are constantly thinking about safety and security you have no brain power left over to think about curiosity and wonder, or focus on school and family, or love
- Stress response systems always activated at a heightened level focus on survival and not playing or exploring their world
- Survival brain is active and learning brain is dulled
- Creates a **value system** and lens through which the child views the world

Effects of Complex Trauma (con't)

- conceptualize harm broadly
- Consider egg-shell rule. The victim of abuse may have suffered previous psychological harm in a different context so that he was particularly fragile and / or vulnerable even though he may evince a strong outer exterior
- Consider not only how the client has been actively harmed but what he has lost. That is, he may have lost a fundamental sense of safety, security, stability, certainty, predictability that has undermined his self-confidence, self-esteem, and even self-worth, loss of trust on one's self
- quality of life issues: deficits in everyday activities (ADLs)
- interpersonal friction
- lifestyle changes
- community loss

Community Trauma

- Violence
- Drugs
- Gangs
- Prostitution
- Guns

Mitigation Videos

- Is this person sincere?

I - PRE-BIRTH CARE

ISSUE - PRESENT - IMPACT

- Parental Drug Use
- Proper Pre-natal Care
- Wanted Infant
- Trauma to Mother/Child
- Pregnancy Complications
- Delivery Complications

II - POST-BIRTH CARE

ISSUE - PRESENT - IMPACT

- Adequate Food, Shelter, Clothing
- Warmth or Affection
- Violent Environment
- Safe & Secure
- Consistent Environment
- Balanced Values & Priorities (Reasonable Expectations)
- Fair Treatment
- Positive Role Models
- Independence Encouraged
- Infant Developmental Milestones

III - FAMILY FACTORS

ISSUE - PRESENT - IMPACT

- Parental Criminality
- Abuse
- Parental Psychopathology
- Poor Supervision
- Parents Relations Problems
- Appropriate Family Roles
- Healthy Family Environment
- Parent-Child Separation
- Alternate Caregivers
- Social-Services Involvement
- Parental Employment
- Neglect
- Parental Medical
- Poor Discipline
- Child Relations Problems
- Appropriate Family Comm.
- Residential Mobility
- Sibling Separation
- Deaths & Others Losses

IV – CHILDHOOD BEHAVIORAL HEALTH

ISSUE - PRESENT - IMPACT

- Emotionally Stable
- Behaviorally Stable
- Aggressiveness
- Restless/Hyperactive
- Concentration/Attention
- Risk-Taking
- Childhood Disorders
- Dishonest Acts/Lying
- Developmental Milestones
- Healthy Hobbies/Interests
- Medical Problems
- Healthy Sexual Development

V – SELF-CONCEPT

ISSUE - PRESENT - IMPACT

- Self-Esteem
 - Self-Blame
 - Proper Boundaries
 - Frustrations & Vulnerabilities
 - Resilience
 - Overwhelmed
 - Anxiety, Fears, Isolation
 - Losses & Trauma
 - Sleep Issues & Nightmares
 - Confusion, Resentment & Disappointments
 - Self-aware
 - Self-solace
- Self-Trust, Self- Love
Outlook
Values, Ideals & Hopes
Understanding of Needs
Self-Preservation
Depression & Sadness
Uncertainties & Instability
Psychosis
Eating Problems
Disappointment / Accomplishment
Isolation / loneliness

VI - SCHOOL/EDUCATION

ISSUE - PRESENT - IMPACT

- Academic Failures
- Low Bonding to School
- Truancy
- Dropping Out
- School Transitions
- Aggressiveness in School
- Attention/Concentration

VII – PEER-RELATED FACTORS

ISSUE - PRESENT - IMPACT

- Delinquent Siblings
- Delinquent Friends
- Peer Rejection
- Gang Membership
- Dependency
- Poor Peer Interaction
- Isolation
- Other Corruptive Influences
- Non-Healthy Sexual Involvement with Others

Thank You !