



PROGRAM MATERIALS

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White Collar Sentencing Strategy: Mitigation in the Post-Booker Era

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5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

Mark S. Silver

CRIMINAL MITIGATION EXPERT

MA, MSW, LCSW, PsyD, JD

Forensic Psychiatric Social Worker

And Lawyer

225 Broadway, Ste. 715

NY NY 10007

917-608-1346

Email: marksilver1@cs.com

Website: MarkSSilver.com

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

– Anna C. Salter

White Collar Sentencing Strategy: Mitigation in the Post-Booker Era

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
M.A., LCSW, PhD, JD.

**PSYCHOSOCIAL
EVALUATIONS AND
CONSULTATION IN
CIVIL LITIGATION:**

*Strategies to Understand
and Humanize the Client*

MARK S. SILVER

M.A., L.C.S.W., Ph.D., J.D.

Redacted Sample Report

For a redacted sample mitigation report please email me at:

marksilver1@cs.com

- Put your name, address, and other law office info so I know you are a lawyer and not spam
- Put the word “whitecollarsample” and I will send it back as an attachment

Who Will Benefit from this Seminar

- White-collar criminal lawyers (fraud / theft / failure to report / those in administrative positions)
- Defense lawyers who tend to focus on clients with middle-class backgrounds
- General criminal defense lawyers
- Defense lawyers who specialize in the area of professional misconduct in administrative hearings

Specialty Areas of Mitigation (separate CLEs)

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

PROGRAM OUTLINE

- I. Overview of Mitigation
- II. Post-Booker Sentencing
- III. Special Issues in White Collar Mitigation
- IV. Character Types

I. Overview of Mitigation

Criminal Mitigation: Definition

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

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 dependence
- Illustrate client's community, educational, employment ties
- Express client's remorse & regret
- Professional expression can replace self-expression
- Not just a mental health report
- **Single document theory – packaged explanation**

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

18 USC §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].”

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.”

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.

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.

Must a Lawyer Mitigate?

- Is non-mitigation a grounds for appeal?
- Should clients be told and afforded the opportunity for mitigation, especially in felony cases?
- ***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.

II. Post-Booker Sentencing

Booker

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.

Separation from USSG

Sentences, particularly for white collar defendants, are becoming increasingly separated from the sentencing ranges calculated under the Guidelines. Prior to Booker, judges granted non-governmental sponsored below-Guidelines-range sentences in only 5.5% of cases

Source: “Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Color Cases” Todd Haugh: American University Law Review vol. 62:1 (2012)

Separation from USSG Con't

- In the year after Booker that number jumped to 12.5%. Since then, there has been a steady increase of below Guideline range sentences, rising to a peak of 17.8% in 2010, and now sitting at 17.4%.
- The trend for fraud offenses is even more pronounced. Non-governmental sponsored below-Guidelines range sentences in fraud cases rose from 6.2% prior to Booker, to 16.4% after Booker, and now sit at 22.6%.
- This means that judges, following arguments raised by counsel at sentencing, are increasingly willing to exercise their discretion and sentence defendants, including white collar defendants, outside the Guidelines.

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

Mitigation Quotes

- 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. U.S.* 518 U.S. 81,113 (1996).
- ...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).

Quotes Con't

- 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).
- In determining the sentence to impose . . . the court may consider, without limitation, any information concerning the background, character and conduct of the defendant. Pepper v. United States, 131 S. Ct. 1229, 1240 (2011).
- 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).

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).

III. Special Issues in White Collar Mitigation

Disabuse Prosecutorial Bias / Prejudice

- Defendant from lower socioeconomic minority inner-city assumed to have suffered complex trauma harming his decision and judgment -> opposite for white collar defendant
- False assumptions by prosecutors - Presumption of wealth
- Anger / Hostility / Jealousy because the client has squandered an envious lifestyle
- “Unforgivable” b/c of multiple victims
- 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
- must be humanized given that the white-collar defendant is demonized for his actions
- Bad not evil !

Case Example:

The Assumption of Greed

Case Example -

A client in an administrative financial position directed funds to himself from a well-established bank where he worked for several years, though the client did not change his lifestyle, except to buy a mid-range priced car. He donated the bulk of the funds to charitable institutions, including a family who lost all of their home furnishings in a house fire. Such behaviors do not exonerate the client's conduct, but such altruism is far different from the person who lives the life of Riley through stolen funds.

PRE-PLEA MITIGATION

- Start early (very early)
- Pre-plea stage – not pre-sentencing
- Today's prosecutor is very powerful and mitigation must start with this office
- Trial Penalty ie, high cost and high risk
- Two uses for one price

Case Example: Mistaken Rapper

Case example -

A client who presented as a rapper from the hood was in fact a Jewish kid from the suburbs who felt abandoned by his parents because of their own irresponsible behaviors. Dusting off the young defendant's veneer of strength revealed someone who had suffered pervasive neglect and allowed the prosecutor early on to better understand the defendant.

Don't Assume Anything

- There is a common, though erroneous assumption, that persons who grow up in privileged homes necessarily avoid trauma in their lives. This is simply untrue
- Do not assume that a person who earns a six-figure salary necessarily grew up in a family where such earnings existed
- Do not assume that money is equivalent to a loving home environment
- What appears to an outsider as an idealized white picket fence home may in fact be a chaotic or brutal environment for its inhabitant(s)
- Don't assume that a \$3000 Giorgio Armani suit = good mental health

Case Example: Assumption of Normal Family

Case Example -

Mortgage fraud client who grew up with domineering, controlling and manipulative father redirected clients decisions leading to the arrest, and yet very normal and healthy looking family.

Strategies From General Mitigation

- Be open to change your mindset
- Employ team approach
- Begin mitigation work (very) early – when the client walks in the door
- Understand your client by building trust
- Develop the most persuasive mitigation evidence
- Creativity - open-ended possibilities for mitigation

Case Example: Complex Trauma

Case example -

A “normal” middle-class family where the father is a physician and the mother a homemaker referred their 34-year-old daughter who had stolen hundreds of prescription pads from her father's medical office to her drug addicted boyfriend. The daughter in fact had BPD and perhaps complex trauma.

The Novice Criminal

- White collar criminals often have no criminal history, such that they are overly trusting
- Naïve about the power of the prosecutor's office
- Belief that things will just work out because things always have in the past
- Money as a solution to life's problems and fails to assist lawyer in the help he needs
- Arrogant / demanding / unapologetic
- May be treated worse than career criminals

Case Example: Arrogant Newbie

Case Example -

A criminal defendant who had never been arrested remained uncooperative believing that things would just work out, he was reluctant to show up for appointments for the evaluation, and was adamant that he would never step foot in jail because of how much he was paying his defense lawyer.

Successful People are the Best Hiders

- Is your client just very good at hiding mental illness and / or drug problems through personal successes?

Case Example: Undiagnosed Major Depressive Disorder

Case Example -

A very successful client suffered from severe depression and suicidality contending with his psychiatric issues through long hours of professional career dedication, but just underneath the surface was a very fragile and vulnerable individual. Ultimately, his depression manifested itself through self-destructive behavior leading to the criminal arrest.

White Collar Evaluations

- mining the client's childhood as one of poverty and neglect may be unfruitful
- it is crucial to present how the client perceived different aspects of his development and the impact on his life
- the fact that a person grew up in a home with a white-picket fence says nothing about what actually occurred behind closed doors
- It can be helpful to delineate the road that brought the client to this specific point in his life and highlight important achievements
- Driven not Greedy → not evil
- Struggles & Obstacles – like every one else

Case Example: ADHD development

Case Example -

A careful evaluation revealed that the client although he presented with emotional, cognitive, and behavioral stability in fact suffered from a long history of developmental issues because of ADHD, which affected his interpersonal relationships, self-esteem in school, ability to properly focus, and overall decisions.

Case Example: Autism Spectrum Disorder

Case Example -

A successful client who owned two pharmacies allowed his manager to repeatedly falsify prescriptions. The client simply did not have the emotional wherewithal or communication or interpersonal skills to confront his employee.

Case Example: Undiagnosed Alcohol Addiction

Case Example -

A successful retail business owner had a long history of alcoholism hidden totally even from his young adult children at home. He would drink all night in his room with his wife who was his co-dependent partner.

Case Example: Undiagnosed Alcohol Addiction

Case Example -

An executive with his own office did not drink at home or even outside of the home but would offer anyone who entered his office a drink while discussing work. This was his way of drinking consistently during the day but placing it in the context of the office.

Key Strategic Ideas to Consider

- Aberrant decision
- Misguided behavior
- Error in judgment
- Foolish conduct (dumb mistake, no animus)
- Unthinking moment
- Diminished capacity
- Life stressors
- Poor judgment, but not evil, ie, not bad
- Cumulative considerations

Case Example: Feeling Unheard

Case Example -

A middle-management client who stole from his company did so foolishly and impulsively, and without animus, believing that doing so would address his gripes with others in management due to his feeling that his work went unrecognized.

Complex Law Bewilders Client

- Criminal statute is overly complicated and frustration ensues
- Client views the illegal behavior as normative or routine among peers
- Complex set of facts – even for the prosecutor who misses out on nuances

Case Example: “Railroaded” Client

Case Example -

A white-collar defendant was indicted for securities fraud that he initiated through the support of his wife. The client was a retired lawyer and his wife’s background in fashion meant that neither could fathom the reason for the arrest. The wife convinced her husband that his actions were not illegal (although his lawyer contradicted this), which sabotaged the mitigation process to the extent that the couple wasted their time insisting that they had been misunderstood and railroaded.

IV. Character Types

Character Types / Pathology

- Character types provide an understanding about how individuals with particular character traits interact with the world around them, with colleagues and family, and how that individual understands things from an idiosyncratic perspective. This ultimately reflects what the individual understand about himself with regard to his own needs, emotions, thoughts, and behaviors
- Essential for lawyers who must contend with demanding or difficult clients

Dependent Type

- difficulty making everyday decisions
 - need others to assume responsibility for them
 - difficulty expressing disagreement
 - feel uncomfortable or helpless when alone
- such clients may unconsciously try to turn the lawyer into a parent bringing to the office insatiable needs for affection and attention, then becoming sulky and hostile when the needs are not met



Borderline Personality Disorder

- Complaints of being unheard, ignored, or misunderstood
- Chronic dissatisfaction / Unhelpful suggestions / Calls everyday
- Fears Abandonment vs. First Friend
- Blurred Boundaries - When such clients feel that their lawyer has abandoned them, they may feel deep jealousy, anger, or even rage
- All black or all white is, Hero or Demon -> Unnerving
- Easily Overwhelmed
- Projective Identification –
- Impulsivity -> sexually inappropriate

-> such client are self-destructive and sabotage their own case, and this may lead to inappropriate legal advice or legal strategies

Controlling Character

- preoccupied with details and rules
 - demonstrate perfectionism
 - unable to separate that which is valuable from that which is not
 - often miserly in their spending
 - rigid and stubborn
 - Extremely obsessional
- Such clients may become so consumed with the unhelpful details of the case that the client prevents the lawyer from moving forward with the substantive issues that need to be addressed

Narcissistic Personality

- Center of Attention / requires excessive admiration
 - Grandiose sense of self-importance
 - Strong sense of Entitlement
 - Interpersonally exploitative
 - Cannot identify with the feelings of others
 - Envious of others
 - Understands others through his own needs
 - Malignant Narcissism
- Such clients may react with fury to legal setbacks in their case and routinely threaten to sue when even short delays are required

Lawyer Uneasiness is the Best Indicator of a Difficult Client

When the lawyer feels unease, nervousness, anxiety, fear, frustration, or anger without an apparent source, it is likely that the client himself has behaved or said something that has caused the lawyer's natural self-protective defenses to go up.

We all have these triggers and they serve as an early warning system that the person we are dealing with is dangerous, a potential threat, or somehow unbalanced.

How This Harms the Client

- client may erroneously believe that he is entitled to a better outcome than offered as a plea deal
- client may demand unrealistic results from the lawyer while also ignoring his lawyer's best legal counsel
- client may pay a substantial fee and expect that this will magically bring a positive conclusion to the problem, even though the lawyer may indeed require considerable assistance from the client
- client may be extremely naïve about the criminal justice system resulting in harmful decision-making

How the Lawyer Can Protect Herself

- Clarity of purpose
- Consistency of counsel
- Appropriate Boundaries
- Address Conflict or ambiguity
- Second Opinions
- Consider Unfinished Business
- Careful Documentation
- Self-awareness
- Mitigation Consultation

White Collar Clients Who Most Benefit

- Undiagnosed psych problems
- Ashamed b/c of arrest and won't talk
- Extreme hardships b/c dependents
- Childhood traumas / abuses
- Poor language, communication, social, self-care, adaptive, or executive skills
- Fear of authority

THANK YOU !