THE SENTENCING PROJECT

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THE THINKING ADVOCATE'S LIST OF MITIGATING FACTORS

Lists of mitigating (and aggravating) factors are legion. The Sentencing Project started to develop one from precedents collected by others, notably the No Name Newsletter ("Official Publication of the North Carolina Bar Association") of August 1981. Factors listed there were attributed to various state statutes, including Illinois, Oregon and California and the Federal Rules of Procedure. Other factors are taken from the American Bar Association's Standards for Criminal Justice, Standards Relating to Pleas of Guilty. Still others from experience.

Several experienced sentencing professionals reviewed our list in draft. They offered cautions: some factors can easily "cut both ways" if claimed without regard to various implications. Some require considerable substantiation and documentation. We pass on their comments with an overall admonition:

> Reference to a list of mitigating factors may not be central to a sentencing advocate's task. The sentence in a usual case is likely to hinge upon the personal characteristics of the defendant and the crime, not a weighted balancing of traditional lists of factors in aggravation or mitigation. One sentencing expert is reported to prepare a list of factors for the attorney when requested, but purposefully divorces that list from his biographical, factual presentation about the defendant. Wise and successful sentencing advocacy may be found in the full exposition of all the factors in the defendant's life which brought him or her to the point at which the crime was committed. What needs to be developed and presented to the court is a theme, not a tally. A list of mitigating factors may be of most help in organizing the sentencing advocate's analysis of the case.

1. The defendant was an accomplice or accessory to the offense committed by another person and his participation was relatively minor, (or, the defendant, having no apparent disposition to do so, was induced by others to participate in the crime)

   • A classic sentencing factor which, however, may require aggressive investigation, factual development, use of preliminary hearing transcripts or even a trial to present well.

2. The defendant was influenced by drugs or alcohol, or there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense

   • Offering excuses or justifications can be risky. After conviction it may be better to present mental impairment, alcohol or drug abuse, as an issue to address through specific action to prevent recurrence rather than as an excuse for the offense committed.

3. The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal

   • Some see this as a poor excuse for crime.

4. The defendant was motivated by a desire to provide necessities for his family or himself

   • At first blush, an appeal based on hardship. But picture the response: the prosecutor can run off a list of charities, agencies and churches to which the defendant "could have gone" for aid. Perhaps the defendant has an inability to cope that requires more sophisticated understanding and intervention?

5. The victim(s) provoked the crime to a substantial degree, or other evidence that misconduct by victim contributed substantially to the criminal episode

   • There is a danger here; you don't ever want to get caught in a game of "blame the victim."

6. The defendant's criminal conduct neither caused nor threatened serious physical harm to another

   • But for some, non-violent crimes are just as serious as violent crimes; this factor bespeaks a rather low standard of conduct.

7. The degree of property loss, personal injury, or threatened personal injury was substantially less than is characteristic for the crime

   • But some will say, "a crime is a crime." Should a defendant who acted with full intent but who was unable to finish the job or extract full value because of an interruption or his or her own incompetence benefit as a result?

8. The defendant's criminal conduct was the result of circumstances unlikely to recur

   • This factor addresses concerns about the likelihood of recidivism, but does not answer concerns about punishment.

9. The character, habits, mentality, propensities, and activities of the defendant indicate that he is unlikely to commit another crime

   • A favorable factor, but one which pointedly may have little to do with the seriousness with which the community regards the crime.

10. Defendant has an excellent employment record

    • Documentation! Never go on the client's account.

11. The general emotional and mental condition of the offender

    • Unless it's so normal as to be boring, the defendant's personal makeup requires expert assessment and professional description; at the least, a social history more probing than the average PSI. How did he or she become an offender?

12. The defendant's educational background, home life, sobriety, or satisfactory social adjustment recommends leniency

    • Documentation from the schools; witnesses; letters; public records; news clips; certificate of honorable discharge. Words alone will fail.

13. There is a strong possibility of a return of the offender to a normal life in the community

    • For some clients, a "normal life" remains just a possibility, rather than a likelihood, without careful planning by counsel and other professionals. For others this is exactly what the community doesn't want: a return to the status quo for a serious offender who left someone else scarred or damaged.

14. The defendant has the capacity to adjust to law abiding behavior

    • It becomes important to answer why the defendant failed this one time. Most persons have the capacity; judges may be more interested in whether the defendant has the opportunity to recidivate, and a tight sentencing plan may limit that possibility.

15. There is a strong possibility of successful treatment or training of the offender

    • Courts need more than possibilities: they need the assurance of diagnosis, prognosis, and placements into programs when treatment or training is required.

16. There are solid prospects for rehabilitation of the offender

    • Lawyers must ask if they are experts qualified to offer this opinion for each client.

17. The defendant is likely to comply with the terms of probation

    • Not all defendants are likely to succeed on probation; the sentencing advocate will fashion special terms of probation, such as additional supervision, to make it more likely their clients will succeed.

18. The defendant is repentant and contrite

    • The court may not be so interested in this. Perhaps what is more relevant is an assessment of the chance that an offender will repeat bad acts. In some cases, a person to whom this factor applies may lack the will or resolve required to reform... no one likes Uriah Heep.

19. In the event of a confession before trial, the court may consider to whom and under what circumstances the defendant confided about his wrongdoing

    • Documentation! A motion to suppress a confession, at which the police may testify to the defendant's willingness to speak, may be helpful here.

20. The defendant has cooperated with criminal justice agencies in resolution of other criminal activity

    • But it's got to be documented and acknowledged by the agencies; chances are the promise the defendant says the police made when he "confessed" won't produce.

21. A favorable or extenuating probation officer report or statement by the prosecutor

    • Requires work with the probation officer and/or hard plea negotiations.

22. Conduct of the defendant between the offense date and sentencing date has been exemplary

    • But this can not be simply lawful conduct; the conduct must be exemplary, preferably in the face of character-testing adversity.

23. The defendant by his plea of guilty has aided in ensuring the prompt and certain application of correctional measures to him.

24. The defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct

    • But watch for a more cynical reference to the defendant's readiness to act in his or her best interest.

25. The defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders

    • This may be the province of the attorney, but it doesn't necessarily fit into the concerns of a sentencing professional attempting to arrange an appropriate punishment for the defendant.

26. The defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial, such as avoiding the necessity of the victim having to appear in open court and publicly testify to the details of what transpired.

27. Defendant's own self-analysis of why he did what he did

    • Most relevant when the offense involved recklessness more than specific intent to do harm. For a crime of intent it may be seen as self-serving; for substance abuse and sex offenses professional intervention is usually required to overcome patterns of denial.

28. The defendant's prior performance on probation or parole was good

    • In some jurisdictions it isn't hard to avoid violating probation or parole; what may be needed is documentation of good conduct from a probation or parole officer, or from employers or others for the period of time the defendant was under supervision.

29. The court may obtain an agreement or order to pay restitution

    • Restitution is one of the grand illusions in both sentencing reform and "victim's rights." Statutes and court orders requiring restitution in addition to doing the time abound, but are simply additional punishment offering little likelihood of being fulfilled. If there is no means to pay, restitution is a false promise to victims and a trap for the defendant, so it must be tied to a job, not incarceration. At the very least, restitution should be substituted for or deducted from other punishments, perhaps in exchange for suspension of a prison sentence for second or additional counts in a multiple-count indictment.

30. The defendant is ready and willing to compensate the victim

    • No one likes the idea of wealthy defendants buying their way out of trouble; lawyers for poor defendants better bring them to court with "something in hand," more than a promise which can't be fulfilled--a set up for failure.

31. The social and correctional resources of the community match or are suitable to the client's needs

    • These resources will not serve your client without work on your part. Most judges won't be persuaded by hypotheticals; they want commitments for placements.

32. A shorter sentence is likely to allow the offender to take his place in society as a useful citizen at the earliest time consistent with the protection of the public

    • This factor could backfire if it is perceived the defendant has escaped punishment. The response is to arrange punishment alternatives.

33. The defendant has been confined for a considerable period of time prior to sentencing.

34. Passing of sentence has been unduly delayed

    • ... but why should the defendant benefit (unless the delay was caused by the government).

35. The imprisonment of the defendant would entail excessive hardships to his dependents

    • This must be documented by more than the family's say-so; and they must be "innocent" or the argument will fail with some judges.

36. The imprisonment of the defendant would endanger his or her medical condition

    • With some judges it won't work; there are many cases in which prison may kill the defendant and yet sentencing courts order it anyway. This claim requires medical documentation. Corrections, not wanting to house and treat ill inmates, may be an ally.

37. The attitude of the community toward the offense

    • Chances are it's going to be negative. Some say its best to let the probation department start with this one.

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