

Competently & Diligently Preparing your Client for Sentencing... and for the Sentence

OR

**WHAT TO
EXPECT[®]
WHEN YOU'RE
EXPECTING**

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Prison

Ethical Framework

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. SCR, Preamble, [2]

Ethical Practice?

SCR 20:1.1 Competence: A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

SCR 20:1.3 Diligence

ABA Comment: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

94% of cases plead.
Maybe 50% of trials are lost

Much of our job comes down to sentencing argument.

Quote from recent “On Point” case:

As to trial counsel’s sentencing advocacy, or lack thereof, here’s what trial counsel argued at sentencing:

This is a very, very, very tragic incident. And Mr. Defendant is responsible for that. There’s no two ways about it. I don’t care what the hell he says why he did it. It’s totally unacceptable. I submit to the Court that Mr. Defendant is a threat to no one but himself in this particular case and he’s going to be removed shortly. But I think for a just sentence, there’s a message that needs to be sent.... [I]t’s about the people who’s handling the guns in this case.... With respect to a sentencing recommendation, Judge, I think the PSI writer tried to document it as best she could with respect to the factors that the Court must use that would help the Court consider. Like the [State], I’m going to punt.

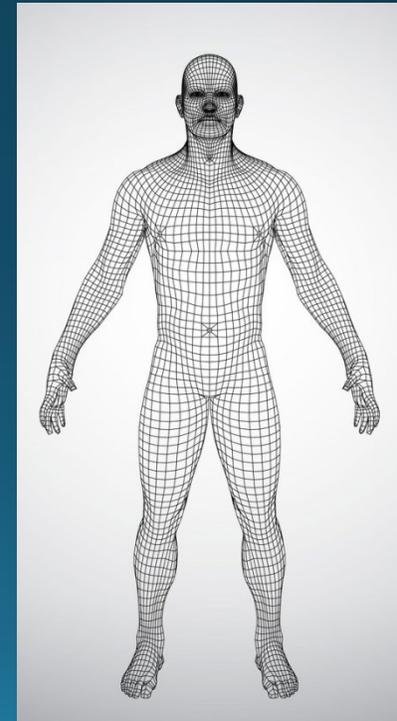
With “advocacy” like that, it might not surprise you to learn Defendant is serving 52 years in prison...

What you're up against

- DA's decidedly one-sided statements
- Victim Impact statements
- Victim in-court statements
- DA#2:
 - Confirmation Bias
 - Anchoring Bias
 - Implicit Racism

It's called an Argument for a Reason!

- Statistics
- Case comparisons
- Quotations
- Biblical Verses
- Poetry
- Client Records
- Rail against the system
- MOST of all, Make your client a 3D Human Being!



Allocution:

Write it out

Don't use the word "but" at all!!!

Do not make excuses!

Do not use the word "mercy" or "leniency" at all. Judges hate that.

-First, Apologize: To: Who are you apologizing to? (NOT to the judge or the Court... think about who was actually hurt by your actions)

For: What did you do wrong? Be specific.

Because: Why is that wrong? Show the judge that you understand that this behavior cannot be repeated.

-How have you changed?

-What have you learned?

-How can you promise that you will never do something like this again?

-Give the judge three goals for yourself for the next year.

-Apologize again. Always end with an apology (again: to the victim, for your actions)

Factual Basis to plea

- Go through criminal complaint, line-by-line, with client. What is true, what is false.
- Does your client understand that complaint will still be argued at sentencing?

Ethics of the Plea

- Plea REQUIRES Informed Consent (Public Reprimand of Smith, 2009-OLR-17)
- Does it follow that Informed Consent requires Information about:
 - What will be argued at sentencing?
 - Where the client will be going, what to expect AFTER the sentencing?
- SCR20:1.0(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Allocution Don'ts

- Yes, but ... (making excuses)
- Not reeeeaally... (functional plea withdrawal)
- Passive Voice: "What had happened was..."
- Blaming others: esp, "hanging with the wrong crowd"
- Meaningless hollow statements (ie. apologizing to the court; "Never going to see me again...")
- Focusing on consequences to yourself/ your family
- "Show me mercy" or "Leniency" (know your judges)
- "Just going to get up and speak my truth..."

Allocution DOs

- Write it out
- Give a REAL apology – Three Parts:
 - 1) To Someone
 - 2) For Something
 - 3) Why was that wrong?
- HOW have you changed?
- What have you learned?
- List 3 GOALS

PSI

- With or Without recommendation?
- Do you go?
- How do you prepare client?
- vs. defense sentencing memo
- Relied upon heavily in prison classification!

Ethics During sentencing

- Misstatements of Facts by Court or DA
 - That benefit client - SCR 20:3.3(a)(1)
 - To client's detriment
- Misstatement by client?
- Misstatement by you?

Ethics During sentencing

- Judge's questions: to you? To Client?
 - Last time smoked THC? How would you test today?
 - SCR 20:3.3(b) - Candor
- Authorized disclosures: medical (HIV, mental health) prior victimization

What do clients think
Incarceration will be like?

Role as Advisor

- SCR 20: 2.1 - In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.
- ABA Comment: "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront."

Role as an Advocate

- The more you know about WI Prisons, the more you can point out what your DA's don't!
 - DA makes recommendation of a dozen years for sex offense
 - What's an argument for a lesser sentence based on Rehabilitation?

SCR 20:1.3 Diligence

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Shameless

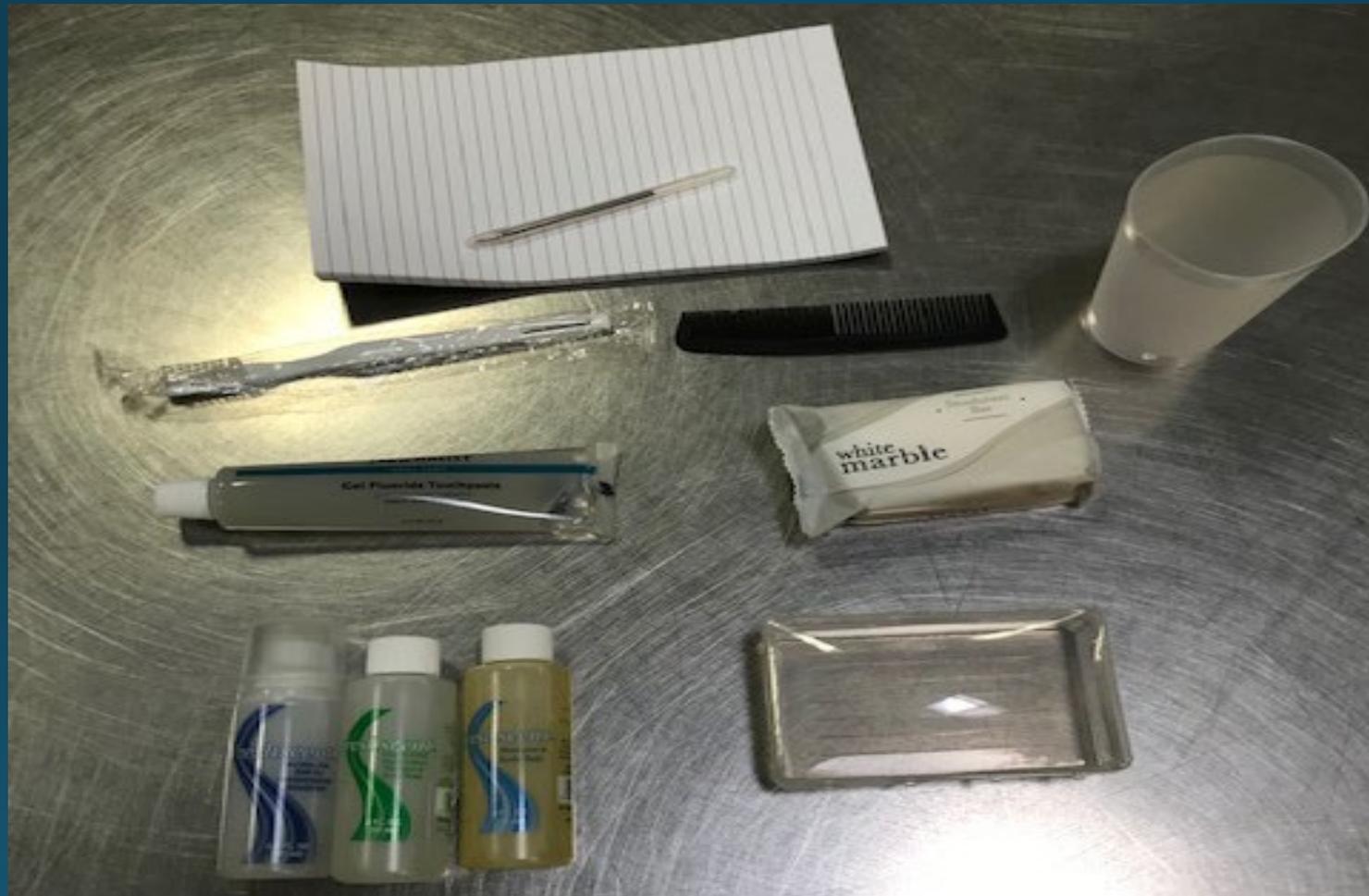
First Week in Custody

- Mom
- Meds
- Money
- Haircut
- Language Barriers
- Keep to yourself
- Do not accept “favors” from anyone

Dodge/DOC

Do your clients even know where Waupun is???

Welcome Packet



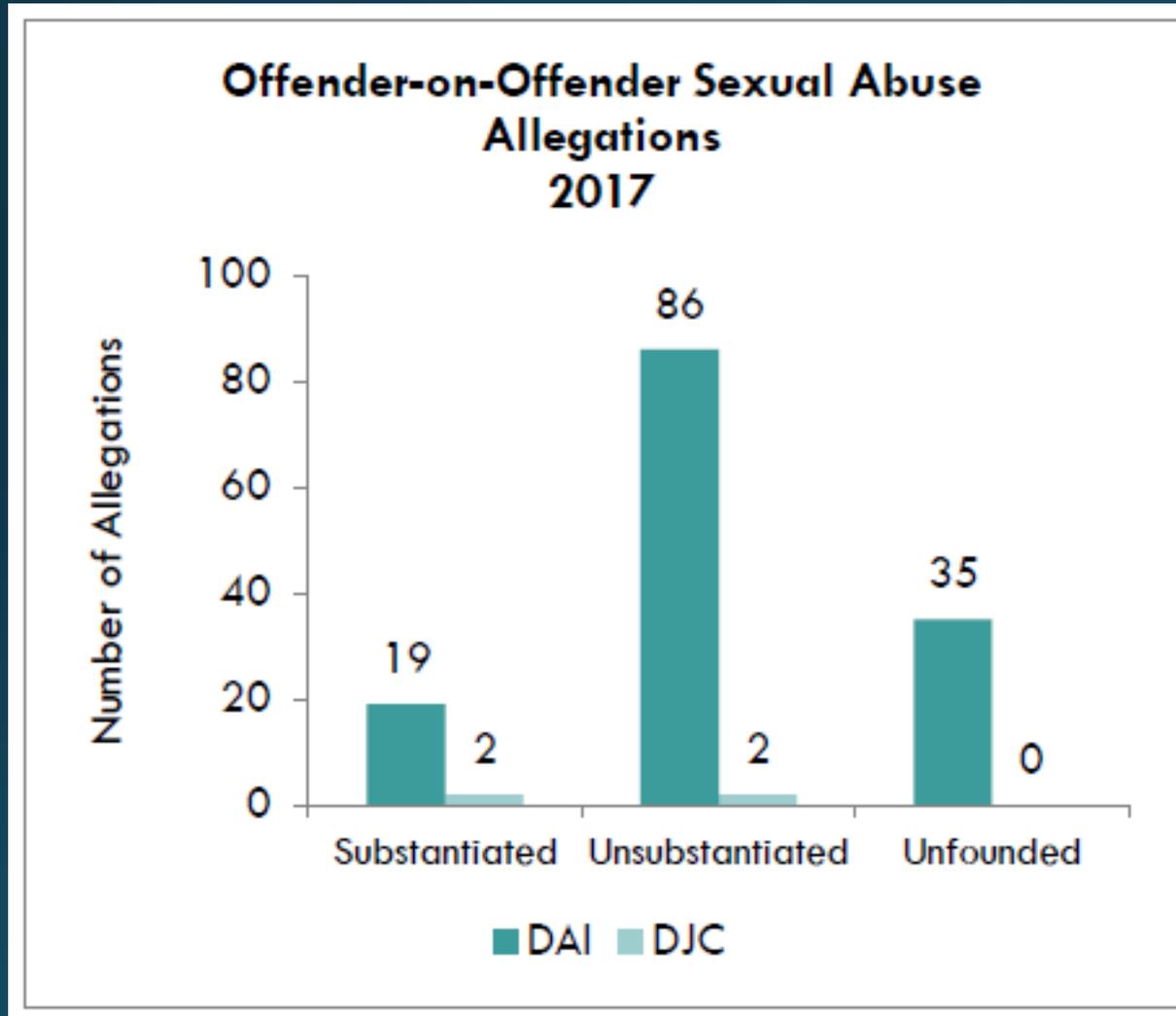
Hit the Biggest Guy in the Yard

Prison Rape

“I could send you to prison. To a men’s prison where you could be someone’s little girl in a dress, and you’d wake up every day wishing you were dead. Those men up there would have all sorts of fun with you.”

Mar 2, 2018 – Milwaukee County Judge to an 18-year-old defendant

Reality Check



2017: 23,687 WI DOC Prisoners
144 Allegations

That's 0.6% of the WI prison population making allegations on any given year.

(compared to 0.13% lifetime chance of dying in a car accident)

Prison Rape

- Requires honesty with/of client
- PREA assessment: 15 questions - predator/victim
- They WILL be moved to a different unit

Local Jails

Common issues:

- Meds
- Mom
- Money
- Huber logistics
- Drug Testing
- Classification

Electronic Monitoring



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