

**TIPS FOR PERSUASIVE SENTENCING
IN MISDEMEANOR CASES
WISCONSIN PUBLIC DEFENDER NEW ATTORNEY TRAINING
SCHOFIELD, WI MARCH 13-15, 2018
Laurie Osberg, Eau Claire Region**

- 1) At the sentencing hearing, keep in mind three things
 - a) The law
 - i. McCleary standards [*McCleary v State, 46 Wis.2d 263*]
 - a. Gravity of the offense
 - b. Character of the accused
 - c. Need to protect the public
 - ii. Harris criteria [*Harris v. State, 75 Wis2d 513*]
 - a) Prior criminal offenses
 - b) Undesirable behavioral pattern
 - c) Personality, character, social traits
 - d) PSI
 - e) Viciousness/aggravated offense
 - f) Degree of culpability
 - g) Demeanor at trial
 - h) Age
 - i) Remorse, repentance, cooperativeness
 - j) Need for close rehabilitative control
 - k) Rights of the public
 - l) Length of pretrial detention
 - iii. The judge has to explain the reasoning for the sentence [*State v. Gallion, 2004 WI 42*]
 - iv. There is a presumption for probation [*Gallion*]
 - v. There is a presumption for concurrent sentences [*State v. Hall, 2002 WI App 108, ¶ 14*]
 - b) The content
 - i. Make sure the information presented is accurate [*State v. Tjepelman, 2006 WI 66*]
 - ii. You may not abdicate your duty to present mitigating information [*State v. Pote, 2003 WI App. 31*]
 - iii. Provide copies of all pertinent documents to the court and the prosecutor
 - c) The client

- i. The client has the right of allocution – exercise it wisely
 - ii. Prepare witnesses and client for presentation to court
 - iii. Know your judge
- 2) Know your sentencing goal
 - a) Talk to your client about the client’s main goal
 - b) Is this a probation case, jail case, or a monetary penalty case?
 - c) What is the maximum length of probation your client is facing?
 - i. Generally probation is for one year
 - ii. Probation can be ordered up to two years for domestic abuse cases, sexual assault, cases involving firearms, and OWI- 2nd + cases
 - iii. Multiple convictions can increase the length of probation [see Sec. 973.09 (2)(2)]
 - d) Is this a case with repeater allegations, and potential prison?
 - e) Does this case include a Deferred Agreement regarding a felony?
 - f) Is there restitution involved?
 - i. Will payment of restitution result in only a fine or reduced jail?
 - ii. Can your client reasonably make restitution payments within a period of probation?
 - g) Do you have alternative dispositions available?
 - i. Straight diversion
 - ii. Deferred prosecution
 - iii. Deferred entry of judgment
 - iv. Ordinance
 - v. Fine and/or costs only
- 3) Make sure you know more about your client than the PO, the Judge, and the District Attorney
 - a) Gather records on your client from schools, juvenile courts, treatment facilities, the Department of Corrections, hospitals, friends, neighbors, relatives, and enemies.
 - b) Be sure you know your client’s complete criminal record, both in and out of the state of Wisconsin
 - c) Double check anything your client tells you that you intend to present to the judge
 - d) If you have a dispute of facts, present evidence of your investigation that supports your version.
 - e) If any DOC document has inaccurate information, counter it immediately and ask that it be included with the court file and forwarded to DOC.
- 4) When presenting information from experts, make sure you know how it will look 5 years from now in a DOC file, or to a possible Chapter 980 evaluator

- a) Psychological reports
 - b) Sex offender evaluation reports
 - c) School reports
 - d) Victim Impact reports
- 5) Ask to have all sensitive information sealed
- a) If you provide medical or mental health or AODA information, be aware that these are medical records under the federal HIPPA law, and are required to be held confidential. An argument can also be made regarding school records, IEP reports and other treatment records.
 - b) Make sure you are familiar with the e-filing requirements in filing confidential documents. Certain information must be redacted from court documents prior to filing:
 - i. Social Security numbers
 - ii. Financial account numbers
 - iii. Tax identification numbers
 - iv. Passport numbers
 - c) If you are seeking to file confidential information, review court e-file forms GF-241 through GF-247B.
 - d) Do not assume that a defense PSI will be held confidentially. However, confidential information within a defense PSI should be masked or redacted for the public file. You may need to argue this before the court. It is best to find out the local practice from the court, or local defense attorneys.
 - e) Never let your client personally attack a PO – it will always backfire.
- 6) Probation – pros and cons
- a) Wis. Stats. 973.09 governs probation – read it closely
 - b) Be aware of the diminution of 4th amendment rights for probationers, particularly ACT 79. See specifically Sec 973.09(13) Wis. Stats.
 - c) Your client can refuse probation, but may do so at his/her peril.
 - d) Become familiar with the standard rules of supervision.
 - e) Try to limit any special conditions of probation in favor of having the agent set the rules.
 - f) Every probationer will undergo a COMPAS to determine criminogenic needs, and rules of supervision are intended to address those needs.
 - g) If your client needs treatment for addiction, let them know the consequences of using on probation.
- 7) Specific problems in sentencing need careful reading of the statutes
- a) Sex offender registration
 - b) Restrictions on gun ownership – domestic abuse

- c) Expungement and CCAP – ordinance vs. criminal conviction vs. Deferred Agreement/ Entry of Judgment
 - d) Huber release –know your jurisdiction rules
 - e) EMP – costs and rules
 - f) Fines, costs, surcharges and restitution
 - g) DNA – yes, even for OARs
 - h) Return of property
 - i) Mandatory minimum sentences
 - j) Mandatory immediate incarceration – 3rd offense OWI and above
- 8) Correct all errors in any DOC and prosecution documents before the sentencing date
- a) Check criminal history and resulting dispositions
 - b) Check juvenile history
 - c) Make sure any victim impact statements reflect the current mood of the victim
 - d) Check the original sources of any summaries regarding diagnosis and treatment, as well as prognosis in regard to your client
 - e) Compare data from older presentences and DOC documents, and make sure that if information is lifted from an older PSI or other Corrections documents, such as Chronological Summaries or Revocation summaries, it is so identified.
 - f) You need court permission to obtain a copy of old PSI's. Make this request under section 972.15(4) Wisconsin Statutes. You will need to third-party file this with the court in that case, and contact the Clerk of Courts to determine if the court has signed the order. Once signed the Clerk should assist you in obtaining a copy.
 - g) Review all documents prepared and signed by your client which were requested by DOC-
 - i. Statement of offense
 - ii. Background and education
 - iii. Prior treatment history
 - iv. Evaluations by any DOC personnel, such as psychologists, job placement personnel, ATR records
- 9) Specific crimes, and issues that arise
- a) OWI cases
 - i. Mandatory minimums
 - ii. Guidelines, and how to argue them
 - iii. Medical issues and interplay with guidelines
 - iv. In-house jail reduction programs
 - v. Treatment courts

- vi. Ignition Interlock Devices (IID) and the half-price order
 - vii. See Sec. 346.65(3r) Wis. Stats for further reduction in the minimum sentences for OWI convictions.
- b) Drug cases
 - i. Public housing problems
 - ii. Student loans
 - iii. Probation vs. Conditional discharge – Sec. 961.47 Wis.Stats.
 - iv. Sentence reduction – treatment – Sec. 961.475 Wis. Stats.
 - v. Driver License Revocation – no longer mandatory
 - vi. Second and subsequent offense enhancers – do not apply to felony meth possession cases – Sec. 961.48 Wis. Stats. They are still subject to regular enhancer penalties.
 - c) Domestic Violence cases
 - i. Federal gun possession restriction
 - ii. Domestic abuse – know to whom it applies and to what it applies [Sec. 968.075 Wis. Stats.]
 - a. Applies to those with whom an adult person is or has been married to, lives with or has lived with, or an adult with whom an adult person has had a child.
 - b. Crimes include Battery, Sexual assault, Intentional impairment of a physical condition, or a “physical act that may cause the other person to reasonably fear imminent engagement in the previously stated crimes.”
 - i. criminal damage to property – domestic?
 - ii. theft – domestic?
 - iii. criminal trespass – domestic?
 - d) Domestic Abuse enhancers – how a misdemeanor disorderly conduct becomes a felony – Sec 939.621 Wis. Stats
 - e) Fourth Degree Sexual Assault
 - i. Sex Offender Registration – Wisconsin law does not mandate registration but it may be ordered by the court Sec. 973.048 Wis.Stats
 - ii. Non-criminal problems – housing, employment
 - iii. Probation will require a sex offender evaluation and will impose sex offender rules
- 10) Other sentencing issues
- a) Bail – Cash bond can be used for costs/fines, so ask for a signature bond prior to sentencing if losing the cash would be a hardship, or if the cash was posted by someone other than the defendant.

- b) Sentence credit – Make sure you have calculated ALL credit to which the client is entitled before sentencing (custody associated with arrest, awaiting bond, PO holds, cash bond)
- c) Prior convictions – general
 - i. Repeaters need to be alleged in the complaint
 - ii. The defendant has to either acknowledge the priors, or the State must prove them [usually via JOC]
 - iii. Must generally be within 5 years, EXCLUDING time in custody, but check specific offenses, such as drug charges, second and subsequent, domestic abuse, and certain sex crimes.
- d) Prior convictions – OWI
 - i. All priors count back to 1989
 - ii. Collateral attacks – check to see if the defendant was represented on all criminal OWI's.
 - iii. If you have two third offense OWI cases pending, don't agree to a 4th offense prosecution if the BAC is under .08% [See State vs. Sowatzke, 2010 WI App 81]
- e) Restitution
 - i. Make sure the restitution sought is statutorily authorized [See section 973.20 Wis. Stats.]
 - ii. It may include restitution for read-ins
 - iii. The defendant is entitled to a hearing
 - iv. Maximum period restitution may be held open is 90 days [Sec. 973.20(13)(c)Wis. Stats.]
 - v. Restitution may be reduced to a civil judgment
- f) Stay of sentence
 - i. Up to 60 days to commence sentence
 - ii. If placed on probation, conditional time may be stayed
 - iii. There is no stay for an OWI-3rd and higher
 - iv. It is unlikely you can obtain a stay of sentence on a felony
 - v. Appeal
- g) Expunction
 - i. Up to age 25
 - ii. Includes all offenses up to Class H and I felonies [see Sec. 973.155 Wis. Stats. for specific restrictions] This is currently a one-time event.
 - iii. But wait – the Legislature is amending the statute, so keep an eye on Adam Plotkin's email...
- h) Prison sentence – misdemeanors
 - i. Misdemeanor sentences are subject to the 75%/25% bifurcation rules
 - ii. Misdemeanants may earn early release

- i) Illegal immigrants
 - i. Padilla ramifications
 - ii. Interpreters
 - iii. ICE
 - iv. Use the Agency Immigration Practice Group for any non-US citizen case you have as this area is under constant change
- j) Bias – racial/gender/ethnic
 - i. Self-check – what are your attitudes?
 - ii. Know your judge
 - iii. Be prepared with statistics regarding similar crimes, personal stories of your client to counter bias
- k) Effect of incarceration on Social Security and SSI – benefits are lost if incarceration exceeds 29 days. Check rules to see if there is a way to work around this.

11) Wrap-up

- a) Check the JOC to make sure the sentence is correct and that jail credit is accounted for
- b) Discuss and sign the Notice of Intent to Pursue Post-conviction Relief and file it with the Clerk before leaving
- c) Check the Judicial Benchbook – Criminal and Traffic- for the latest information judges have on sentencing matters.

*Among the attributes of God, although they are all equal,
mercy shines with even more brilliancy than justice.*

Miguel De Cervantes (1547 - 1616)

Everyone loves justice in the affairs of another.

Italian Proverb

Injustice is relatively easy to bear; what stings is justice.

H. L. Mencken (1880 - 1956)

*You know, the courts may not be working any more, but as long
as everyone is videotaping everyone else, justice will be done.*

Matt Groening (1954 -), The Simpsons

Nobody wants justice.

Alan Dershowitz

“I have always found that mercy bears richer fruits than strict justice.”

Abraham Lincoln