

TIPS FOR PERSUASIVE SENTENCING
IN MISDEMEANOR CASES
WISCONSIN PUBLIC DEFENDER CONFERENCE
MADISON, WI
MISDEMEANORS – A TO Z
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- 1) Know your sentencing goal
 - a) Talk to you 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?
 - 1) Generally probation is for one year
 - 2) Probation can be ordered up to two years for domestic abuse cases, sexual assault, cases involving firearms, and OWI- 2nd + cases
 - 3) 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?
 - 1) Will payment of restitution result in only a fine or limited jail?
 - 2) Can your client reasonably make restitution payments within a period of probation?
- 2) Make sure you know more 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.
- 3) 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

- 4) Ask to have all sensitive information sealed
 - a) Section 972.15(4) provides for the confidentiality of the PSI, and information presented by the defense is entitled to the same treatment, since it contains the same types of sensitive information.
 - b) 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.
 - c) Never let your client personally attack a PO – it will always backfire.
- 5) 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-but see State v. Melody P.M., 2009AP2994, Wisconsin Court of Appeals, District IV, unpublished opinion
 - d) Huber release
 - e) Fines, costs, surcharges and restitution
 - f) Return of property
- 6) Correct all errors in any DOC 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) Review all documents prepared and signed by your client which were requested by DOC-
 1. Statement of offense
 2. Background and education
 3. Prior treatment history
 4. Evaluations by any DOC personnel, such as psychologists, job placement personnel, ATR records
- 7) Specific crimes, and issues that arise
 - a) OWI cases
 - 1) Mandatory minimums
 - 2) Guidelines, and how to argue them
 - 3) Medical issues and interplay with guidelines
 - 4) In-house jail reduction programs
 - 5) Treatment courts
 - b) Drug cases
 - 1) Public housing problems
 - 2) Student loans
 - 3) Probation vs. Conditional discharge – Sec. 961.47 Wis.Stats.

- 4) Sentence reduction – treatment – Sec. 961.475 Wis. Stats.
- 5) Driver License Revocation – no longer mandatory
- c) Domestic Violence cases
 - 1) Federal gun possession restriction [case law is evolving on this issue – watch SCOTUS for scaling back this law]
 - 2) 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 and 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.”
 1. criminal damage to property – domestic?
 2. theft – domestic?
 3. criminal trespass – domestic?
 - d) Fourth Degree Sexual Assault
 - 1) Sex Offender Registration – Wisconsin law vs. Adam Walsh Act [See section 973.048(1m) and (3) Wis. Stats.]
 - 2) Non-criminal problems – housing, employment
- 8) Other sentencing issues
 - a) Bail – Cash bond can be used for costs/fines, so ask for a signature bond prior to sentencing
 - 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
 - 1) Repeaters need to be alleged in the complaint
 - 2) The defendant has to either acknowledge the priors, or the State must prove them [usually via JOC]
 - 3) Must be within 5 years, EXCLUDING time in custody
 - d) Prior convictions – OWI
 - 1) All priors count back to 1989
 - 2) Collateral attacks – check to see if the defendant was represented on all criminal OWI’s.
 - 3) 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, 2009AP1990, Court of Appeals District 2, Publication recommended]
 - e) Restitution
 - 1) Make sure the restitution sought is statutorily authorized [See section 973.20 Wis. Stats.]
 - 2) It may include restitution for read-ins
 - 3) The defendant is entitled to a hearing

- 4) Maximum period restitution may be held open is 90 days [Sec. 973.20(13)(c)Wis. Stats.]
- 5) Restitution may be reduced to a civil judgment
- f) Stay of sentence
 - 1) Up to 60 days to commence sentence
 - 2) If placed on probation, sentence may be stayed
 - 3) Appeal
- g) Expunction
 - 1) Up to age 25
 - 2) Includes all offenses up to Class H and I felonies [see Sec. 973.155 Wis. Stats. for specific restrictions]
- h) Prison sentence – misdemeanors
 - 1) Misdemeanants are eligible for PAT
 - 2) Misdemeanants may earn early release
- i) Illegal immigrants
 - 1) Padilla ramifications
 - 2) Interpreters
- j) Bias – racial/gender/ethnic
 - 1) Self-check – what are your attitudes?
 - 2) Know your judge
 - 3) Be prepared with statistics regarding similar crimes, personal stories of your client to counter bias
- 9) At the hearing, keep in mind three things
 - a) The law
 - 1) 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
 - 2) 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
 - 3) The judge has to explain the reasoning for the sentence [State v. Gallion, 2004 WI 42]
 - 4) There is a presumption for probation [Gallion]
 - 5) There is a presumption for concurrent sentences [State v.Hall, 2002 WI App 108, ¶ 14]

- b) The content
 - 1) Make sure the information presented is accurate [State v. Tjepelman, 2006 WI 66]
 - 2) You may not abdicate your duty to present mitigating information [State v. Pote, 2003 WI App. 31]
 - 3) Have copies of all pertinent documents ready ahead of time for the court and the prosecutor
- c) The client
 - 1) The client has the right of allocution – exercise it wisely
 - 2) Prepare witnesses and client for presentation to court
 - 3) Know your judge

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