

# PRACTICE POINTS

BY KATRINA DANIEL

## Telling a Story in a Mitigation Video

A sentencing mitigation video can be a powerful tool for the defense. Through use of the video, the defense team's goal is to obtain a shorter sentence for the client. The video should be short (approximately 10 minutes) and should show the judge that the client is more than what the sentencing report says. Has the client already started the process of improving himself? This can be the focus of the sentencing mitigation video. Has the client's family rallied around her and is ready to support her when she re-enters society? A short video will give the judge a sense of the support and resources the client will be able to rely on to ensure success. Sentencing videos can have impact.

### Initial Interview With the Probation Officer

If the defense team is considering a sentencing mitigation video for the client, defense counsel must make sure that the client's temperament at the initial interview with the probation officer is the same temperament on display in the mitigation video. In both the interview and the video, the client should be the same abjectly remorseful individual who is accepting of responsibility for his criminal acts. Perhaps most of all, he should be properly humble and polite in his interview with the probation officer and in the sentencing mitigation video.

The sentencing mitigation video the probation officer and the prosecutor receive is the same one the judge receives with the defense sentencing memorandum. The last thing defense counsel wants is for the probation officer to go to the judge's chambers and have a conversation like this:

I got the video too, Your Honor. I have to tell you, it's not the same guy I interviewed. When I interviewed him, he was angry and arrogant. He was bitter and resentful that he'd been arrested, and he blamed his partner for doing this.

Judges listen to probation officers — even more so than they listen to prosecutors.

### Be Creative With the Video

*Scenario One.* A client, already incarcerated, is awaiting sentencing. He generously prepares “welcome kits” for other newly arrived inmates at his own expense, sharing his experience as a new inmate with others who are as unprepared and shocked as he was.

The welcome kits he provides — with his own canteen money — contain shower shoes, envelopes, stamps, and snacks. Will the BOP allow defense counsel to film the actual kits the client creates? Probably not. Now is the time to be creative! Defense counsel can go to the store, buy the supplies, and film them. Counsel can include that footage in the sentencing mitigation video to show the judge that the client is a good person, is trying hard to adjust to prison life, and is helping others to do so.

*Scenario Two.* When trying to show a judge how hard the client has tried to better himself and change himself after charges have been filed, the defense must figure out how to drive that effort home and impress that upon the judge. A wealthy client is facing child porn charges. The client is humiliated, shamed, and semi-suicidal. He starts intensive mental health treatment. He sees several psychologists and a psychiatrist at least five times a week for three years. The client spends thousands of hours and hundreds of thousands of dollars in therapy. He becomes better groomed, and he gets a job interacting with the public.

The defense team can use time-lapse photos to show the client's progression. The photos will show his physical change from unkempt, unshaven, and scruffy to a more “normal” appearance wearing a suit and tie.

More important, the defense can develop a diagram or flow chart showing how many hours the client spent in therapy. How many thousands of dollars did he spend? How much time and effort did



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he exert? How many thousands of miles did he drive to get to different therapists' offices? He did not do it online in the comfort of his mom's spare room.

### Mitigation Videos Aren't Only for White Collar Clients

Effective sentencing videos can be created even when the client has little money. It is the “story” that is the heart of the video, not expensive production values.

A young man, 34 years old, was incarcerated and awaiting sentencing. He had grown up poor, but his parents were hard workers and had tried to keep him on the straight and narrow path. Despite his parents' best efforts, the young man became one of 19 defendants in a federal drug case. The young man had numerous priors, and the sentencing guidelines called for life in prison.

He was interviewed in his cell. The collar on his orange jump suit had to be turned up to hide his neck tattoos. The young man was lightweight, and he was shy. He said things on video that he would never have said in open court.

The young man apologized to his parents for being in jail and causing them to have problems. He also mentioned his son: “I tell my 12-year-old son *never* to

follow in my footsteps. ‘Look how I messed up,’ I tell him. I urge him to stay in school.” He lamented the fact that he dropped out of school in the ninth grade. He liked going to school, especially playing football, but his family did not have the money to buy him football gear. In an especially poignant moment, he shared something that he had never revealed to anyone: If he could turn back the clock, he would stay in school and become a paramedic. Although the guidelines called for a life sentence, the young man was sentenced to 11 years in prison.

### The Cost of Crime

The sentencing mitigation video can show the judge what the client has already lost and what his criminal acts cost him.

Here is an example. A client served as city attorney for a well-known municipality. He lost that job and his good reputation. He lost his partnership in a well-respected law firm. He lost his Bar license. Because the client was a public figure, the defense can incorporate newspaper headlines detailing his arrest into the mitigation video. On a personal basis, the client lost his family. His wife found out about his mistress. His daughter, a doctor, refused to allow him

access to his grandchildren. The bottom line is that the judge will see how much this client has already lost, both personally and professionally.

### Don't Do What I Did — A Discouragement Program

Since rehabilitation is one of the required components outlined in 18 U.S.C. § 3553(a), consider enhancing that rehab requirement. How? Assist the client in developing a program designed to inform and discourage others from following in the client's footsteps.

Consider these examples. The client has a drug addiction issue. He became addicted to painkillers after an injury. The addiction formed, continued, and spiraled out of control, becoming a major factor contributing to the client's crime. The client's mental capacities were impaired — bad lapses in judgment followed by bad acts.

The client is a pharmaceutical sales representative who becomes addicted to his own products. His defense attorney can help him develop a program or speech to be delivered to others in his position. The presentation would detail how he became involved in the crime and how he may have unwittingly slid

into illegal acts by exercising poor judgment that was driven by his addiction.

In this “Don't Do What I Did” Discouragement Program, the client could outline step-by-step exactly how he became involved and subsequently committed a crime that could send him to prison. The client can relive every part of what he went through, explain what he was or was not doing right, describe the entire mental process, and create a customized speech that includes anecdotes from his experience.

The client could give this presentation to a group at a church, a temple, a Boy Scout meeting (older scouts), a high school assembly, and an AA meeting. Also, he could speak to a high school athletic team. Athletes have injuries and have easy access to painkillers. This presentation would be videotaped on a cellphone with time and date stamp to show authenticity, and clips of the presentation would be included on the sentencing mitigation video.

A client who is an accountant could compose a speech detailing how he inadvertently descended into criminal acts. The accountant thought he was doing the right thing when he hired an acquaintance

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who was recently released from prison. The accountant believed he was doing a good deed for a guy he “sort of” knew. The formerly incarcerated individual convinced the accountant that he was too qualified to serve burgers at McDonald’s. He convinced the accountant to hire him for a sales job. Unfortunately, the newly hired salesman eventually started conning again. This time the well-meaning accountant who hired him got the blame. “Let no good deed go unpunished.” That accountant is facing four years in prison and the loss of his license. He could create a speech aimed at graduating accounting and business students. For a graduating class, that accountant who pled to mail fraud and tax fraud could describe his actions and thought processes, with the result being that future young professionals in that field would be alerted to the potential for committing a crime even if they think they are just “trying to help somebody.” It falls under the “let no good deed go unpunished” axiom.

The same “Don’t Do What I Did” Discouragement Program can apply for a client who is a doctor. Health care fraud is huge, and many doctors and health care professionals are caught up in these crimes. Florida is the health care fraud capital of the United States. In this instance, the doctor was charged with health care fraud after he tried to help a friend from medical school whose practice was overwhelming. The government charges the doctor when the med school friend is defrauding Medicare. The med school friend refused to let his friend look at the accounting or bookkeeping records. It was the Good Samaritan doctor’s own fault for not demanding to look at the books. He trusted a friend who should not have been trusted. A presentation detailing his inadvertent odyssey into crime could make for a perfect “Don’t Do What I Did” speech to medical school students.

### Setting the Scene

If a client is not incarcerated, what locations should be considered for filming a mitigation video? Given the choice between a pretty landscape and a windowless, uncomfortable room, choose the room. If the background is beautiful, the sentencing video may look like an expensive commercial. Looking like an expensive commercial is not the goal, especially when the case involves a financial crime. “I hate seeing beautiful beach shots with a defendant holding someone’s hand and walking off into the sun-

set. I think about the defendant’s victims,” one judge said. It is a good idea to use a room in an attorney’s office as the background. This is a neutral background, and the judge can relate to it.

### Stumbling Blocks

Are there potential drawbacks to creating a sentencing video? Yes. Each defense attorney must know his or her judge. Some judges may refuse to watch defense counsel’s video. Also, there may be accusations of manipulation and staging. Finally, as a countermeasure, prosecutors may begin showing videos of the victims harmed by the client’s conduct.

### Conclusion

What can the video do that the client’s allocution cannot do? Sentencing videos can help achieve a downward departure from the sentencing guidelines, humanizing the client in a way that words on a page cannot do. Weeks before sentencing, the judge will see and feel the sentencing presentation. The video can show the judge who the client is — long before the judge walks into the courtroom on the day of sentencing. The goal is to show the judge that the client is a real person, not merely a sen-

tencing guidelines number. Think of sentencing mitigation videos as “character witness” letters — brought to life.

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Katrina Daniel founded Legal Video Concepts after a successful career as a reporter, anchor, and national correspondent for various local and national media outlets. She also writes for print and online publications. She is a Certified Guardian ad Litem and has a master’s degree in Psychology.



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