TAB 9

Identifying Mitigating Factors On Sentence

Fergus (Chip) O'Connor
Barrister and Solicitor

7th Annual Six-Minute Criminal Defence Lawyer

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2007 Six Minute Criminal Defence Lawyers

Identifying mitigating factors on sentence.

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Last year, I was asked and agreed to partake in order to offer my somewhat specialized expertise in post-sentencing matters. I submitted a paper which was an effort to make clear my opinion that a sentence in the penitentiary is to be avoided, and never sought in preference to a reformatory term. Due to problems with the satellite equipment, my oral presentation was not broadcast. That paper is in last year's material and I would be pleased to respond to any questions. By e-mail, at oconnor@kos.net .

This year I was asked again to speak, but given a choice of several topics, none of which was a post-sentencing topic. I chose "Identifying mitigating factors on sentence" because it struck me that the job trial counsel does at the sentencing hearing forms, in a sense, the record from which one must work in any post sentencing exercise. For those who do not know what a post sentencing exercise means, the most obvious example is a parole hearing. Other examples include institutional security rating, institutional placement, segregation reviews, transfer decisions, private family Visits, and Pass programs.

In all of these decision making processes, just as in the original sentencing hearing, a government official can and will look to the sentencing transcript, or the reasons for sentence, as well as the exhibits and, if so inclined, endeavor to trash the prisoner or to find favor with the prisoner based on that record. Therefore, MY FIRST POINT IS: EVEN IF YOU HAVE A JOINT SUBMISSION, PLACE ON THE RECORD ALL MITIGATING FACTORS; AND FILE INTO THE RECORD ALL DOCUMENTS THAT GO TO MITIGATION. Otherwise, the Correctional authorities will be able to refer to what they will euphemistically call the "official record" and disbelieve anything your client says in mitigation when considering if he should be placed in the dungeons of K.P., or the relatively more comfortable ten man houses at Bath.; in deciding if he should be placed or held in segregation following an anonymous allegation; and in deciding if he should be allowed to have his stepson and his Aunt Tilly come to visit him; not to mention whether he gets parole. The official record often is nothing more than the police brief. As the experienced counsel sitting among you are well aware, the Police brief often presents a dramatically more aggravated scenario than that which is finally resolved in court, be it by plea bargain or otherwise.

With that in mind, what are the mitigating factors to look for? MY SECOND POINT IS THERE ARE ALWAYS MITIGATING FACTORS. There are always mitigating factors. No matter how bad the case is, there is always a way to characterize it as "It could have been worse". I shall go over some specifics now, but as my six minutes will quickly run out, I add now my third and most over-arching point. MY THIRD POINT IS THAT THE JOB OF A LAWYER IN SENTENCING IS NOT ROCKET SCIENCE: JUST BE THOROUGH.

Specific places to look for mitigation:

Consider 1. The Offence(s), and, 2. The Offender.

1. The Offence

a. Was alcohol involved? Does he have a substance abuse problem? If yes, then his judgement was clouded and he, now sober, is resolved to remain so. If no, he does not have a substance abuse problem and is therefore a good candidate for rehabilitation. [N. B. This and any other submission may only be made if there is an evidentiary basis for it on the record; or if your client has instructed you that it is true! You should not speculate. If possible, avoid relying solely on your client's instructions. That is an important reason why this topic of evidence in mitigation is so important]

b. How many crimes were there? If one, it was a single and isolated incident. If more than one, then, whatever the number, it was not as bad as the next higher number; and one can envision (and hopefully cite a case) where the number was higher.

c. What was the degree of violence? It could have been worse. How serious were the injuries? Has the complainant fully recovered? Was the severity of injury intended? If unintended, that is mitigating no matter how serious the injury. Conversely, if the injury was not serious, or the victim has recovered, that is mitigating no matter how unsavory the fact scenario.

d. Has the client shown remorse? A guilty plea is important evidence of remorse. "The guilty plea itself of course is the most tangible demonstration of his remorse and regret for the offence." R v Hennessey, Sept 28 2005, O.C.J., per Griffiths, J. On the other hand, in the event of a not guilty plea or continuing denial, that may be the result of a deeply felt guilt so deeply felt that the pain of admitting would be greater than that of accepting the severe consequences of being in denial; and therefore the Court should not let denial stand in the way of the sentence you advocate. See R v Mathews, (1999), O.C.J. per Pedlar, J. (as he then was) . [As in this example, apply the converse to searching for factors in mitigation, namely minimizing the effect of traditionally aggravating factors, also.]

e. What provocation had taken place? What was the motive? Why did it happen? This may not be obvious from Crown disclosure. Your client may not be comfortable telling you. You may have to extract it from him or from others who know him. This is particularly so if he was bullied, or teased, or been subject to racial or other prejudice. Find out the history. No one does anything for no reason. [If he claims not to know why he did it, and it is a serious matter, suggesting mental disorder, or calling for ruling out mental disorder, do not hesitate to obtain a psychological or psychiatric examination; but do so under the umbrella of solicitor client-privilege].

f. Who was the victim? If young, she could have been younger. The victim may have had issues that played into the scenario. If a commercial entity, perhaps your client did not appreciate the importance of the banking system to our society. In any event, seek his instructions, and, if possible, corroborative evidence, and then assure the Court that he now has gained a much deeper than before appreciation of the error of his ways and it will not happen again.

g. What planning took place? Here, you look for evidence to empower you to argue that it was unsophisticated, not premeditated; that it was opportunistic, or downright impulsive, rather than predatory.

h. What was the monetary loss? It could have been worse. Can he make amends, financial or otherwise? If not, a sincere letter of apology may help.

And on and on and on…

2. The Offender

a. Regardless of the various factors as to the offence, even the aggravating ones, you can argue that it occurred during an episode in his life. Life consists of episodes. Establish what was in place in his life that will not be repeated. Did somebody die? Did he lose something? (a relationship, a job, an eye?) Did he have a fight with his wife, mother or anyone? Had he drank more than usual? (Of course, analogous arguments apply to drugs; as well as the escalation from one drug to another, one with which he was unfamiliar or less familiar.)

b. What is his age? Youth mitigates. Old age also mitigates. By mid-40's, crime rate is minimal, including violent and sexual crimes. [Expert evidence is available. Matt Yeager advertises in the C.L.A. Newsletter] [Get a current copy of the DSM. The diagnosis that you want most to avoid for your client, or minimize, is Antisocial Personality Disorder. Therefore, you may not want to bring it up. But, if the Crown does, note that, even then, if your client is thirty or more, the disorder is likely to be in decline (Look under the heading "Course" in the description of A.P.D., wherein it states the decline may occur in the fourth decade of life. The fourth decade begins at thirty.)].

c. Get proof of Education? Employment history? A current job offer? A place to go and a thing to do? Plans for the future? Do not offer vague hopes and ideas but establish specific courses of action for specific future times and places. If he is enrolled in a course that begins in September; or has a summer job, you are able to argue the detrimental effects of a certain jail term. Think it through and talk it over with your client; timing can be important.

d. Family and friends? Supportive people? Letters? Get as many as you can but make them meaningful. Conversely, get whatever you can, when you can't get much. Letters of support should specify who the writer is and what the writer's relationship is to the accused. And be signed and dated (Do not hesitate to ask for a second one if the first is inadequate; but, if you do, be sure to re-emphasize the importance of telling the truth, something you should be sure to emphasize in the first place when requesting a letter.) A J.H.S. worker who just met the guy in the bucket and is willing to help with a job search upon release may seem to be of minimal weight. However, it enables you to argue that the client has taken the initiative to introduce himself to a helping professional and wants to better himself. A letter from a law abiding adult who has known the accused since he was a little boy, and can attest to a chaotic upbringing and that he has always kept in touch, that he always has seen good qualities and that he now sees a very positive change in his attitude, can be of significant weight. Ask the writer(s) to come to court and sit where you can point him or her out to the Court. Take a look at the writer first.

Conclusion.

Find something to say to make the accused likeable. Add the fact that the accused is a human being and the Charter informs and requires the Courts as the instrument of government to see and respect the human dignity in the accused as in all of us. The Crown may get on a high horse and wax eloquent about how the accused showed disregard for the dignity of the victim or flaunted the social contract. Or that he has been to jail before and did not learn his lesson and is a hardened criminal. You may be able to counter with some evidence of hardships that the accused faced in his life. This could be in early childhood. It could also be within the correctional system. It is essential not to paint yourself into the corner of establishing that the system created a monster. If the accused is found to be a monster for any reason, society must be protected from him. Instead, concentrate on the phenomenon of conditioning, and even mention Pavlov's dog, a well accepted euphemism. It was due to the conditioning to which he was subjected in his life that he acted out in committing this crime. Try to put yourself in a position to establish that, since then, he or she has adopted a positive attitude and is amenable to other conditioning. If that argument is weakened by recent misconduct, such as substance abuse, put yourself in a position to offer resources to deal with any presenting problems and argue that jail has not worked but your proposal may.

The best long term protection of society is not through punishment but through careful maintenance, monitoring, and integration of offenders in the main stream of society.

In short, try to help the Court craft the best sentence that offers the positive conditioning that the accused so dearly wants and that will ensure the best management of the accused for the protection of society in the long term.