

THE ROAD LESS TRAVELED: BEING A SENTENCING ADVOCATE

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Has anybody you know well ever gotten into trouble with the law? You hope that the powers that be, whoever they are, will see that person as the person you know, a good person who made a bad decision or a mistake. And, ultimately, if any punishment is going to be meted out, you hope that “justice” will be a compassionate penalty derived from intimate knowledge of the person, knowledge that properly weighs the need for accountability and specific deterrence. This notion of individualized justice is at the core of sentencing advocacy, a growing area of specialization within criminal defense. Sentencing advocates help parties to the judicial process (court, counsel and probation) understand the defendant and fashion a sanction that best satisfies the recognized goals of sentencing – deterrence, public safety, rehabilitation and punishment. Because sentencing advocates tend to view institutionalization as counterproductive to the offender and to the community at-large they also often devise and present community-based sentences, that is, alternatives to incarceration.

Sentencing advocacy’s roots lay with John Augustus, a 19th century Boston boot maker known as the “Father of Probation” and the originator of presentence investigation. Although presentence investigation reports are commonplace today, the probation officers who prepare them are officers of the court and therefore tasked with maintaining neutrality. As a result, probation officers tend not to recommend sentences outside of the penalties called for by statute or guidelines and seldom-if-ever suggest non-prison sanctions beyond what is part of the court’s standard protocol of conditions of community supervision. Counterbalancing what probation offices provide courts is the “private” presentence report developed by Dr. Jerome Miller of the National Center on Institutions and Alternatives (NCIA) in the mid-1970s. It is at NCIA where I became a sentencing advocate.

The impetus for Dr. Miller's efforts was a young man with a drug problem. Dr. Miller met this young man while serving as Commissioner of Children and Youth for the Commonwealth of Pennsylvania; he had been arrested for a low-level offense and turned to Dr. Miller for help getting treatment in lieu of imprisonment. Dr. Miller called a residential program director he knew, arranged a tentative placement and wrote the Court explaining the young man's history and advocating for treatment. The Court, which had never encountered such a presentation, gladly accommodated the request. Thus, "Client Specific Planning" was born.

If you are reading this, you might well be considering, attending, or graduating from law school. Perhaps like me, you found many bright and ambitious people in law school who, despite their accomplishments, lacked a clear sense of how they intended to use their degrees. In large part they trusted that their summer associate position would set them on the path to their careers. I was different, or at least I thought I was. Cleaning up around the house a few years back, I came across my law school admission essay and my long abandoned desire to be a federal prosecutor. The product of a conservative (military and law enforcement) family, I "knew" I wanted to be a trial attorney first and a prosecutor second. That is what it meant to be a "real" lawyer in every clichéd sense of the profession: to be in court; to enforce the law; to protect society.

I quit my first job after college to take an internship at the Arizona Attorney General's Office before starting law school, and I returned the summer after my first year. My interests and ambitions also pushed me toward those non-required law school courses involving criminal law and criminal justice issues. Fortuitously, this led to enrollment in criminology classes through which I started to gain an appreciation for the causes of crime and the policy considerations underlying the punishment and incapacitation of criminal offenders. It was also through these classes that I discovered NCIA and its Client Specific Planning program. Client Specific Planning formulated individualized "alternative" sentences that were recommended to courts on behalf of convicted defendants. The work, in essence, was not about guilt or innocence but about appropriate penalties for those found guilty either by a change of plea or after trial. Intrigued, I applied for a summer internship, eager to learn about the criminal justice system from the penalty phase backward. Happily, I got the job, though not until Dr. Miller was convinced that appearance (blue suit/red tie/wingtips/short hair) notwithstanding, I was not an FBI plant.

Nothing will ever duplicate that summer. Like many nonprofits, NCIA had a unique culture consisting of diverse personalities

committed to a shared mission of helping others. I was supervised directly by a criminologist who had worked in Washington, D.C.'s notorious Lorton Reformatory. And, as is often a benefit of government and nonprofit jobs, I was thrown right into the mix, tasked with substantive writing assignments and allowed to have direct client interaction. Having shown at least a modicum of competence, I was even assigned my own case (with heavy supervision): write a sentencing report for a 19-year old African-American kid from Southeast Washington, D.C. convicted of manslaughter for stabbing a twenty-something Caucasian kid from the Northern Virginia suburbs in a drug deal gone awry. The stakes? A youthful offender sentence, with the possibility of release at age 21, or an adult sentence and entering manhood at Lorton.

Following the lead of NCIA's dedicated staff, I poured myself into the case. I learned about my client, his family and how they had done everything within their power to make a better life. I also learned about the lure and ethos of the street and about the difficulty of severing ties with childhood friends. Most of all, I learned that fundamentally good people (young and old) can make poor choices in the heat of the moment with tragic consequences. These lessons were reflected in our sentencing report, and I sat in the courtroom watching the judge leave and return to the bench repeatedly as he struggled to impose what he believed to be an appropriate sentence. The disposition? According to the judge, it was the first time that he had imposed a youthful offender sentence in a case involving a crime of that magnitude. We "won" or, more accurately, prevailed.

I was hooked. Over the course of approximately one month I had done something that affected the life of a young man for the better. I wanted to be a sentencing advocate, that is, to tell a person's story and construct sanctions for judicial consideration that accounted not only for the offense but also for the offender, as well as for broader societal goals. And, over the next five years that is what I did. I worked with all types of individuals convicted of any number of crimes in cases across the country. Given my educational background, however, I worked mainly on federal matters, as I still do. At the time, the federal guidelines were mandatory and consistently harsher than comparable state criminal penalties. They limited judicial discretion and constrained leniency largely to legally recognized downward departure bases.

It's been eight years since I left NCIA and entered into the more "traditional" practice of law as a criminal defense lawyer. Yet, the lessons during my time there continue to shape and influence how I represent clients. The simple reality is that once you learn to approach

each case with a holistic understanding of the client it stays with you forever.

While this may sound strange given its direct connection to the criminal justice system, the field of sentencing advocacy falls outside what many think of as the practice of law. And, truth be told, it is not for everyone. Perhaps that is why sentencing advocacy and its more exacting sister profession, capital mitigation specialist, is dominated by those with “soft science” backgrounds: social workers, sociologists, criminologists and the like. Certain educational curriculums no doubt lend themselves more naturally to sentencing advocacy, but there is no defined route to the field. The most important attributes one can bring to the profession are empathy and respect. The work is not about you as the advocate. It is about your client. Criminal justice deals with the complexities of the human existence. Sentencing advocacy pushes to the cores of those considerations. It is a multi-faceted discipline where creativity and thoughtfulness are rewarded.

Aside from being a more considerate individual, what might one gain from being a sentencing advocate? For one, you become a better advocate. And, no, that is not a circular answer. The profession, by definition, entails advocacy. To be an effective advocate, one needs to be persuasive in the sense of being both credible and influential. To be credible one must be both thorough and objective. It does little good to propose a sentence that does not account for the offender’s abilities because it increases the risk of future noncompliance. Likewise, suggesting a sentence disproportionate to the offense of conviction (for example, probation for murder) will not be taken seriously. Effective advocacy means making your case, which means knowing from where you come and being able to demonstrate – usually through a compelling narrative – that where you want to go is the right place given the totality of circumstances.

Many of those with whom I worked as a sentencing advocate have left the field, but not for a lack of love of the work. Rather, sentencing advocacy tends to foster intellectual curiosity and individual growth. Those with whom I had the pleasure to share time, and who worked at NCIA before and since, have diverse and interesting careers. We all look back with satisfaction on those times and the good we were able to achieve. At the end of the day, isn’t that we all hope to take from our work?