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Overview of Mitigation and the Client Interview

What is mitigation?

Mitigation is a complex, multi-pronged approach to preparing for sentencing for a defendant's crime with the goal of reducing or lessening the effects of aggravating factors. Mitigation is the story-telling part of representing the criminal defendant. Where the prosecution talks about the crime and the victim, mitigation talks about the story of the defendant as a person before the crime, after the crime, and in the future.

Mitigation is:

a) A gathering and presentation of all trauma, abuse, neglect, and deprivation suffered by the defendant;
b) The impact of those negative factors on 'normal' development;
c) Any turning points in the defendant's life ("But for this event, the defendant would not be here today");
d) Evidence of positive performance and potential for reform (so the Court does not begin to believe the defendant is "ruined" with no hope for reform in the future);
e) Evidence of remorse;
f) "Good person" evidence;
g) Any good that a defendant has accomplished (and can accomplish in the future) and any positive measures taken by the defendant in an effort to perform restitution of the offense.

(In the following, defendant and client will be used interchangeably).

Common misconceptions about mitigation[1]:

Mitigation is an excuse.

Mitigation is an explanation – often a comprehensive explanation – and not an affirmative defense (responsibility is not at issue).

Mitigation is calling the client's mother the night before sentencing.

Mitigation takes many shapes and forms over time, beginning with the initial client meeting and continuing through the legal advocacy process of talking to family and friends,

[1] Portions of the preceding information has been taken and adapted from the Mitigation Protocol Manual put out by the First Judicial District of Pennsylvania and the Criminal Justice Section, Philadelphia Bar Association Philadelphia, retrieved from https://www.courts.phila.gov/pdf/manuals/mitigation_protocol_manual.pdf.

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gathering records, and even having the client professionally evaluated – all of which takes time.

The focus of mitigation needs to be narrowed down early on.

While the mitigation process begins early in the defense relationship, narrowing the focus of mitigation to a single theme early on is hazardous. Often, clients require multiple meetings with defense counsel to develop rapport and, through those multiple meetings, mitigation evidence will emerge from the complex and multi-layered analysis of the client's life.

Mitigation is optional.

Mitigation is part of zealous advocacy. The Supreme Court of Appeals of West Virginia has repeatedly cautioned "silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial." [*State v. Grimmer,* 162 W.Va. 588, 595, 251 S.E.2d 780, 785 (1979), *overruled on other grounds* by *State v. Petry,* 166 W.Va. 153, 273 S.E.2d 346 (1980)." *State v. Proctor,* 227 W.Va. 352, 359, 709 S.E.2d 549, 556 (2011).] There is always something to say about a client, and silence is not always golden; sometimes it is waiving the opportunity to appeal a negative sentencing outcome [and, from State v. Ordie Rogers, Jr., W.Va. Supreme Court, January 9, 2015, "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." (citation omitted)].

Steps in the mitigation process:

1. *Complete a thorough and diligent interview with the client.*

This information can include information useful for bond motions [see Attachment 1], but is also useful based on the following:

a) Childhood development, rearing, discipline, abuse/neglect, significant events, emergencies, out-of-home placement, DHHR involvement+;
b) Juvenile record and/or juvenile placement;
c) Mental health/mental illness diagnosis and treatment (childhood and adult);
d) Substance abuse problems and treatment (childhood and adult);
e) Legal issues as an adult;
f) Military history;
g) Medical history (childhood and adult);
h) Family relationships (significant other, marriage, children);
i) Employment history and/or presence of disability;
j) Strengths, recreational activities, community groups/activities.

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+Consider performing a quick Adverse Childhood Experiences (ACE) questionnaire [see Attachment 5] to determine if your client had four or more adverse childhood experiences before the age of 18, making your client more likely to experience substance abuse, mental illness, violence (victim and offender), criminal activity, and a multitude of medical conditions in adulthood.

More in-depth questions of these categories may include:

a) Educational History:
- All schools attended;
- Achievements, gifted classes, or special education classes and struggles;
- Any extra-curricular activities;
- Any special placement or alternative school placements;
- All behavior and disciplinary actions;
- Reasons for school absenteeism or school drop-out;
- Any post-school educational participation/achievements;
- Any teacher/coach with whom the client stayed in touch or had a significant or meaningful relationship.

b) Complete Family History:
- Identity of parents, step-parents and their relationship (how they met, interacted, if client's birth was planned, etc.);
- Role of the above in client's life;
- Who raised client including any out-of-home placements;
- Who disciplined the client and how/where/with what/how often/for what infraction;
- Significant events in family history - divorce, death, close family member moving away, tragedies, emergencies, police/EMS responses;
- Any involvement with DHHR, adoption agency, foster care, or any other social service/social welfare organization;
- If and how birthdays and holidays were celebrated;
- Differences and protective factors that have enabled siblings to overcome negative family dynamics and avoid criminal involvement.

c) Complete Juvenile Court History and Record:
- Adjudications, arrests, placements, scope of services in placement, programs participated in, programs client failed, any personnel at juvenile programs client became attached to or who client stayed in touch with.

d) Complete Adult Criminal History:
- All arrests, convictions, success or failure on probation, any programs or alternative sentences tried, all jail placements, any achievements in jail/prison

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(e.g., obtained GED), any major problems (escape attempts, discipline, new charges while incarcerated) any current involvement in programs, work, etc.
- Any treatment programs or treatment involvement pretrial (names/addresses and dates of attendance of each0.

e) Physical/Mental Health Background [see Attachment 3]:
- All diagnoses, treatments, medications, problems;
- When diagnosed, by whom, diagnosed with what;
- Any medications given (and for what purpose);
- Why treatment stopped if it did;
- Any emergency department visits and outcome of these;
- Head injuries (concussions and head injuries both with and without loss of consciousness) and any mood or behavioral changes afterwards;
- Involuntary commitments to the hospital;
- Suicidal threats/acts and homicidal threats/acts;
- Any current treatment or medications, or needs for treatment or medications at present.

f) Drug/Alcohol History [see Attachment 4]:
- Family history of use;
- When and how did client first become aware of substances of abuse;
- Substances used by client and dates/methods of first use and last use;
- Consequences of use;
- Treatment history;
- Current environmental factors related to client's use (use at home, by significant other, in neighborhood, etc.).

g) Client's Role as a Parent and/or Significant Other:
- Name/location of all children parented by client;
- Role in each child's life;
- Witness(es) who can testify to same;
- Contact client has had or will have with child while in jail;
- Letters/drawings to/from child;
- Any noteworthy acts client has performed as a parent (e.g. homework, doctor's visits, special activities);
- Relationship history;
- How long with current partner and quality of that relationship;
- Role and responsibilities in relationship with current partner.

h) Employment History:
- First job/first age worked (what/how long);
- All types of training and all employment episodes including duration of employment, job responsibilities, any disciplinary actions, any commendations, and reason for leaving each job;

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- Contact persons for the most recent employment, or employment where client was best regarded.

i) Any Community Involvement:
- Church/religious activities;
- Sports activities;
- Neighborhood assistance (raking leaves, getting groceries or mowing the lawn for neighbors);
- All other volunteer or extra-curricular activities;
- Names and contact information for persons who can speak to these activities.

j) Witnesses and Collateral Contacts and Supports:
- Names/addresses/telephone numbers of close family, friends and others significant in client's life. The more names and contact numbers provided, the better the chance of reaching a helpful and reliable character witness. *In addition to asking what the witness knows about the client, ask the witness the best thing they know about the client and the worst thing they know about the client.*

k) Military Record:
- How/why enlisted and when;
- Branch of service, location of basic training, rank at time of discharge, nature of discharge, kind of discharge, places served, any special training/honors, any special assignments, any injuries while serving, any distressing or disturbing events observed or experienced while serving, any disciplinary actions taken against client, any current medical treatment through the Veteran's Administration.

l) Relevant Information from the Day of the Criminal Incident:
- Any information regarding client's mental/physical condition on the date of incident that might be relevant to sentencing inquiry. This can include what time the client woke up that day, who he/she saw, what he/she did, what client consumed (food, alcohol, drugs – how much and when), who client was with at the time of the incident, what choices the client made at the time of the incident.

m) Instances of Client Assistance with Law Enforcement:
- Any incidents where client assisted police, prison officials, prosecutors or other law enforcement entities in the investigation or prosecution of any crime.

2. Gather records about the client.

Records can provide specifics about the circumstances and quality of a defendant's life, including any trauma or abuse suffered by the defendant, that the family and/or defendant is unlikely to talk about.

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Records can provide useful information to identify witnesses and to follow up on specific questions (based on the content from the records).

Records can, themselves, be used as evidence. School records or abuse records can be introduced as evidence to underscore collateral information about the defendant.

The types of records [see Attachment 2] that are likely sources of data include:

- School records (ask for educational as well as psychological testing, IEPs, and behavior/discipline records);
- Juvenile file (sometimes a juvenile delinquency or status offense file will include a CAPS psychological assessment and family information);
- Mental health records (include record requests for involuntary commitment, mental hygienes and attempted mental hygienes, out of state treatment, and times when hospitalization happened but the client is unsure if it was for mental health or drug use);
- Substance abuse records (include record requests for detox, mental hygienes and attempted mental hygienes, inpatient, outpatient, and times when hospitalization happened but the client is unsure if it was for mental health or drug use);
- Medical and hospital records (special attention to notations in the record indicating abuse, trauma, head injuries, drug-seeking behavior, environmental factors, drug and alcohol issues);
- DHHR and child protection records (these may be difficult to obtain but important to request these records from the office where the client lived; if you are seeking child protective services records of an adult client, consider that these records may exist within the juvenile file/juvenile court file as they may have been expunged at DHHR upon the client turning 21 years 6 months);
- Military records (these exist at each Veterans Administration Medical Center and at each community outpatient clinic as well as nationally with the service treatment and military personnel records);
- Disability records (Social Security Administration records - SSI/SSDI – whether the client is clear of the reason for the receiving a disability check or not);
- Employment records (especially time cards if favorable, or letters of support from the employer/supervisor);
- Jail/prison records (including education, employment, medical, mental health records in prison and any certificates and classification information); and
- Community affiliations (church involvement, community involvement or letters of support).

If having the client evaluated by an expert for any reason, it is helpful to summarize and highlight for the expert relevant points from the client's records. Do not assume the expert will see the exact section of the record you anticipate will stand out and be relevant for him or her. Highlighting the relevant sections of the record in a cover letter (such as quoting portions of the record and referencing these, or noting the client's interactions with you that

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create the basis of why you want the client evaluated) will help the expert understand why the client is in need of an evaluation and what relevant issues you, as the attorney, have observed.

3. Talk to collateral contacts and develop witnesses.

Based on the client's recounting of his/her life and the review of records, a list of collateral contacts and witnesses can be developed.

If expert evaluation is warranted, many experts wish to speak with witnesses and collateral contacts relevant to the client's world (this additional step also provides further credibility for the expert evaluator, as the expert is not relying solely on the client for information). If you speak with these witnesses and collateral contacts first, you will have knowledge of what they know and will say about the client and also prepare the witnesses/contacts for a call from the expert about the client.

4. Determine if expert evaluation and/or testimony is warranted.

Experts can evaluate for competency and criminal responsibility, but also can evaluate for diminished capacity.

Diminished capacity can be useful to introduce a reasonable explanation to the court of why the client was incapable of forming intent in the crime charged due to his/her mental state (thus introducing mitigation information, opening the door to a lesser included offense, and avoiding the narrow terms related to competency and criminal responsibility).

From the syllabus by the Court preceding Justice Davis' opinion in State v. Robert Bradley Joseph, 2003,

> The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense.

Experts also can review client information and evaluate the client for mitigating information relevant at sentencing, apart from competency/criminal responsibility and diminished capacity, albeit paid for directly by defense counsel).

Sex offender evaluations are required if probation is to be considered at the time of sentencing.

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5. *Determine the most efficacious way in which to present mitigation information.*

Witness testimony through experts, family, friends, employers, and neighbors (to name a few) is only one way of introducing mitigation in advance of or at sentencing. Not all witnesses will be helpful or heard effectively in their oral representations about the client.

Written reports or letters of support [see Attachment 6] submitted to the Court by way of a motion or as an attachment to the presentence investigation report can be particularly useful to balance any victim sentiment.

The presentence investigation report will gather information about the client and produce that information into a written document for the Court. The defense attorney is allowed to sit through the presentence investigation interview process with the client, which provides the defense attorney an opportunity to hear the questions asked of the client and how the client answers those questions (and to make objections to incriminating questions or answers in that process).

A motion for alternative sentence or a reduced sentence based on mitigating factors is another way to introduce mitigation in advance of sentencing. This motion can provide comprehensive mitigation information (with or without exhibits of support) which can then be highlighted during oral argument at sentencing.

Similarly, a sentencing memorandum can be produced to enumerate the mitigating factors that help explain to the Court the client's criminal involvement, and can then ask the Court for specific sentencing alternatives to address the client's underlying needs.

Oral argument to outline mitigating factors for the Court can be effective, and oral argument can also be used to address inconsistencies or misinterpretations in the presentence investigation report and/or LS/CMI (where, on a factual basis, information is not being challenged but in an oral form, there is more to the information than simply what has been prepared and compiled).

Finally, the Rule 35/Motion for Reconsideration can include mitigating information and factors that were not previously heard or considered at sentencing, thus constituting new information by which the Court can reconsider a client's sentence.

Many forms of mitigation exist to aid a client in sentencing or post-sentencing, but all forms require background consideration and effort related to the unique qualities and conditions of the client.