

## Show, Don't Tell: The Power of Sentencing Mitigation Videos

By Rebecca Brodey and Tess Lopez

In a post-*Booker* world, most powerful sentencing submissions lay out a client's history and characteristics with a comprehensive sentencing presentation: a detailed memorandum that puts the offense into the context of the client's life, powerful objections to the presentence report, character letters from an array of individuals who know the client, and compelling arguments at the sentencing hearing. There is one new medium that has become increasingly popular amongst both public defenders and private attorneys—sentencing mitigation videos.

### What are Sentencing Mitigation Videos?

Sentencing mitigation videos (“sentencing videos”) come in many different forms and styles. The most effective sentencing videos are no-frills 7 to 20 minute compilations of interview segments from individuals who can illustrate a client's character in a powerful way that is not delivered through the letters or sentencing memorandum. The videos are not elaborate Netflix-ready documentaries about a client's life. They are also not meant to replace character letters—which are critical to any submission. Rather, they are a supplement.

Sentencing videos are impactful for several reasons. First, these videos can convey emotion in a way that leaves a lasting impression on the judge. While a letter or memo may be able to explain the impact that a client's incarceration would have on his or her family or a client's charitable works, a video brings it to life. It provides an opportunity for the judge to see the tears in the eyes of a client's spouse or sibling or to hear the gratitude in the voice of an employee the client has helped. Interviews can also be filmed at a client's home or place of work, further elucidating aspects of a client's life other than the offense. On some occasions, they also contain limited photos from a client's life or images of the client's home or place of work. The visual aspect of sentencing videos is a stark *and moving* contrast to the images and charts of the offense that are usually put before the court through evidence or exhibits to the government's pleadings.

Second, unlike letters, sentencing videos cannot be skimmed. When presenting the court with voluminous material, it is impossible to ensure that a meaningful anecdote in one of the

letters doesn't get glossed over. In a short video, it is highly unlikely that any part is missed.

Finally, videos are helpful tools for individuals who struggle with crafting a letter, especially due to old age or language barriers, or for individuals who are unable to support the client in person by attending the sentencing proceeding.

Although every video is different, the purpose of producing a video is simple: to highlight the most meaningful stories that attest to the client's true character. It is a collaborative effort between the client, the defense attorney, and the video “producer” to identify the strongest mitigating factors and decide who is best suited to explain, provide examples, and verify these factors.

### What Goes Into a Video?

Sentencing videos are concise—they should not run more than 20 minutes. They should include edited segments of interviews from a combination of family, friends, colleagues or employees, or individuals the client has helped. If it is helpful, there are situations where the interview can be filmed in the client's home or place of work. This is a subtle way for the court to get a glimpse of the client's impoverished circumstances or, in some white collar cases, modest lifestyle despite significant wealth. A sample list of video participants may include a client's wife, an adult child or child in-law (minors only in exceptional situations), an elderly neighbor, an employee, and a reputable member of the client's community who can attest to the client's acts of kindness and generosity.

The individuals who are interviewed for the video may have also submitted letters but the content should not be the same. A video should not leave the judge feeling as though his or her time is being wasted with redundant material.

In addition to focusing on the client's character, there may be other important mitigating factors to highlight in the video. In one example, those interviewed commented on the client's abusive childhood and need for mental health counseling. In another example, one of the interviewees focused on the client's naiveté and likely blindness to many of the “red flags” of money laundering. This information provides insight into the circumstances that contribute to the client's involvement in the offense. While the focus of the video shall always be the client's history and characteristics, it can be effective in exploring other mitigating issues.

While some discussion of the offense can be helpful, a compelling video should focus on highlighting the client's life and not the offense. When referencing the offense, it is important to not include any material that would offend the court—especially after a trial where the judge is intimately familiar with the evidence. After a plea agreement, it is also essential that

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interviewees do not make comments that suggest that a client is innocent or has failed to accept responsibility.

Lastly, the video is *about* the client, not *from* the client. Generally, any allocution from the client should be in court while he or she can look directly at the judge. In some instances, videos can be helpful to show a client's efforts toward rehabilitation or time spent with family but this should not replace addressing the court at sentencing.

### How Are Videos Received by the Court?

As a relatively new method of sentencing advocacy, it is difficult to quantify the impact these videos have had on judges. A recent poll of federal public defenders revealed that most of the AFPD's who have used video have found them to be effective. Federal defenders in one district reported that the judge in their division has commented that videos are efficient in that they reduce the length of the sentencing hearing because potential witnesses are able to testify in video and the video enables the judge to review that testimony prior to the hearing. A 2017 survey in another district showed that 16 of 18 cases in which videos were submitted resulted in variances. In 11 of those cases, the judge departed 50% or greater. In 6 of the 11 cases, the judge departed 100% resulting in a sentence of probation. After being shown a compilation of sentencing videos at a recent ABA panel presentation, the two federal judges on the panel embraced the sentencing videos as effective advocacy in a proceeding where the judges have a very narrow window into the defendant's lives outside of their offense conduct. Still, some judges have expressed distaste for videos, so it is essential to research your individual judge before embarking on the task of creating a sentencing video.

Anecdotally, moreover, they are impactful. Federal defenders have reported that videos "have been well received by the court as long as they are not too long, less than 10 minutes" and the AFPD's have "found them to be very effective in achieving lower sentences than the government's recommended sentence." In one Louisiana case where a video was presented, a federal judge imposed probation on a defendant facing 8 years in prison under the guidelines. In a Southern District of New York case where a sentencing video was presented, the judge sentenced the defendant to 24 months where the guidelines range was 151 to 188 months. Of course, in each of the cases, the defense attorneys provided the court with complex sentencing submissions so the video by itself did not lead to a below guidelines sentence. But, the cumulative effect of a presentation that includes a sentencing mitigation video can only be helpful in securing a favorable sentence.

While there has been some criticism that these videos are unavailable to low income offenders, their growing use by public defenders suggests otherwise. In an era of modern technology, the costs for these videos is usually on par with, or even less than, most forensics experts. Moreover, the type of video

presented controls the impact on the judge. Where a modest compilation of personal interviews is well received, an expensive film noir style production would certainly offend the court. Skilled editing and a seasoned video producer undoubtedly make these videos more compelling. But even the costs for expert production and editing are relatively marginal when compared to attorney time and fees for other types of experts.

### How to Submit Videos?

The rules on video submission vary by judge. Generally, when filing the sentencing memorandum, the video can serve as an exhibit that is referenced in the memo. A flash drive or disc can then be sent to the clerk's office along with a paper notice that can be entered on the docket. Assuming the judge's rules allow for it, courtesy copies should be provided to both chambers and the government. Of course, it is imperative to check with the judge's individual rules prior to submitting any type of electronic media. While it may seem enticing to play the video during the sentencing proceeding, there are reasons this may not be the best approach. Interviewees would be reluctant to participate in a video if they knew their private comments were going to be played in open court. Submitting the video to the judge at the same time as the sentencing memo allows him or her to view it in chambers when he or she is considering the appropriate sentence, not at the time of the sentencing hearing when many other factors are at play.

### Sentencing Videos are On the Rise

Sentencing videos are growing in popularity as a useful form of advocacy at sentencing. The style and submission of the video will vary based on the particular case and the judge. For instance, in a drug case, video footage of the client's rehabilitation may be helpful whereas this could come off as too slick in a white collar case. Despite some criticism, video submissions at sentencing have continued to increase and the feedback from practitioners is that they are effective in reducing sentences. As technology continues to change the practice of law, it is also changing representation at sentencing.



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