How to Argue Sentencing to Judge Marcus

Judge Michael Marcus, Circuit Court Department 34

This short piece is intended to elicit from advocates (defense and prosecution), PSI writers and probation officers the kind of information and argument that will assist me in making better sentencing decisions. Arguments that allude to aggravating and mitigating circumstances and then conclude simply that the recommended disposition is "appropriate" to the crime are for the most part unintelligible and unpersuasive to me. Please focus your analysis on the following concerns. For more information, see my web site, http://www.smartsentencing.com.

Resources: Counsel should explore the first 30 pages of the Sentencing Chapter of Oregon's Criminal Benchbook, available on line at http://www.ojd.state.or.us/reference/criminalbenchbook.htm. Counsel should also access Multnomah County's Sentencing Support tools: http://www.ojd.state.or.us/mul/Marcus.htm

1.The Law - If there is a mandatory minimum sentence (or mandatory sentencing component), it will be imposed unless state or federal constitutional considerations foreclose what the statutes direct. Where the law requires "compelling and substantial reasons for a departure," I will not depart without them. My understanding is that a stipulation is not alone sufficient for a departure.

2.The Objectives: - I am skeptical of the efficacy of general deterrence outside the realm of white collar crime or minor regulatory fines. Advocates who ask me to "send a message" as a matter of general deterrence should be ready to make an intelligent demonstration that this is a viable tactic to reduce criminal behavior. My highest objective is to prevent future crime and victimization by the offender. If there is a specific victim, I want to serve the needs of that victim.

A. Reducing Criminal Behavior - I intend to follow the direction of 1997 Judicial Conference Resolution #1: "judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct" [the full text is on the reverse of this page]. Incapacitation (incarceration) is generally excellent protection against harm by an offender on the outside while the offender is in the inside of an institution, but in most cases I will have to consider the likelihood of diverting offenders from criminal *careers* with or without custodial measures.

Anyone wanting to argue in this area should be prepared to discuss what we know about the sources of the offender's criminal conduct and what responses (programs, sanctions, etc) are in fact available in or out of custody. Yes, access to information may depend on whether the advocate represents the state, the defendant, or corrections. If we need some kind of evaluation or assessment of the offender, say so and why. Speed is *not* our most important product. If necessary, make the phone call to find out whether a given service is actually going to be available in custody or out, and whether it really addresses an offender's needs. Prison, jail, and even "in-patient treatment" are not black boxes; some of what goes on in each, and how much of it is available or appropriate to a given offender, can be discovered with some inquiry -- and it changes over time.

B. Serving the needs of victims - Where there is a victim, restitution may or may not be a viable need and a viable objective. Many victims would benefit from "restorative justice" in the form of "victim-offender" programs. All victims are entitled to notice and an opportunity to appear at sentencing, and in non-domestic violence, non-sexual assault cases, I often want to know if the victim is interested in a more structured session with the offender, such as offered by Resolutions Northwest.

In the event of a victim of a sexual assault, particularly but not only when the victim is a child, I hope to know as much as I can about how the sentencing choices available to me affect the victim's interests in recovering from the effects of the crime. This may involve finding a way for the offender to pay for ongoing counseling, but I am also interested in this difficult question - which depends in large part on the circumstances of an individual victim and victimization -- Will a sentence perceived as harsh or lenient exacerbate or alleviate any feelings of guilt, blame, or responsibility for the incidents involved? How

does this choice affect any counseling or treatment prognosis? In intra-familial cases, is this complicated by any attitudes of other members of the family towards the case or the parties involved?
As with the impact on future criminal behavior, arguments based on ideology or philosophy are far less likely to be persuasive than those based on contact with providers (ideally, the victim's provider) or at least based on accepted social science.

SENTENCING POLICY RESOLUTION

Adopted at the 1997 Oregon Judicial Conference

WHEREAS Oregon law vests judges with discretion to select an appropriate sentence or disposition following adjudication of criminal conduct or violation of terms of probation in adult and juvenile cases;
WHEREAS Article I, Section 15, of the Constitution of the State of Oregon provides that "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation;"
WHEREAS Oregon law declares that the purposes of the Criminal Code include, among others, "To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection" (ORS 161.025(1)(a)); "To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders" (ORS 161.025(1)(f)); and "To safeguard offenders against excessive, disproportionate or arbitrary punishment" (ORS 161.025(1)(g));
WHEREAS Oregon law empowers judges to "impose any special conditions of probation that are reasonably related to the crime of conviction or the needs of the defendant for the protection of the public or reformation of the offender, or both" (ORS 137.540(2)), and requires that judges make decisions to incarcerate probation violators in prison based "upon a reasonably systematic basis that will insure that available prison space is used to house those offenders who constitute a serious threat to the public, taking into consideration the availability of both prison space and local resources" (ORS 137.592(2));
WHEREAS Oregon law provides that the juvenile justice system in delinquency cases is "founded on the principles of personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community" (ORS 419C.001);
WHEREAS Oregon law vests judges with discretion to select an appropriate sentence or disposition following an adjudication of criminal conduct or violation of terms of probation in adult and juvenile cases;
WHEREAS public safety would be furthered by increased attention to the probable impact of judges' choices in the exercise of such discretion on the future criminal conduct of offenders;
THEREFORE, BE IT RESOLVED BY THE OREGON JUDICIAL CONFERENCE that in the course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct.
BE IT FURTHER RESOLVED that judges are encouraged to seek and obtain training, education and information to assist them in evaluating the effectiveness of available sanctions, programs, and sentencing options in reducing future criminal conduct.