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District Court Sentencing

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I. Overview

§10.1 In criminal cases, trial work is the main focus of attention for attorneys and the public. However, the fact remains that more than 90 percent of criminal cases in the district court result in some form of plea by the defendant. Therefore, it follows that most criminal cases will result in some form of sentence. As a criminal defense attorney, your preparation should focus on sentencing rather than trial in the vast majority of cases. From a defense perspective, sentencing is

often the most significant part of the process. It will also answer the defendant's most pressing question: "What is going to happen to me?" Although the judge is the only one who can, and ultimately will, answer that question by pronouncing the sentence, defense counsel can make a difference in the process by making creative suggestions and providing information about the client that will help the court select a sentencing approach that fits the particular circumstances of an individual defendant.

The court's perspective at sentencing is driven largely by each judge's individual sentencing philosophy. In sentencing, the district court judge is bound by statutes and court rules but not by the sentencing guidelines that limit a circuit court judge's discretion in sentencing (see §§11.27–11.33 for discussion of sentencing guidelines). The lack of sentencing guidelines means that understanding a district judge's sentencing philosophy is even more important for defense counsel.

When representing misdemeanor clients, you should begin sentencing preparation with the client as early as the initial interview. Timing is very important, as the longer a client waits after arrest to take voluntary steps toward rehabilitation, the less impact those steps will have at sentencing. Depending on the type of charge the client faces, you should recommend steps that may have a positive impact at sentencing. As the sentencing will probably take place around three months after the arraignment, the client will have enough time to take proactive steps to which judges may respond positively. If the offense involves the use or possession of alcohol or drugs, some form of counseling is generally appropriate. There are a variety of levels of counseling, ranging from short-term educational programs to residential (inpatient) treatment programs. Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings and breath and drug testing may also be helpful, especially if undertaken voluntarily. You should provide the client with forms for documenting any proactive steps, such as AA/NA attendance sheets and preliminary breath test (PBT) logs (see exhibit 10.1). Further, you should have the client sign medical authorization forms to allow counselors to send progress reports and completion summaries before sentencing.

Any proactive step the client undertakes should be tailored not only to the type of offense charged but also to the inclination and philosophies of the sentencing judge. Further, any affirmative step in mitigation should take into account the age and particular circumstances of the client. The sentencing judge may appreciate a younger client charged with retail fraud (shoplifting) attending educational classes that focus on illustrating the negative societal impact of theft. On the other hand, a more mature client with a family may impress the judge by performing community service or by making restitution to a victim ahead of sentencing.

II. Sentencing Philosophy and Evidence-Based Sentencing

§10.2 The phrase "know your judge" must be kept in the forefront with respect to sentencing in district court. Some district court judges think primarily in terms of punishment while others emphasize rehabilitation. A new trend called evidence-based sentencing has been adopted by some judges and was developed by

the National Center for State Courts (NCSC). Evidence-based sentencing can best be described as an approach geared to designing a particularized sentence for each defendant that addresses ways to prevent future criminal behavior, in part by focusing on the specific needs of the defendant, not just the sentencing offense.

Most district judges establish sentencing goals that focus on providing an individualized sentence proportionate to the gravity of the offense, while keeping in mind offender rehabilitation, general deterrence, victim's rights, and protection of the community. District judges are bound by principles of proportionality, "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender," *People v Milbourn*, 435 Mich 630, 636, 461 NW2d 1 (1990), and means that a sentence should be no more stringent than necessary to effect the court's sentencing goals.

Every sentence has a potential impact on recidivism. There are a variety of successful sentencing philosophies used by different judges, based on personality and experience. Some newer philosophies, like evidence-based sentencing, apply the best available evidence about each defendant to minimize recidivism, which is usually the main focus of the sentencing judge. In accomplishing these goals, the judge must be aware of any specific problems affecting the defendant's behavior, and this necessarily requires the use of an expanded "needs" assessment.

The use of needs and risk assessment tools (such as those mandated in operating while intoxicated (OWI) cases in Michigan) identify and evaluate criminogenic needs. These needs include antisocial attitudes, antisocial friends and peers, antisocial personality factors, family and education factors, and substance abuse issues. Identifying specific needs allows for the integration of services and necessary sanctions in a more effective way. For example, jail resources are wasted on offenders whose needs and risk assessment indicate a primary substance abuse and antisocial peer factor, which is better addressed through treatment than incarceration. Defendants with low needs and few antisocial indicators may actually be negatively affected by long-term probation with stringent treatment requirements. Therefore, evidence-based sentencing produces a tailored sentence targeted at the core needs of the defendant and not just the crime that brought him or her before the court. In fact, the district courts in Michigan have been using these evidence-based sentencing principles in dealing with OWI offenders for years, requiring substance abuse treatment, when appropriate, during a period of probation, and there has been an appreciable reduction in recidivism as a result.

Because preventing recidivism is of great concern to the district judge, designing and implementing an appropriate sentence is paramount. What works for one defendant may not be effective with another. Evidence-based sentencing is individualized and is based on a careful analysis of the risks for the community and the needs of the defendant. Certainly, limiting recidivism often requires that the probationary terms address particular issues and the underlying problems that lead to such behavior. The court therefore sentences the defendant based on the facts and circumstances of the defendant rather than simply rendering a sentence based on the specific crime. For example, if a defendant is convicted of shoplifting, but a needs assessment indicates a serious substance abuse issue, then it is the latter the

court should address in sentencing the defendant. This kind of approach will require a more expanded “needs assessment” but will surely lead to more effective sentencing practices in the future. Outside the OWI field, evidence-based sentencing is somewhat new for many courts in Michigan, although the trend is toward increased use of evidence-based sentencing for a broader spectrum of offenses.

The court must consider the gravity of the offense when assessing the risk to the community and also when assessing the needs of the defendant. Proportionality requires that the structure of the sentence reflect these considerations; therefore, a short term of probation may be appropriate in certain circumstances involving low-risk behavior and a low needs assessment, particularly when extended probation would result in a defendant associating with others who have more serious needs. A defendant may present with a serious substance abuse problem and therefore be considered a higher needs probationer, although the offense for which he or she is sentenced may be considered a low-risk crime. Under these circumstances, a longer term of probation may be appropriate, so long as the sentencing structure addresses the substance issues of the defendant. In short, evidence-based sentencing involves, in part, identifying and addressing the underlying issues that affect the defendant’s behavior rather than simply looking at the behavior itself.

It is in the design and implementation of an appropriate sentence that the defense attorney can have a significant impact. Often, the defendant’s attorney will be aware of certain factors involving the defendant that might influence the judge when designing a sentence. Without input from defense counsel, these factors would not be considered. You must take the sentencing as an opportunity to provide the judge with any additional information about the particularized needs of the defendant that might not have been noted by the probation interviewer. Further, you should prepare the client to provide all pertinent information at the presentence investigation (PSI) to ensure a thorough and complete picture of the defendant, which will be communicated to the court by the probation officer.

III. Court Rules Governing District Court Sentencing

A. In General

§10.3 Generally speaking, MCR 6.610(F) and 6.445(G) (probation violation sentencing) deal with sentencing procedures in the district court. At sentencing the court has a duty to require the presence of the defendant’s attorney, to provide a copy of the presentence investigation report at a reasonable time but not less than two business days before the day of sentencing, and to inform the defendant of credit to be given for time served, if any. MCR 6.610(F)(1)(a)–(c). Although the court has jurisdiction to impose a sentence within the statutory framework, it does not have continuing jurisdiction over a defendant who has served the maximum period of incarceration allowed for a particular offense. *People v Bisogni*, 132 Mich App 244, 347 NW2d 739 (1984).

The district courts handle a wide variety of cases, including conducting preliminary examinations for all types of felonies. But in sentencing the district