

THE National Association of Criminal Defense Lawyers CHAMPION®

June 2014

CHARLOTTE, NC — SEE PAGE 3
October 23-25, 2014 / NACDL's
16th Annual Making the
Case for Life Seminar

WASHINGTON, DC — SEE BROCHURE
November 5-8, 2014 / 10th Annual
Defending the White
Collar Case Conference

LAS VEGAS, NV — SEE PAGE 33
November 20-21, 2014 / 5th Annual
Defending Sex Crimes Conference

ASPEN, CO — SEE PAGE 44
January 11-16, 2015 / NACDL's
35th Annual Advanced
Criminal Law Seminar

THE ART OF SENTENCING ADVOCACY

Three Perspectives
On Effective
Sentencing Advocacy



© chaoss | fotolia.com

Using Moving Pictures To Build the Bridge of Empathy at Sentencing

I. Introduction

During an address to the defense bar in 2008, the Honorable John Kane of the U.S. District Court for the District of Colorado boldly asserted that in the post-*Booker* world of discretionary sentencing, a criminal defender's primary responsibility and greatest challenge is to "[m]ake the judge suffer."¹ He explained that, for so long, many judges have become accustomed to employing cookie-cutter calculations instead of careful, individualized assessments of the facts and circumstances of each case and client. However, sentencing should rarely be an easy decision for the judge. Defenders must constantly seek out the most powerful ways to make the judge understand their clients and the mitigating circumstances behind the clients' conduct.

Not only should judges agonize over the proper sentence in each case, but they must truly feel the client's pain as they do so. Clients suffer. They suffer through traumatic and abbreviated childhoods. They suffer from mental illness or addiction.

They suffer through extreme poverty, abuse, or exploitation. They suffer the pains of being separated from loved ones. More often than not, that suffering is at the core of their criminal conduct. It is incumbent upon defenders, therefore, to create an *emotional connection* between judge and client by compelling the judge to walk a mile in each client's shoes. Put simply, in order to rise to Judge Kane's challenge, *a defender must make empathy the centerpiece of any effective sentencing presentation*. One of the most effective ways to meet that challenge is through the use of visual storytelling, specifically, the production of short documentary video presentations about the client.

The first section of this article will explain why the "moving picture" format is an especially useful tool for sentencing advocacy. The next section is designed to help the reader understand which cases are best suited for using this method of persuasion. The technique must be used sparingly, and only when the mitigation story is compelling, has empathetic characters to tell it, and most important, can be told in a visual, emotionally charged way.² The article concludes with a case study that elucidates the concepts presented.

II. Making the Case for Movies³

A. Persuasion Through Story

Just as every good writer knows that *story* is the primary vehicle for conveying fundamental truths about life,⁴ every good lawyer knows that story is the most effective tool of courtroom persuasion.⁵ The best lawyers consistently use story as a means to illuminate the truth of their cases. With the increasing prevalence of technology in the courtroom and the accessibility of inexpensive and user-



BY DOUG PASSON

friendly recording and editing equipment, the use of digital media to tell those stories became inevitable.⁶

A well-crafted “moving picture” has the power to move an audience — not just to laugh or cry, but to *act*. Movies connect viewers to, and reshape their views about, people, places, and issues. Although the term “moving pictures” is used to describe the technical essence of visual storytelling — images speeding across a viewer’s field of vision — it means much more than that. The goal of this process is not just to create pictures that have motion, but ones that are packed with *emotion*. In so doing, the defender brings the client’s story to life like nothing else can.

B. Control

The video process affords attorneys a significant degree of control over their sentencing presentation. No matter how much preparation a lawyer undertakes before putting a witness on the stand or having a client address the judge, things can, and often do, go awry. Even if witnesses do not say anything detrimental to the case, they often convey information that is of no particular relevance to the judge. The video editing process allows the lawyer to trim away the fat from traditional sentencing presentations, allowing for ultimate control over content, pace, and emotional tone. Not only does this result in more powerful sentencing advocacy, it can also shorten the length of sentencing hearings — something judges will undoubtedly appreciate.⁷

C. Relaxed Evidentiary Standards at Sentencing

Sentencing is the perfect place to employ moving pictures because most jurisdictions have liberal rules governing a lawyer’s ability to introduce mitigation materials.⁸ If a prosecutor or judge finds this perfectly acceptable form of mitigation objectionable, federal and state practitioners have many weapons at their disposal to fight and win this battle.

Under the federal rules, before imposing sentence, the court “must” allow the defendant to “speak or present *any information* to mitigate the sentence.”⁹ The federal sentencing statute goes even further, stating, “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”¹⁰ Given the expansive language contained in these provisions, it is hard to imagine a situation in which a judge could reasonably preclude the

defense from presenting such information as mitigation at sentencing.¹¹

The fact that sentencing videos contain a significant amount of hearsay should not be an impediment. Not only is hearsay already prevalent in the sentencing process (pre-sentence reports, sentencing memoranda, character letters, and so forth), but the Federal Rules of Evidence clearly state that the rules of evidence do *not* apply at sentencing.¹² If a prosecutor complains she has no opportunity to cross-examine witnesses who appear in the video, a defender can point to many post-*Crawford* citations stating that the right to confront is not generally applicable at sentencing hearings.¹³

The information a party presents at (federal) sentencing need only bear “minimal indicia of reliability” and the prosecution must have an “opportunity to refute.”¹⁴ A properly produced sentencing video will only contain reliable and relevant evidence. Moreover, pre-sentence disclosure of the video should preemptively obviate opposing counsel’s claim of lack of opportunity to refute. If the prosecution is so inclined, it has its own resources available to locate and interview witnesses who appear in the video, or present other testimony or evidence to counter the information.

In the end, a defender should be able to break through a wall of objections with little difficulty. However, although the rules should ensure admissibility, only a compelling, well-crafted finished product will ensure success.

III. Creating a Powerful And Persuasive Sentencing Video

A. Use Sentencing Videos Sparingly

Although every case is important, a lawyer must carefully consider whether her client is best served by video mitigation. Using this form of persuasion too often or under the wrong circumstances may lessen its impact and fuel resistance to this type of advocacy. In short, sentencing videos are *not* for every case.

As a threshold matter, a moving picture may be appropriate when the lawyer determines that a client’s sentencing story is far better *shown* to the judge, rather than simply told. If so, the lawyer must then determine whether she has access to the three essential ingredients of any successful sentencing documentary: a *solid story*, *connective characters*, and *emotionally evocative images*. If a lawyer cannot muster all three elements,

she must strongly consider saving this technique for another case.

B. The Three Elements of a Sentencing Documentary

1. Solid Story

A solid story is moving. Movies build the bridge of empathy, first and foremost, with story elements that make the judge *feel* something. Thus, it is essential that sentencing stories evoke emotion. However, this is an area where the lawyer must strike a delicate balance. Arguably, any attempt at persuasion involves a modicum of manipulation, but audiences have stink-detectors. If a scene contains too much raw emotion, the audience will feel manipulated. They know when they are being “played” (made a fool of or taken advantage of), and they will not tolerate it for long. Consequently, effective persuaders must be *subtle* in their methods. Some sentencing video “no-no’s” include the use of dramatic voice-over narrations, flashy editing tricks,¹⁵ overbearing or melodramatic music,¹⁶ gratuitous scenes of crying loved ones, pointless inclusion of children, ham-handed re-enactments, and so forth. This kind of overblown content distracts from the message of the movie and destroys credibility.

A solid story is unique. Not surprisingly, a good sentencing movie shares many of the same elements of a well-crafted commercial film, either feature or documentary. When a person pays 10 dollars to enter a dark theater and give over two hours of his life, he expects a good story. He expects to hear things he has never heard, see things he has never seen, and go places he has never been. Put simply, “a good story means something worth telling that the world wants to hear.”¹⁷ In the world of visual storytelling, there is perhaps no greater sin than boring an audience. Therefore, mitigation movies must not be used for “ordinary” sentencing stories.¹⁸

A solid story is lean and “integrated.” A common complaint of modern moviegoers is that films are longer than they need to be. Films that run too long tend to bore, annoy, and distract. The last thing a lawyer (or her client) wants is for the judge to tune out. There is no right answer to the question of how long a sentencing movie should be, as some stories are more complex than others. As a general parameter, however, the video should be between five and 15 minutes long.

Good movies, like good trial presentations, reveal a process of “integration.”¹⁹ In courtroom persuasion, this process requires that every aspect of a

lawyer's presentation advance the theory and themes of the case. In trial, a lawyer may leave a particularly brutal or entertaining piece of cross-examination on the cutting-room floor if she knows the questions, fun as they would have been to ask, would not further the theory of the defense. Likewise, in movies, every scene, line of dialogue, image, and sound must serve the story, move it forward, and illuminate a central theme.²⁰ That is not to say a sentencing video cannot have multiple story lines. In fact, many great stories have "subplots." However, even with subplots, the concept of integration still applies, as each subplot must still directly relate to the main theme of the story.²¹

The sentencing video should be between five and 15 minutes long.

A solid story employs small stories to tell the big story. Lawyers must resist the urge to rely on dry data to tell the story, and instead they must seek out emotionally charged smaller stories that move the main story forward. In one example, a defendant was caught smuggling drugs across the border. It was a one-time event, done out of desperation to pay off a large gambling debt. The story the lawyer sought to tell was the intensity of the gambling addiction that fueled the crime. The defendant and other witness could have droned on about the dull details of how often he gambled, which casinos he frequented, which games he played, and how much money he lost. That data was better suited for the sentencing memo or the pre-sentence report.

For the mitigation movie, the lawyer chose instead to convey the reality of the defendant's disease by telling the (literally) gut-wrenching story behind the story: The client recalled a time he was on bed rest, having just undergone serious stomach surgery. He was staying at his mother's house, as she was helping him recover. In the middle of the night, the sights and sounds of the casino began to echo in his dreams. The lure of gambling was so powerful that he dragged himself out of bed, struggled to get dressed, took his mother's car and, while barely able to exert the effort to steer, drove himself to the casino and played the slot machines into the early morning. This short, vivid story moved

the judge to greater understanding by enabling him to suffer through the power and pain of the client's addiction.

2. Connective Characters

Character is connection. A discussion of character reveals again how the process of forging bonds of empathy comprises the core of every effective sentencing presentation. Without someone with whom the audience can identify, care about, and root for, a movie falls flat on its face. In sentencing documentaries, the main character is usually, although not always, the client.²² The client is often best suited to tell his own story. In some cases, this may not be possible. The lawyer must then find other characters to fill that role.²³

A lawyer must include characters in her movie that the judge can relate to in some meaningful way. Ideally, the "characters" will be attractive, articulate, and likeable. In reality, most criminal defendants are the polar opposite of the bankable Hollywood movie star. However, a lawyer need not be discouraged by this fact. Indeed, this "disconnect" is often the reason a lawyer chooses this medium of persuasion in the first place — because although the client's bad deeds may create an impediment to *sympathy*, they need not impede the goal of character *empathy*.

In describing the important distinction between sympathy and empathy, creative writing instructor Robert McKee unwittingly underscores the critical importance of building character connection at sentencing:

The protagonist must be empathetic; he may or may not be sympathetic. Sympathetic means likable. Tom Hanks and Meg Ryan, for example, or Spencer Tracy and Katharine Hepburn in their typical roles: The moment they step onscreen, we like them. We'd want them as friends, family members, or lovers. They have an innate likability and evoke sympathy. Empathy, however, is a more profound response. Empathetic means, "like me." Deep within the protagonist the audience recognizes a certain shared humanity. ... There's

something about the character that strikes a chord.²⁴

A client may do bad things, but if the lawyer emphasizes connective character traits, the audience will instinctively bond with the client and want good things for him.²⁵

Consider some of the great "bad guys" in film and television with whom audiences consistently connect with and root for, notwithstanding their evil deeds. Dr. Hannibal Lecter in *The Silence of the Lambs* is a wonderful example of empathy at work. Lecter is a serial killer who eats his victims. It is hard to imagine a more disturbing, unlikable character. Yet the audience is drawn to him. In fact, many who see this movie are actually quite satisfied at the end when (spoiler alert) Lecter escapes and announces his intention to devour Dr. Chilton, the sadistic psychiatrist who tortured him for years in the dungeon of the prison insane asylum.

Why is it that audiences rally behind this crazed killer? The writer, Ted Tally, masterfully infused this complicated character with traits that engender admiration and connection. Lecter was brilliant. He was persecuted by the government. He cooperated with law enforcement to help catch a far more disturbing serial killer. He had the capacity to care for other human beings, as demonstrated by his relationship with the protagonist, Clarice Starling (played by Jodie Foster). He was fearless and strong and in control. These are the kinds of qualities people see in themselves, either in truth or in desire. It is because of those connections that audiences root for Lecter, if even on a subconscious level.²⁶ If this technique can work to convince an audience to support a cannibalistic killer, it can work for virtually any defendant, no matter how "unlikable" the defendant may seem.

Another wonderful example of filmmakers bridging the gap between audience and character can be found in the National Geographic documentary *March of the Penguins*. Hardly the makings of Hollywood blockbuster, *March* began its life as a small French-produced nature film exploring penguin mating rituals in Antarctica. Are you still awake? That little penguin pic went on to gross over \$77 million and won the Academy Award for Best Documentary in 2005. The reason *March* was so successful is because the filmmakers built the bridge of empathy by infusing human elements into their subjects and their story. The movie, at its core, was about family and the struggles parents endure in order to provide for and protect their children.

They also replaced the French narration with the instantly relatable voice of actor Morgan Freeman. When asked about the key to making a compelling wildlife documentary, director Luc Jacquet said, “[e]motion. If you don’t feel something when you’re out in the wild, there’s no film. That’s the basis for everything.”²⁷

Character is action. Another storytelling axiom of particular relevance is that the truth of a person’s character is revealed by what the character *does*, not what he *says*.²⁸ Character and credibility are very much at issue during sentencing.²⁹ The challenge is to prevent the defendant’s crime from defining his character. In a typical sentencing presentation, the lawyer, the client, or the client’s people will *tell* the judge all about the client’s character (i.e., “he’s a hard worker,” “he’s a good dad”). Sentencing documentaries allow the judge to see *character in action*. As explained in greater detail below, it is a wasted opportunity to simply show characters talking. To the extent possible, a lawyer must show the character *doing*. For example, instead of a defendant talking about his job, try filming him in action at work. Showing the character engaged in the performance of some special skill enhances credibility, makes the movie more interesting to watch and, most important, forges those all-important bonds of empathy.

3. Emotionally Evocative Images

Movies are stories told with *pictures*.³⁰ In other words, “[f]ilm is a visual medium that dramatizes a basic story line; it deals in pictures, images, bits and pieces of film: a clock ticking, a window opening, someone watching, two people laughing, a car pulling away from the curb, a phone ringing.”³¹ Undeniably, “for all its complexity, a movie provides but two kinds of information: sight and sound.”³² Therefore, every moment of a sentencing video is an opportunity to create connections by using powerful images to tell the defendant’s story.

Beware the dreaded “talking head.” Documentaries almost universally include on-camera interviews. However, as stated above, if a sentencing video is merely a parade of “talking heads,” it will be boring and ineffective.³³ The judge will ultimately wonder why the lawyer did not just bring the speakers into court or have them write a letter. The lawyer’s goal is to strive for creative *visual* ways to convey the narrative in final form. This may be the most important and yet most overlooked aspect of the mitigation video production process.

Fairfield Investigation



Computer & Cellphone Forensic Specialists

Internet & Computers

- Cyber Stalking
- Child Pornography
- Banking Fraud
- DATA Theft
- Identity Theft
- White Collar Crimes
- Sexual Harassment
- Sexting of Minors

Evidence Analysis

- Computers
- Cellphones
- Tablets
- Removable Media
- Internet Usage
- Social Media
- Hacking Detection
- Evidence Tampering

Nation Wide 866-215-2195

www.FairfieldInvestigation.com

In sentencing documentaries, witness interviews are akin to the foundation of a building. Without a strong foundation, the building will not stand. However, the “moving pictures” are the walls, windows, roof, and all the rest. In this craft, emotionally evocative images are absolutely essential to add layers of emotion, excitement, and credibility over the story being

would speak a thousand words.

Finding b-roll material is perhaps the most challenging part of this process. B-roll can come from a number of sources. A lawyer may find useful b-roll in government discovery, such as excerpts from police reports, crime scene photos, surveillance videos, interrogations, diagrams, and booking photos. On occasion,

Instead of showing a defendant talking about his job, try filming him in action at work.

told. Without those images, the building is uninhabitable. With those images, the judge begins to suffer.

Images layered on top of witness interviews in the editing process are typically referred to as “cutaways” or “b-roll.” To draw from the previous example of the client at work (character in action), the defendant’s on-camera interview provides the narration, but the viewer sees mostly b-roll or cutaways to the client actually at work engaged in his specialized activity.³⁴ In another example, if a witness describes the hardship of growing up in extreme poverty, a cutaway to images of his childhood home

the client or his family will have pre-existing b-roll such as home movies or family photos. Documents make for decent b-roll as well. If a client talks about completing a drug program, the filmmaker can scan the graduation certificate and include that image in the video. A lawyer may also find useful photos, videos, and documents on the Internet.

The filmmaker must also be prepared to create her own b-roll. For example, if the story is about an elderly relative who relies on the defendant for daily care, the filmmaker can shoot “a day in the life” footage, showing the client driving the relative to the doctor, cleaning the home,

sorting medications, giving insulin injections, and paying bills. A lawyer may have to be especially creative in obtaining b-roll from places great distances away. Consider enlisting friends or family in faraway places to assist, even if it means sending them a recording device. A filmmaker need not cover up every second of their talking heads with b-roll. However, she should always be thinking “visually” and devising creative ways to infuse the final product with as many relevant emotionally evocative images as possible.

C. Test Screenings

When meticulous lawyers prepare cases, they enlist friends, family, or co-workers to proofread pleadings, weigh in on theories and themes, or serve as mock jurors. Likewise, filmmakers conduct their own “mock trials” in the form of test screenings. After the lawyer assembles the pieces of her sentencing video into a rough cut, she should conduct a test screening with a trusted audience to determine whether the movie achieves its goals. A test audience will suggest cuts, edits, or other changes to improve the quality of the final product. A lawyer must take care to finish a first draft far enough in advance of sentencing to allow ample time for screening, adjustments, and disclosure.

D. A Case Study: United States v. Sabourjian

Zal Sabourjian³⁵ was born and raised in Iran. He came to the United States in 1991 seeking asylum, having escaped intense religious persecution in his home country. Zal was an evangelical Christian which, in Iran, is a life-threatening endeavor. He made it to Mexico, crossed the border illegally, and obtained asylum. Eventually, he legally brought his two children to America and they began to live the American dream.

In 2005, as tensions between Iran and the United States were escalating, Zal was accused of conspiring to help an undetermined number of Iranians illegally cross the U.S.-Mexico border using counterfeit visas. With the help of a dubious informant, the government painted Zal as a professional alien smuggler and created unfounded fears of terroristic intent.

Because so much bad information had been disseminated about the client in discovery and in the media, his lawyer knew it was imperative to show the judge who Zal really was and why he did what he did. Zal's intent was not to sneak a gang of terrorists across the border, as the government insinuated. Instead, he wanted to help persecuted members of his extended Iranian family find refuge in

America, just as he had done several years earlier. In addition, because Zal's native language was Farsi, his lawyer knew it would be difficult for Zal to express himself in the courtroom. In short, the disputed facts were damning, the empathy gap was huge, and the case was ripe for a sentencing documentary.

The three ingredients for a successful sentencing documentary were at the lawyer's disposal. Zal's story was unique and moving. His account of being jailed and tortured by Iranian Mullahs for his religious beliefs, his harrowing journey to freedom, and the amazing life he built for himself and his children in America were cinematic gold. There were loads of great characters to tell the story, including the client, his children, and their pastor. Zal, speaking in the quiet comfort of his home instead of a sterile and stressful courtroom, came across clear and sincere.

The movie was loaded with dynamic visuals that left no doubt in the judge's mind about the truth of the story. The lawyer shot b-roll showing, among other things, the client hard at work as a tailor in a high-end clothing store, playing keyboard at Bible study, and worshipping in church. He and his 11-year-old daughter, already an accomplished classically trained pianist, provided a moving musical soundtrack that was integrated into the story. A paralegal working on the project located an Internet photograph of the prison in Iran where Zal was jailed for his religious beliefs. His family in Iran, who were the intended beneficiaries of Zal's offense, sent a videotape explaining their situation and asking the judge for leniency.

In this situation, a sentencing documentary was undoubtedly the most moving and persuasive way to tell the client's story. The judge saw, as clearly as he could, that Zal was not a professional alien smuggler; he was a master tailor working two jobs. He was a single father raising two beautiful and brilliant children. He was not an extremist; he was a man of peace and deep religious faith. He made a bad choice for the right reasons. At sentencing, the judge carefully considered the video and expressed his appreciation for the defense lawyer's advocacy. Even the prosecutor was impressed and made favorable comments. In the end, the client received probation.

IV. Conclusion

It is no secret that well-crafted movies have enormous power not just to entertain, but to inform and persuade. Adapting this medium for use in court proceedings is gaining momentum as it becomes easier and less expensive for attorneys to produce

their own professional-looking product. To be effective, the lawyer must tell a unique story using connective characters and powerful visuals. When done properly and in the right case, an emotionally charged sentencing documentary can be the most effective way to forge the bonds of empathy and truly make the sentencing judge suffer.

© Doug Passon, 2014. All rights reserved.

Notes

1. See the Honorable John Kane, United States District Court, D. Colo., *Remarks for CJA Session*, October 3, 2008. Judge Kane's charge for all criminal defense lawyers is as follows: “Your job in the sentencing process, as I see it, is to thwart the powerful convenience that encourages a laconic adherence to a thoughtless and passionless process.” *Id.* at 7.

2. Even in such cases, time or budget constraints may make the production of a sentencing video implausible. However, even simply including *still photos* in a sentencing memorandum can add layers of emotional depth to a sentencing story.

3. This article cites liberally to screenwriting and filmmaking sources, as well as examples from well-known movies. This is because lawyers are storytellers, and the elements of a persuasive sentencing documentary closely mirror those of well-made commercial documentary and feature films.

4. *E.g.*, ROBERT MCKEE, *STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING* 25 (1997) (“[A]ll writers must come to understand the relationship of story to life: *Story is metaphor for life.*”).

5. *E.g.*, TERENCE F. MACCARTHY, *ON CROSS-EXAMINATION* 4-5 (2007) (in cross-examination, lawyers must “tell a story,” as it is the “most persuasive technique known”); LISA L. DECARO & LEONARD MATHEO, *THE LAWYER'S WINNING EDGE: EXCEPTIONAL COURTROOM PERFORMANCE* 75-77 (2004) (“A story transcends a basic fact pattern ... and lets the listener feel emotionally involved.”).

6. Lawyers are increasingly employing visual persuasion techniques in various stages of legal proceedings. For examples and other excellent resources, visit the New York Law School's “Visual Persuasion Project” online at <http://www.visualpersuasionproject.com>.

7. This medium may also help control costs. In some cases, witnesses often reside far outside the jurisdiction of prosecution. While it may be costly or impractical to bring witnesses to court to address the judge at sentencing, it may be far more feasible for a lawyer, investigator, or paralegal to arrange for a witness's statement to be videotaped.

8. This article focuses on the production of moving pictures for use at sentencing.

ing only, where wide-open rules for presenting mitigation materials make them a natural fit. That is not to say moving pictures have no place at other stages of the proceedings. A lawyer is limited only by his imagination, his good judgment, and the rules of evidence.

9. FED. R. CRIM. P. 32(i)(4) (emphasis added).

10. 18 U.S.C. § 3661 (emphasis added).

11. Many states have similar wide-open sentencing rules that mirror the federal system. For example, the Arizona Rules of Criminal Procedure require a court to conduct a sentencing hearing. ARIZ. R. CRIM. P. 26.7(a). The rule further allows "any party [to] introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre-sentence [or other] reports." ARIZ. R. CRIM. P. 26.7(b).

12. FED. R. EVID. 1101(d)(3). This may also be the case in many state courts. For example, in Arizona, judges are not required to follow any rules of evidence in mitigation and aggravation hearings. See, e.g., *State v. Donahoe*, 118 Ariz. 37, 574 P.2d 830 (Ariz. App. 1977).

13. E.g., *United States v. Littlejohn*, 444 F.3d 1196 (9th Cir. 2006) (right to confront not generally applicable at sentencing hearing); *State v. McGill*, 213 Ariz. 147, 140 P.3d 930 (Ariz. 2006).

14. E.g., *United States v. Giltner*, 889 F.3d 1004 (11th Cir. 1989). Note, however, that these requirements are usually imposed as minimal due process protections for the defendant.

15. One must never use the editing process to portray statements out of context or to otherwise abuse the truth. Keep in mind, especially when filming the client, that a prosecutor could request and likely receive an order for disclosure of all raw footage.

16. This is not to say that music does not have an important place in the world of sentencing videos. Music can enhance the emotional content of the movie and help tell the client's story. The best scenario for music is when it is organic (i.e., "integrated") to the story. For example, if the client or a family member is a musician, it might serve the story to showcase that person's talents.

17. McKee, *supra* note 4, at 20.

18. Of course, there are exceptions to every rule. Sometimes, a moving picture can turn the ordinary into the extraordinary. In one example, a lawyer argued for mitigation based on the relatively common claim that the client was a single parent, and the children would suffer in her absence. To make matters worse, the client had those same kids in the car with her when she was caught transporting narcotics across the U.S.-Mexico border. The prosecution argued

that she was using the kids as cover. The client responded that given her status as single mom, she had no choice but to have her kids with her that day. Showing the client engaged in the process of being an amazing mom and seeing this family's daily circumstances brought a routine and very difficult mitigation argument to life.

19. RICHARD WALTER, STORY: SCREENWRITING: THE ART, CRAFT AND BUSINESS OF FILM AND TELEVISION WRITING 112-114 (1988) (coining the term "integration" to describe the fundamental process of synchronizing all elements of a film).

20. What lawyers refer to as "theory" and "theme," author and teacher Robert McKee calls the "controlling idea." He describes this as "the purest form of a story's meaning, the how and why of change, the vision of life the audience members carry away into their lives." McKee, *supra* note 4, at 114-17. For example, in the movie *Dirty Harry*, the controlling idea is "[j]ustice triumphs because the protagonist is more violent than the criminals." *Id.* at 116. In *Groundhog Day*, the controlling idea is "happiness fills our lives when we learn to love unconditionally." *Id.* at 117.

21. For example, the film *Rocky* is about a down-and-out fighter who is given a chance to finally make something of himself, but only by overcoming seemingly impossible obstacles. A major subplot involves Rocky's romance with Adrian, an introverted pet store worker living with her tyrannical brother Paulie. Here too, Rocky battles against overwhelming odds to win Adrian's heart. The fight against Apollo Creed and the fight to win the girl are therefore "integrated."

22. Movies have main characters and supporting characters. The main character is typically referred to as the protagonist. McKee defines the protagonist as a character with a conscious desire, who has the capacity to convincingly pursue the object of his desire, and who has a realistic chance of attaining that desire. McKee, *supra* note 4, at 138-39. Good stories have antagonists as well, which are "forces that oppose the character's will and desire." *Id.* at 317-318. Characters are not always necessarily people. Sometimes defendants battle "antagonistic forces" in the form of interpersonal conflicts including drug addiction, post-traumatic stress disorder, and abuse. The best stories involve the protagonist battling against and ultimately defeating these antagonist forces. An underdog client who overcomes a lifelong meth addiction, for example, is the most compelling character in his own life story.

23. In movies, "[a]ll other characters are in the story first and foremost because of the relationship they strike to the protagonist and the way each helps to delineate the

dimensions of the protagonist's complex nature." *Id.* at 379.

24. McKee, *supra* note 4, at 141.

25. See KARL IGLESIAS, WRITING FOR EMOTIONAL IMPACT 61-76 (2005) (setting forth techniques for "instant character appeal and empathy").

26. Lest one think Dr. Lecter is an isolated example, consider the empathetic traits of these other troubled, yet lovable characters: Melvin Udall (Jack Nicholson) in *As Good as It Gets*, Tony Soprano (James Gandolfini) in *The Sopranos*, and Ratso Rizzo (Dustin Hoffman) in *Midnight Cowboy*, to name a few.

27. GENEVIEVE JOLLIFFE & ANDREW ZINNES, THE DOCUMENTARY FILMMAKERS HANDBOOK 497 (1st ed. 2006).

28. E.g., SYD FIELD, SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING 41 (1994) ("ACTION IS CHARACTER — what a person does is what he is, not what he says."); WALTER, *supra* note 19, at 87. ("In movies, as in life, actions speak louder — and more eloquently, more articulately — than words.")

29. See, e.g., 18 U.S.C. § 3553(a)(1) (listing the "history and characteristics" of the accused as a sentencing factor).

30. FIELD, *supra* note 28, at 8.

31. *Id.*

32. WALTER, *supra* note 19, at 115.

33. *Id.* at 104 ("What drama is NOT is a bunch of characters sitting around talking, twiddling their thumbs, doing nothing.")

34. Computer software allows an editor to easily blend multiple sounds and images to accomplish seamless cutaways. Everyone with a computer has basic editing software included, either Windows Moviemaker or iMovie. Each program is simple to use, will work for basic sentencing videos, and will allow the user to develop skills that will carry forward to more advanced programs.

35. This example is based on a real case, but the defendant's name has been changed. ■

About the Author

Doug Passon has been practicing criminal defense for 18 years in Phoenix, Ariz. He is also an award-winning filmmaker and President of D Major Films, which specializes in the production of powerful and persuasive moving pictures for use in criminal and civil cases.



Doug Passon

480-326-0677

E-MAIL dpasson@dmajorfilms.com

WEB SITE www.dmajorfilms.com

Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit www.djreprints.com

- [See a sample reprint in PDF format.](#)
- [Order a reprint of this article now](#)

U.S. NEWS

Leniency Videos Make a Showing at Criminal Sentencings

Some Lawyers Supplement Letters of Support With Mini-Documentaries; Effectiveness Is Debated

By JOE PALAZZOLO

May 29, 2014 4:32 p.m. ET

Randy Ray Rivera, formerly of Springfield, Mass., and now a resident of the Metropolitan Detention Center in Brooklyn, is the subject of a documentary film that was made for a very limited audience: the federal district judge who held Mr. Rivera's fate in his hands.

It tells the story of a young man who began dealing drugs as a teenager to support his siblings and his heroin-addict mother, who died of AIDS in 2004. The 26-minute video includes emotional interviews with Mr. Rivera's brothers and sisters, daughters and son, current and ex-girlfriends and a social worker, as well as with Mr. Rivera himself, in white-and-gray prison garb.

"You put yourself at risk, because what are you going to do? Starve? I'm not gonna let..." he says, his voice trailing off. And then: "Never."

Such films, while rare, have caught on in some federal public defenders' offices. Now, some private lawyers and investigators are attempting to unlock the potential of video in the sentencing phase of criminal cases, supplementing the memorandum and letters of support that are typically used to plead for leniency.

"The sentences are almost always better than they would otherwise be," said Doug Passon, a veteran assistant federal public defender in Arizona who is considered by his peers to be a pioneer of so-called sentencing-mitigation videos. For the past five years, he has held a sentencing film festival at an annual training conference for federal public defenders.

Mr. Rivera pleaded guilty last September to conspiring to distribute crack-cocaine. It was the latest of more than a dozen drug-related convictions on his record since 1998; federal prosecutors sought a sentence of 30 years to life in prison, the guideline range for an offender with Mr. Rivera's criminal history.

Launch DJ Hub

the federal district court in Vermont, gave Mr. Rivera 12 years in prison, after viewing the video Mr. Rivera's legal team put together. It captures the rundown buildings in Springfield that Mr. Rivera's family occupied, sometimes as squatters. At one point, Mr. Rivera's teenage daughter, through tears, calls him "one of the best dads ever."

Judge Sessions, speaking generally about sentencing videos, said, "When you have a video of either a defendant's life or a victim's life, it provides context for that life."

But he said videos weren't a substitute for a good legal argument in a sentencing memorandum. "They are supplementary," he said.

Tristram J. Coffin, the U.S. attorney in Vermont, said he believed the videos are of limited use to judges, offering only an "edited version of the defendant's life."

Prosecutors and victims have less of an ability to offer a counternarrative in video form, he said. In the case of a convicted drug dealer, for instance, "it's hard to represent the tremendous damage his illegal activities caused to many communities and individuals," Mr. Coffin said.

Proponents say the videos fall within the scope of a federal rule that allows people convicted of a crime to "speak or present any information to mitigate the sentence" to the courts. But some courts have rejected sentencing videos, after prosecutors protested they weren't given an opportunity to question the witnesses who appeared in the videos, investigators said.

While investigators and lawyers say such videos are used in a small fraction of the tens of thousands of federal cases that end in a criminal sentence each year, the word appears to be slowly spreading.

Susan Randall, a former documentary filmmaker who now works as a private investigator in Vermont, said she has created more than 20 sentencing videos for a range of white-collar and drug defendants, including Mr. Rivera.

Another of her subjects, Robert Rosploch, was sentenced last year to six years in prison after he pleaded guilty to conspiring to distribute cocaine in Vermont. Federal sentencing guidelines called for 14 to 17½ years in prison.

"There are definitely cases where a sentencing memo in black and white doesn't cut it," Ms. Randall said.

Katrina Daniel, a former television news reporter who covered crime, started her own production company in 2012 and has made about 10 sentencing videos, charging anywhere from \$5,000 to \$20,000.

Some are simply interviews with the defendants, while others draw on family, friends, co-workers and others. Ms. Daniel said she tries to convey the defendant's remorse and acceptance of responsibility.

Mr. Passon said he got the idea for sentencing videos from an attorney he clerked for in 1995, while he was law student at Washington University in St. Louis. They were representing a man charged with a drug crime whose wife was dying of lupus, and the defendant was her sole caretaker.

"We were trying to show how desperately he was needed at home," Mr. Passon said. They went to the client's home with a clunky, tape-fed video camera and recorded the man as he cared for his wife. "It was very, very powerful," said Mr. Passon.

Copyright 2013 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our [Subscriber Agreement](#) and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit

www.djreprints.com