

# YOU CAN TEACH OLD DEFENDERS NEW TRICKS

## Sentencing lessons from specialty courts

By Tamar M. Meekins

There are nearly 2,000 specialty courts now operating in the United States, leading judges and lawyers to look closely at both their benefits and their negative factors. Today's specialty or problem-solving courts are touted as new ventures on the criminal justice landscape, but the underlying methodologies of many of these courts are reminiscent of a comprehensive sentencing practice that some conscientious defenders have been doing for years. A number of defender agencies employ social workers, educational consultants, civil litigators, and sentencing specialists to help lawyers craft individualized alternative disposition plans that will be compelling to jurists and prosecutors. These plans focus on the same types of issues—problem solving and attention to community or victim interests—that are notable in specialty court theory. Additionally, comprehensive plans that focus on specific issues in the client's life are attractive to many judges in all parts of the criminal justice system because of renewed opportunities for sentencing advocacy opened up by recent cases. On a greater scale, defense lawyers can now propose creative, holistic, and effective sentencing plans that address important issues in the clients' lives and that are positively received by some judges.

There has been a wealth of writing and discussion in scholarly and judicial circles about the benefit of the specialty court approach, which marries principles of problem-solving, therapeutic jurisprudence, and restorative justice to the judicial administration of criminal cases. Almost every major metropolitan city now has a drug court, which is the most prominent example of the specialty court. The judicial problem solving that takes place in specialty courts is akin to the notion of providing and administering alternatives to incarceration at the sentencing stage. (Phyllis Bamberger, *Specialized Courts: Not a Cure-all*, 30 FORDHAM URB. L.J. 1091 (March

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2003).) Utilizing a team approach with the judge as the central figure, a system of quick sanctions for noncompliance, attention to issues normally outside of the criminal justice system, such as housing and counseling, and providing additional resources for case management and monitoring, specialty courts have given a renewed and undeniably invaluable focus on developing alternatives to incarceration for a small segment of the criminal justice population. And despite some well-founded concerns of several commentators that problem-solving courts may sacrifice procedural due process protections and facilitate ethical violations by defense lawyers, our clients may benefit from the bright spotlight that sentencing issues now may enjoy. (See Tamar M. Meekins, *Specialized Justice: The Overemergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, \_\_ SUFFOLK L. REV. \_\_ (forthcoming 2006).)

Additionally, more judges may now seek to adapt the methodologies of specialty courts to courts of general jurisdiction. (Bamberger, *supra*, at 1099.) Judges returning from rotations in specialty courts, where their assignments may have lasted up to a year, often can be persuaded to fashion innovative sentences for offenders who have been found guilty of a variety of crimes, including those that are more serious than usually seen in problem-solving courts. These returning judges may also influence their colleagues with no specialty court experience to favorably consider alternative sentencing that uses these methodologies. A greatly reopened window of opportunity now exists for a vigorous defense sentencing practice that is client-centered, creative, comprehensive, and effective. Defense lawyers can now use the best and most beneficial principles of specialty courts to enhance sentencing options and alternatives to incarceration for all defendants before a variety of court.

### Enhanced sentencing advocacy

Our highest courts have long recognized the critical nature of the sentencing phase in the adjudication of criminal cases and the necessity for the zealous and effective defender. The Supreme Court in *Mempha v. Rhay*, 389 U.S. 128 (1967), noted that *Gideon v. Wainwright* requires that a defendant in a criminal case be afforded legal representation at the critical stage of sentencing even when the defendant is indigent. Defense counsel is, therefore, required to marshal the facts, introduce evidence of mitigating circumstances, and assist the defendant in presenting his or her sentencing requests.

Likewise, many lower federal courts and state appellate courts have gone farther, noting the weighty role the defense lawyer must play at sentencing. In *Taylor v. State*, 339 S.E.2d 859 (N.C. 1986), the North Carolina Supreme Court, citing the *ABA Standards for Criminal Justice* and the federal case of *Pinkney v. U.S.*, 551 F.2d 1241 (D.C. Cir. 1976), found that the energies and resources of defense lawyers should be directed as fully to the sentencing phase in a criminal case as

to the pretrial preparation phase. (*Taylor*, 339 S.E.2d at 861; see also *Christy v. State*, 731 P.2d 1204 (Wyo. 1987) (noting that “sentencing may well be the most important part of the entire” criminal proceeding and that therefore it called for thoroughness and resourcefulness, not just a perfunctory allocation by the defense).)

Although the fundamental notion of a proactive defense involvement in sentencing has been the law in federal and state courts for some time, in the recent past—with the advent of “tough on crime” sentencing policies and a movement to determinate sentencing structures with mandatory guideline ranges and mandatory minimum sentences—defense lawyers have found it difficult to implement a proactive sentencing strategy. However, several key legal changes have opened up the possibility for a renewed sentencing practice even in guidelines jurisdictions. In federal courts the holdings in *Booker* and *Blakely* have again given the green light to defender-initiated alternative sentencing plans.

Because of the 2005 Supreme Court decision in *United States v. Booker*, 125 S. Ct. 738 (2005), the U.S. Sentencing Guidelines are viewed as merely advisory, and federal judges now have more latitude to fashion specific individualized sentences in criminal cases. Judges can now consider the guidelines along with any other relevant information, and are not required to sentence within the guideline ranges. (Alan Ellis, *Litigating in a Post-Booker World*, 20 No. 1 CRIM. JUST. 24 (Spring 2005).) This decision gives judges more discretion in fashioning sentences, and defense lawyers practicing before federal judges can present fuller sentencing plans, which may include treatment, restitution, and any other relevant conditions or problem-solving methodologies. Likewise, state and local court systems that utilize guideline systems are open to more creative sentences that make use of a greater range of alternatives to incarceration.

## General specialty court theory

At their foundation, some specialty courts, most notably drug and community courts, use alternative sentencing methodologies proactively to process cases and to address issues that may be relevant to a particular case or type of case. (James Nolan, *Redefining Criminal Courts: Problem Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (Fall 2003).)

These courts seek to change the traditional adjudicative process to allow for a combination of treatment, conditions, sanctions and rewards, or other measures, all in an effort to modify behavior, punish the alleged offender, or address a community problem. The prevailing theoretical model of a specialty court calls initially for the placement of a case on a special docket if eligible based on the case type, the neighborhood in which the offense was allegedly committed, government or defense request, or the rules adopted by the particular jurisdiction. Sometimes the judge assigned to that particular

docket has received specific training in some issues related to certain social problems, for example, substance addiction, domestic violence, or homelessness. In the case of community courts, the judge may take part in regular meetings with community leaders and residents relating to the incidence of quality-of-life crimes in the area. Specialty courts also usually have social workers, case managers, victim advocates, or other relevant professionals who interact regularly with the defendant or other parties to the case in order to assess any treatment, restitution, or other issues that may be present. Short- and long-term treatment, behavior modification, and especially punitive sanctions are often required and can be enforced through the power of the court. (Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (Fall 2003).)

Although there are many types of specialized courts that focus on different issues, such as domestic violence, quality-of-life offenses, mentally ill defendants, or homelessness, supporters of specialty courts point to several fundamental principles that can emerge to varying degrees in a number of these courts. Some of these principles may lead to procedural due process concerns and potential ethical quandaries for defense counsel. These problematic principles include:

- The courts’ requirement that treatment for the defendant be imposed early in the life of a case. Often the decision to enter treatment must be made by the defendant before his or her counsel has adequately investigated, evaluated, or negotiated the case. The defense lawyer often advises clients to give up certain rights to enter treatment without the ability to fairly assess the case.
- In order to coerce compliance with the ordered course of treatment, the specialty court judge assesses and enforces a set of increasingly severe punitive sanctions, including jail time, community service, restitution, and/or the abdication of rights or privileges. (Richard Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1216 (1998).) A defendant may have agreed to the imposition of sanctions when he or she first entered the treatment court, at a time when the defendant was not fully aware of the ramifications of the sanctions.
- Regular and frequent interaction between the judge and the defendant is encouraged in specialty courts. Many times hearings are scheduled with no reason other than for the judge to learn the defendant’s progress in treatment or to determine compliance with the conditions imposed. Unfortunately, the judge often inquires of the defendant in open court about particular aspects of the defendant’s life and/or compliance with treatment. These hearings sometimes occur without the presence of the defense lawyer and the defendant is expected to candidly answer the judge’s questions, even those that inquire about the violation of additional criminal laws.
- A central tenet of specialty courts is the use of a team approach. (Key Component #6, *Defining Drug Courts: The*

*Key Components*, Bureau of Justice Assistance (1997).) The team consists of the judge, the prosecutor, the defense lawyer, and case managers. The lawyers are expected to cast aside their traditional partisan roles and work together toward the goal of the specialty court. Defense lawyers may forgo challenges to the imposition of sanctions or not intercede when a judge asks the defendant to make inculpatory statements in court in the presence of the prosecutor.

- Many of these courts involve nonlegal actors as part of the “team,” for example, drug treatment professionals, case managers, and social workers. These professionals often use a scientific or medical approach to treatment or client-relations issues that focuses on the best interests of the defendant, who may have more contact with the professionals than the defense lawyer during court proceedings.

- Also key to the operation of the program is the enhanced and increased role of the judge. The judges in specialty courts direct the course of the case, a role that is distinctly different than in traditional courts, where the lawyers take on a more central role, thereby dictating the course of the litigation.

- Finally, and perhaps most significantly, the new treatment courts explicitly disavow adversarialism. In the specialty court, the team approach dictates that each side’s goal is the same—the success of the treatment court’s goal, be it that the defendant succeed in the proscribed treatment program or that the community be satisfied based upon sanctions that are levied against the defendant. Even in instances where the treatment is something more than substance abuse treatment, for example, group counseling, punitive community service, or monetary restitution, the defense is required to support the completion of the “treatment.” Judges frown upon any challenge or argument against the “treatment” or any type of modification to it.

Even amidst concerns about due process and ethics in specialty courts, a general defense sentencing practice can adapt some of the courts’ fundamental justifications and treatment methodology to bolster a defense argument for alternative sentencing.

## Specialty court models

Two working models of specialty court practices emerge as predominant and provide lessons and opportunities for an enhanced defense sentencing practice. Either of these models can be adapted by the defense to creatively work to the client’s benefit.

The first model allows acceptance into the specialized court or its various treatment or social service programs as a condition of pretrial release without the need for the defendant to enter a guilty plea. Usually the program is offered to the defendant with the prosecution’s permission very early in the life of the case, sometimes as early as the day of arraignment or presentment. In many instances it is enticing to a defendant to enter the program because it almost always guar-

antees that the defendant will be immediately released from jail. Many specialty court proponents contend that early entry into a specialty court treatment program is advantageous because the defendant’s addiction or other social issues can be addressed immediately. However, there may be consequences for those defendants who refuse the treatment alternative, for example, those who accept it and later fail to meet any or all of its conditions. (Peggy Hora and William Schma, *The Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999); see also Nolan, 40 AM. CRIM. L. REV. at 1560 (recounting statements of judges who push defendants into the treatment court with the veiled threat of the possibility of jail time).) In such a pre-adjudication model, the defendant is allowed to enter treatment prior to any substantive disposition of the case. If the defendant is unsuccessful in treatment, the case returns to a pretrial stance, and the defendant can elect to go forward with a trial or challenge the constitutionality of police action. However, should the defendant be found guilty, he or she may face a harsher sentence with no possibility for treatment.

The specialty court notion of introducing treatment early in a case can easily be incorporated into a general sentencing practice and may offer defense lawyers support for proposing traditional type sentencing plans early in a case—prior to conviction—as an alternative to pretrial incarceration or other restrictions on liberty. Defense lawyers should always begin to think about sentencing at the start of a case. (See *Ten Principles of Sentencing Advocacy*, The Sentencing Project (December 2003).) From the first interview with the defendant, the lawyers can begin to collect valuable information and to ascertain the client’s objectives with respect to the final disposition of the case. (*12 Steps to Effective Defense Sentencing Advocacy*, The Sentencing Project (1993).) Family background information, prior substance abuse treatment history, employment, and education information are all areas that the lawyer can develop at the beginning and throughout the case. However, it is important that counsel not foreclose preparation of the case in the normal course, including evaluating legal suppression issues and factual investigation. As well, defenders need to reassure the client that the gathering of social information does not signal foreclosure of any positive dispositions of the case, including challenges to the government’s allegations at a trial. Rather, the client should be informed completely that the information can be used in a variety of ways that inure to the client’s benefit.

A second model for the operation of specialty courts has treatment being made available to the defendant only after a guilty plea is entered or many pretrial due process rights, including the right to a speedy trial, right to a jury trial, and the right to a preliminary hearing, are waived. (*Id.* at 1559.) In the post-adjudication model, which is similar to the process in general jurisdiction cases, a defendant must enter a plea of guilty to the charged offense(s) or to a plea-bargained agree-

ment in order to be eligible for the court treatment program. Sentencing is postponed until the defendant is assessed and completes treatment or other court-imposed conditions. A defendant who fulfills the proscribed conditions is guaranteed probation or dismissal of the case. If not successful in treatment, the defendant is sentenced in the normal manner. The post-adjudication model has garnered support from prosecutors who may worry that their abilities to prosecute a case will be irreparably harmed by a delay due to the defendant's treatment. They point to the loss of witnesses or other evidence as one of the rationales for advocating the post-adjudication model. However, the post-adjudication model seems at odds with specialty court jurisprudence because experts argue that a guilty plea has no therapeutic value in a court system that places a premium on treatment. Moreover, the guilty plea may be solely the product of coercion and the defendant's resulting acceptance of treatment may not be voluntary, rather it may be the only way for the defendant to get out of jail. (See *Tenet #5 of the Ten Tenets of Fair and Effective Problem Solving Courts*, National Legal Association of District Attorneys (2001).)

Despite the questions that surround the post-adjudication model, its emphasis on securing treatment can be applied in general jurisdiction courts by requesting deferrals of sentencing following a conviction at trial or a guilty plea. During the deferral period, the defendant can be given an opportunity to show the court success in whatever treatment may be appropriate, or to gain access to appropriate programs. Some defense lawyers have used the deferral period to secure public benefits to pay the cost of treatment, as a waiting period for treatment beds, to allow for the completion of job training programs, to influence probation authorities, or to secure housing for their clients. Judges may be receptive to this deferral proposal, as the defendant may remain incarcerated during the deferral period or be supervised by a pretrial services agency that can monitor drug use, compliance with court orders, or can impose treatment. In general jurisdiction courts and, indeed, even in some specialty courts, it may be necessary to educate the judge on the benefits of the deferral period.

### **Client-centered representation and ethics**

So how can a conscientious and committed defense lawyer use this open environment for alternative sentencing plans to their client's advantage? First, it requires that counsel be mindful of the positive lessons and principles from the specialty court movement and incorporate them into a sentencing practice in both general jurisdiction or specialty courts. Counsel must also be mindful of the policies or processes in the specialty court model that may compromise their ability to represent their clients fully and zealously. Several commentators have noted concerns about the erosion of client-centeredness and adversarialism in the specialty courts, principles that are essential to full and quality representation of a criminal defendant.

A client-centered defense practice, which is almost always adversarial, can oftentimes be at odds with specialty court principles and almost certainly with the views of other actors in the process, most notably the judge, the prosecutor, and the case manager or social worker. This is because the "team-work" principle of specialty courts has every actor working toward the basic goals of the court, be it treatment for the defendant, restitution to the victim or community, or otherwise. However, the defense lawyer's allegiance must always be to the client (see, e.g., Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J. L. & POL'Y 83 (2003)); the client's wishes, expressed or implied must trump other goals. This is why it is difficult to renounce adversarialism as required by specialty court practice or within a sentencing practice that seeks to use specialty court principles. The defense lawyer's allegiance to the client should be primary and must be evident to the client and to all others at the beginning of a case and at every step throughout a case, including the formulation and presentation of an alternative sentencing plan.

Client-centered criminal defense representation is in line with the lawyer's ethical obligations under ABA Model Rule of Professional Conduct 1.2. The rule requires that a lawyer abide by the client's wishes with respect to the objectives of the representation and consult with the client with respect to how those objectives are pursued. Continued consultation and adherence to the client's wishes must occur throughout the case. To be sure, the parameters of the requested defense and the means through which its goals are to be achieved fall within the express purview of Rule 1.2.

Because client-centered defense representation promotes the client's desires and wishes, the defendant's wishes serve to establish the direction that the lawyer takes with respect to sentencing, even in instances where the defendant's wishes appear irrational or idiosyncratic. For example, in a case where it is clear that a defendant needs some form of treatment, such as an inpatient drug program, and the judge is likely to defer sentencing to allow for completion of the program or to sentence the defendant to probation with the condition that he or she enter and complete the program, the defense lawyer should argue against a treatment program if the client would rather take jail time in lieu of a treatment program. In other words, the lessons that come from the specialty court movement—that defense lawyers can be therapeutic agents or problem-solvers—may have to take a back seat to the wishes and desires of our clients.

### **What can a defense lawyer do?**

Defense lawyers can and often do spend a great deal of time putting together a sentencing allocution for their clients. This requires them to go beyond the roles of counselor and advisor, and often demands a foray into unfamiliar areas. However, approaching sentencing holistically—similar to the

approaches of some specialty courts—may require lawyers to delve into the client’s life, challenges, support systems, and goals, and to develop different practices to ensure the persuasiveness of their advocacy.

**Input from other professional disciplines.** In adjudicating cases, specialty courts make aggressive use of information, personnel, and theories from other, nonlegal disciplines. For example, it is not uncommon for a drug court to have an addiction counselor or social worker assigned to the court. Likewise, judges in specialty courts have often received special training in other disciplines; for example, in drug courts some judges have received limited medical training in the disease model of addiction, some may have attended training courses in pharmacology to determine the effects of drugs on the human body, and some may have attended limited training courses in mental health diagnosis and treatment. Such nonlegal professional disciplines may have different methods, different ethical guides, and different goals from that of the defense lawyer. They may be guided by a desire to do what is in the client’s best interests, defined by the professional’s expert evaluation, not the client. As a part of the specialty court team, these professionals may push for an outcome that follows their perceptions of the client’s problems. They, along with judges and prosecutors, may not understand that a defense lawyer does not have an allegiance to what is in the best interests of the client but rather to what is the client’s wishes. The defense lawyer cannot become the disinterested, neutral, greater-good-seeking professional that is central to other disciplines. The defense lawyer must keep vigilant in advocating for the client’s wishes, but, in order to be an effective advocate, must also adapt the skill sets and acquire information from these other professional disciplines.

In order to fully inform and persuade the court not to order a full incarcerative sentence, and to use other community-based alternatives to incarceration, the defense lawyer may have to become immersed in the language and substance of these other professional disciplines. This means learning about the subject matter, as well as the goals and methods of treatment or counseling. For example, in order to persuade a judge to defer sentencing and allow a client to enter a community-based anger management course that is offered through a local holistic counseling center, the defense lawyer must understand and convey to the court the goals of the center, what specific topics will be covered, what techniques or methodologies will be used to uncover and address the anger issues, as well as what professional support the particular program receives. This is required in order to competently and persuasively make the presentation to the court.

**The lawyer reconnaissance mission.** In order to be an effective advocate at any stage of the process—especially in a specialty court or at sentencing before a general jurisdiction court—the defense lawyer must be aware of the idiosyncrasies of the forum, specifically, what matters to the judge who will make the decision in the client’s case and what mat-

ters to the prosecutor or other professionals upon whose input the judge might heavily rely in making a sentencing decision. The lawyer might talk to other lawyers who have had experience with the judge or prosecutors. The lawyer should ask what the judge has said in previous cases about the treatment issues that may be apparent. Is the judge partial to educational programs? Has the judge looked in the past to family and community support to keep an offender on track? Will the judge hear from family members at the sentencing? Does the judge often think of a monetary fine as key to having the offender take full responsibility?

Prosecutors in specialty courts often have the power to veto the defendant’s admission to a specific program or access to a particular disposition. In general jurisdiction courts, of course, the prosecutor’s power is great—the prosecutor has the sole authority to offer a particular plea bargain in the case. Moreover, to achieve pretrial release for a client, it is often important to secure the prosecutor’s support. This means that the defense lawyer who is working hard to obtain a particular alternative disposition for the client cannot ignore the prosecutor. The defense lawyer should consider advocating the client’s position with the prosecutor at the start of the case. Counsel can sensitize the prosecutor to the issues that are extant in the client’s life, including work, education, and treatment prospects. The prosecutor may listen to a plan of action that will take into account real services and treatment from which the client can benefit. Counsel should continue to make the prosecutor aware of the defendant’s skills and talents that call for more than punishment.

Moreover, treatment personnel and case managers are often not able to have meaningful one-on-one contact with a defendant and may not have enough time, because of overburdened resources or unwillingness, to fully acquaint themselves with the issues and problems that need to be addressed in a client’s life. Additionally, these professionals may be so accustomed to treating an issue in a particular manner that they will not consider the defendant’s point of view. Counsel can help to change this mindset by advocating on the client’s behalf with these professionals at different points in the case. Counsel must keep the lines of communication open by offering assistance with getting the client to appointments or in obtaining needed information that will ensure treatment or success in a particular program.

**Developing the sentencing plan.** The supporters of such highly publicized and successful specialty courts as Red Hook Community Justice Center in Brooklyn, New York, often point to their program’s focus on developing comprehensive services for a particular offender that will benefit that person and the entire community (GREG BERMAN AND JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM SOLVING JUSTICE* (2005).) Likewise, many defense agencies with a holistic approach to representation or that have dedicated resources to social work divisions or to employing professional sentencing advocates, have also focused much time and

resources to looking comprehensively at an individual or a case. This is a very useful and appropriate approach for lawyers to use whether litigating in the specialty court or preparing for sentencing in a general jurisdiction court. The defense lawyer should look at every aspect of the case and look at many facets of the defendant's life to develop a plan for sentencing to present to the court. By identifying at-risk factors, the need for treatment and social services, and bringing to light the talents and motivations of the defendant, the lawyer may be able to make clear a sentencing strategy that will persuade the court to move beyond a traditional sentence of incarceration.

The defense sentencing theory can be built around a particular need for treatment, or can be developed around the need to build foundational elements in a client's life. It can involve the defendant's family commitments or the client's employment prospects. For example, a young client who resorted to drug dealing as a way of making money may desire a career that allows for advancement, job satisfaction, and a stable income. Defense counsel can then focus the sentencing plan on vocational training or exploitation of the client's talents or prior job history to put together a plan that has as its central theme a new career or work experience.

There are many elements that can be addressed in putting together a comprehensive sentencing plan, and a defender should evaluate what role each of these elements may play in designing and presenting the sentencing plan whether it be before a specialty or general jurisdiction court.

**Using community resources.** It is often important to a judge to take into consideration the needs of the community, as well as the effect on the community of a nonincarceration sentence for a defendant. A sentencing plan that involves the community in some way can go far in convincing a court to consider alternatives to incarceration. Defense counsel may look for resources in the community with which the client can become involved, including churches, service groups, advocacy organizations, or community leaders. Clients could volunteer with these groups or attend programs, or may even be able to educate themselves or others to the needs of the community.

**Involving the defendant's family.** Family support for a defendant is important and can be a real indicator of success with a sentencing program. At the beginning of a case, defense counsel must identify those family members who have or could have an impact on the defendant. With the defendant's consent, counsel may contact family members, particularly those with whom the client resides, and involve them in the sentencing plan. Counsel should seek to locate absent family members whose presence in the defendant's life may have a positive effect and can ensure that the defendant has the support and assistance of family to aid in meeting the sentencing goals. Counsel should secure letters from family members or have them attend the court hearings and let the court know specifically what role each will play.

**Attending to housing concerns.** Secure, safe, comfortable, and affordable housing is essential to anyone's attempts to live productively. Therefore, defense counsel must inform the court about the defendant's housing and how it will provide the client with stability and access to the other parts of a sentencing plan. For those clients who may be homeless, counsel should look into shelters or transitional housing programs that will provide a start to self-sufficiency.

**Employment prospects.** Many judges want to know about the client's employment, its stability and potential to provide for the defendant. Counsel should present verifications of existing employment or letters from employers who may be able to hire the defendant irrespective of court involvement. It may also be important to provide the court with the details of the employment, including the nature of the position, the hours, and locations where the client will work, and the possibilities for long-term tenure and advancement.

**Vocational counseling and assessment.** In those instances where a client does not have a stable work history or has had difficulty in finding work, counsel should research and evaluate the possibility of the defendant entering a vocational training program. Some of these programs provide a stipend during the full-time training period and placement at completion. For some clients who don't know what they might be interested in, vocational counselors may be able to provide assessments and other evaluative tools that can predict those areas with the most promise.

**Financial responsibility.** Some jurisdictions require payments to a victims fund or to the court following a conviction, so it is important to ascertain the client's ability to pay such a fine. Counsel should, prior to development of a sentencing plan, consider the impact and necessity of financial restitution to the victim or to the community. Indeed, many specialty courts, particularly community courts, impose varying forms of restitution to the community or to the victim as part of the requirements of adjudication. Several community courts, including the Midtown Community Court in New York, use principles of restorative justice as a reason to require clients to engage in projects that seek to pay back the community for the offense and to instill in the defendant an investment in the community. (See [www.courtinnovation.org](http://www.courtinnovation.org).) For example, in a recent District of Columbia case where the defendant was charged with destroying property for painting graffiti, the judge in a general jurisdictional court ordered that the defendant pay for the restoration of some of the property and perform the work of removing the graffiti. (See *Virginia Teen Jailed in DC for Graffiti Vandalism*, RICHMOND TIMES DISPATCH, Feb. 10, 2006.) Additionally, law school clinic students have proposed that a client convicted of cruelty to animals engage in supervised service and education activities with the local animal advocacy group. Unfortunately, sometimes these requirements are counterproductive and may stigmatize the defendants or create resent-

ment because of the use of a defendant's forced labor to benefit a particular business or group of businesses. Before proposing such action, or any other, as part of a sentencing plan, it is important to discuss with the client the details and ramifications of the activity.

**Mentorship, internship, and externship.** Many lawyers and sentencing advocates sometimes neglect the benefit that mentorship can afford a defendant. Communities have many organizations that offer a one-on-one or group mentoring program for young adults. Some of these groups focus on particular themes, including assistance with education, training, or success in substance abuse treatment. Additionally, many organizations, even small businesses, might be willing to allow a defendant to work as an intern in order to acquire work skills while benefiting the business.

**A defendant's talents.** Defenders should never neglect to make the court aware of the defendant's talents and skills that may not have had an opportunity to flourish. Talent in art, writing, poetry, music, and many other areas may inform the court of a defendant's potential. Including these skills in a sentencing plan through specific counseling, education, service, or work may allow the court to focus on positive individual characteristics of the defendant that may form the foundation for later success in the community.

**Building an educational plan.** Especially in situations where a defendant is of high school or college age, and employment prospects are limited, courts are receptive to plans that detail how the defendant will continue education in order to secure employment in the future or as an outlet for creativity and learning. Counsel should look into tutoring programs, college prep courses, GED classes, and admission to colleges or technical schools. To the extent possible, counsel should have the client begin these programs prior to sentencing or continue them while in the specialty court program. Counsel should inform the court of the specifics of the program and should secure proof of placement.

**Securing treatment or counseling.** Statistics from social science and from data obtained from specialty courts support the notion that a majority of people who enter the criminal justice system have some need for substance abuse, mental health, or other form of treatment or counseling to address chronic or acute issues that have led in some way to the offense. It is of utmost importance that these types of issues be evaluated and assessed prior to or as part of the specialty court program and prior to sentencing. Because of the probability of privacy issues, it is essential that the client be informed and advised, and makes the final decisions regarding the appropriateness of treatment. As well, counsel must follow through on the client's desires for treatment or counseling because the judge may be informed of noncompliance or nonparticipation if the client is not fully invested in the program.

Among the treatment options to evaluate are mental health counseling or medication, physical or medical assessment, anger or conflict management, substance abuse treatment, parenting classes, and disability support programs, including day treatment options and dual-diagnosis programs. Counsel must also look into related issues such as 1) securing government or public benefits to allow acceptance into a course of treatment; 2) whether the treatment is inpatient or community based; 3) the security of the treatment facility; and 4) the length of the program.

**Cooperation with law enforcement.** The judge should be informed of the client's cooperation with police and prosecutors at any stage of the process, from the time of arrest through a bargain with the government. Such cooperation is often substantial because securing or disseminating information may put the client in danger. Counsel should discuss with the client the manner in which the disclosure should be made to the court in order to safeguard the dissemination of the information at a court proceeding, in court records, to treatment or specialty court personnel, or through the defendant's participation in court-ordered treatment or group counseling.

**Prior criminal history.** The client's criminal justice history will become part of the record that the judge relies on in sentencing or in adjudicating the specialty court case. The information that the court receives comes primarily from court agencies or law enforcement, and sometimes may be incorrect or incomplete, therefore counsel must be careful to verify and correct the information and must give the court additional explanatory information where appropriate.

**Using victim impact evidence.** In some form or another during a sentencing hearing, the individual victim, victim's family, or the victimized community will be addressed. A central component of some specialty court jurisprudence is to restore the victim and the community to the extent possible. This is done through treatment, service of the defendant, and other means, as well as the reduced possibility that the defendant will recidivate. Counsel has opportunities, as well, to use victim-impact evidence to support a plan for alternative sentencing. There may be instances where counsel can directly involve the victim in the sentencing plan—by illustrating the changed circumstances in the client's life, or that the client has received needed treatment, or any other information that will allow the victim to buy into the sentencing plan. The victim may address the court in writing or in person. When circumstances are appropriate, defense counsel can meet with the victim prior to the sentencing hearing in order to discuss the disposition of the case. Mediation or conciliation may also be considered.

**Presentation to the court.** Counsel should always be fully prepared when presenting an alternative sentencing plan to the court or in requesting a particular disposition

or treatment plan in a specialty court. This preparation may include submitting the plan to the court in writing prior to the day of the hearing. Counsel should submit supporting and verification documentation to the court along with the plan. These additional documents might include a letter of acceptance from a treatment program, psychological, educational, or other assessments by professionals secured by the defense to evaluate the defendant, and letters from the family and community members. Counsel should also include relevant information and argument when requesting a disposition or treatment plan that differs materially from that recommended by the court case managers or other professionals. These documents need to be submitted to the judge far enough in advance of the hearing so that the court can fully digest the information.

Counsel's oral presentation should not rehash every aspect of the written materials, but should cover the most important and compelling elements of the plan. It should also exhibit candor, but clearly set forth how the plan addresses issues affecting the defendant. Counsel may also have to address why incarceration or other traditional disposition is inconsistent with the goal of addressing the client's issues and factors affecting the client's life.

Additionally, counsel should advise and prepare the defendant for participation in the sentencing hearing. The defendant has the opportunity to speak at the hearing and to

offer additional information. The defendant's voice and perspective can be a persuasive and important factor that may lead to the court's acceptance of the sentencing plan.

Counsel should meet with the client prior to the hearing and discuss allocution and the compelling information that the client wants to convey to the court—be it remorse, an apology, or a forward-looking statement of the defendant's goals after the case is concluded. (See, e.g., Carrie Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. LAW. 337 (2002).)

In sentencing, the defense lawyer has a valuable and formidable task to perform. With a renewed focus on this stage of defense representation, spurred on by recent court rulings and the emergence of thousands of specialty or problem-solving courts in local court systems across the country, many more judges are influenced by the notion that their power to sentence means more than just doling out punishment; some are becoming more open to creative sentencing options that focus on specific alternatives to incarceration designed to provide a benefit to the defendant and to the community. These judges are open to full and complete alternative sentencing requests by the defense that will focus on specific issues in a defendant's life or the circumstances of the case that may, in the long run, lower the possibility of recidivism and improve the defendant's life and our communities.