

THE PRESENTENCE INTERVIEW: THE IMPORTANCE OF SHOWING UP

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In a recent APB to Assigned Counsel Panel Attorneys, Chief Defender Bob Convissar urged all lawyers to attend the Pre-Sentence Interview of your client by the Probation Department to make sure that your client's rights are protected, in part, by limiting the scope of the interview and to help "clarify or ameliorate" any less-than-satisfactory answers that your client may provide.

To quote Woody Allen (who may have lifted this adage from columnist William Safire in 1977), "showing up is eighty percent of life." Depending on the severity of the crime for which your client has been convicted, your showing up or "Being There" (to cite one of Peter Seller's best movies), can be the difference between life, many years, a shorter time in prison or none at all depending on your (and your client's) preparation, presence and presentation. In short, the importance of your showing up cannot be overstated.

When the sentence date has been announced, counsel should make sure to request that he/she be notified by the Probation Department of the Presentence Interview (PSI) date with a notation that your client should not be interviewed in your absence. Therefore, you (and your client) should make a point of being there at the appointed date and time, and if it conflicts with your schedule, request an adjournment to a mutually agreeable date. Also, make sure that your client is aware of the date and time and understands the importance of punctuality, appearance and making a good impression. (Send him or her a reminder as the PSI date approaches

The key to making a good impression is PREPARATION for the interview. Toward that end, counsel should meet with the client beforehand to inform the defendant of the purpose and scope of the interview. CPL 390.30(1) states that "the pre-sentence investigation consists of gathering information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education and personal habits."

Your client is arguably in the best position to provide this information, so it's better that he/she start thinking about these matters long before meeting the probation officer lest he/she come across as a dummkopf or disinterested dimwit to the probation officer who will likely have only so much time and patience to spare. Counsel may wish to go through the client's NYSIS so that the client will have at least some understanding of his criminal convictions (the fewer the better).

Counsel may also want to get a look at your client's FACEBOOK page to make sure there is nothing on it that could bury him/her with the probation officer or worse yet, the sentencing judge. The client should

be advised to stay off social media, be mindful of the company he/she keeps and refrain from use of illegal drugs or alcohol. (Good luck with all of that).

If time allows, you may consider conducting a mock interview of the client, asking questions that he is likely to be asked by the probation officer. (You went over his/her potential testimony beforehand, so why not the PSI)? You should also prepare him/her to be POLITE, HONEST and CONTRITE. In the case of a plea, he/she has already admitted guilt, so there is NO GOOD REASON at this stage for the client to hedge, fudge or minimize what he/she did. In other words, he/she should accept responsibility for his/her conduct, be sorry about it and not speak as if he/she were the victim of circumstance. (e.g. "I caught a case").

While the defendant should not hesitate to tell his/her side of the story (except in the case of a guilty verdict in which case, on counsel's advice, he/she should SAY NOTHING), he/she SHOULD NOT bash, trash or blame the victim under any circumstances. In many instances, the officer will have already gotten an earful from the victim and/or his family, so assailing the victim will generally serve no productive purpose.

The client should also be advised that virtually everything he/she tells the probation officer will be submitted to the judge to consider in arriving at a sentence. So, the defendant should not say anything that would invite a harsher sentence than the judge was otherwise inclined to impose or cause the court to back off a sentence commitment. He/she should also be aware that the officer who submits the report may well take it upon him/herself to editorialize (usually under "Evaluative Analysis"), about the defendant (e.g. he/she: "took no responsibility for his actions," minimized responsibility, " " has squandered prior treatment opportunities," "is inappropriate for probation supervision," "preys on others for his own personal gain," " is a danger to the community"). They will also MAKE A SENTENCE RECOMMENDATION which many judges are likely to follow.

Sentencing judges DO READ the reports and absolutely DO NOT LIKE to read that the defendant has "not taken responsibility" for his/her actions. They especially don't like to read things like, "the defendant denied responsibility and said he only took the plea because his/her lawyer made him/her do it." (The client is arguably less likely to blame the lawyer if he/she is sitting right there next to him/her).

If the defendant was found guilty after trial, the defendant is more likely to receive a more severe punishment than after a guilty plea, so whether or not he/she "accepts responsibility" in the PSI or at sentencing borders on immaterial since the jury has spoken and counsel does not want him/her to say anything that might contradict his trial testimony (if he testified), or otherwise jeopardize his appeal. In those instances, silence is likely the safer option. (I once presided over an armed robbery trial where one of the defendants testified that he wasn't at the crime scene then told the probation officer that he was sorry for his involvement in the crime. His conviction was unanimously affirmed).

Some probation officers reportedly cop an attitude when defense attorneys accompany their clients to the interview. Some may feel that counsel "crimps their style," but that may be the point especially where the probation officer asks the client (e.g. who played guilty to simple possession), questions like "so how long have you been dealing drugs", or (in a DV case), "when did you start beating your wife?"

Attending the PSI can also help counsel be better prepared for the sentencing and to be in a position to clarify or, where appropriate, contravert any errors or misrepresentations in the Presentence Report

based on personal knowledge rather than the client's recollection. (As between the defendant and the officer, who is the court more likely to believe?).

Knowing exactly what your client told the probation officer can also pave the way for a more consistent story at the time of sentencing. Conversely, telling the judge at sentencing, "your honor, my client takes full responsibility for his conduct," will ring hollow if the report (based on an interview that you did not attend), says something like, "the defendant takes no responsibility for his actions."

Some clients are likely to make a lousy impression on the probation officer no matter what you do or say to prepare them for the interview. In such cases, it is all the more important that you "show up and be there," if only to minimize the damage and be forewarned and forearmed for what will likely be a less than stellar report to the sentencing court. Not showing up in such circumstances may border on malpractice.