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# The Sociologist As Mitigation Expert In First Degree Murder Cases

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## ABSTRACT

This paper describes the experiences of a sociologist as a mitigation expert during the “typical” first degree murder case, from indictment through the penalty phase of the trial. The author, who has worked in death penalty cases (capital murder) since 1988, has served as a mitigation expert in over 40 such cases. Topics covered include: working with a death penalty mitigation team and what to expect; interviewing the client, family members and others significant to the defense; making a genogram; making a time line of the client’s life; preparing for trial; and the style and content of your testimony and getting qualified.

## Introduction

In Louisiana, as in most states, the trial of a first degree murder case is separated into two proceedings. The first proceeding is to determine the guilt or innocence of the defendant. If the defendant is found not guilty or guilty of second degree murder or manslaughter, the trial ends. If the defendant is found guilty of first degree murder, a second trial begins almost immediately, before the same jury, to determine if the defendant will be given a sentence of death or life in prison without benefit of parole. First degree murder is the only charge for which the jury is allowed to impose the sentence.

The most important factors from a defense standpoint are the mitigating factors. Louisiana law recognizes any relevant evidence as potential mitigating evidence but generally categorizes the factors to be considered as follows:

- a. The offender has no significant prior history of criminal activity;
- b. The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
- c. The offense was committed while the offender was under the influence or under the domination of another person;
- d. The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
- e. At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
- f. The youth of the offender at the time of the offense;
- g. The offender was a principal whose participation was relatively minor;
- h. Any other relevant mitigating circumstance.

The job of a sociologist in a case such as this is to present, in an orderly fashion an entire history of the defendant and his family or other relevant social conditions affecting behavior. Sociologists have been trained to grasp a problem deductively, fitting the data to a theory, and inductively, creating a theory from data. Both of these skills are well-suited to the role of mitigation expert. All cases have or will have a theory around which the defense is centered. There are certain key components of this process which will be discussed below.

### **The Death Penalty Mitigation Team**

The mitigation team is made up of all the experts who may offer their opinions about the defendant and his behavior at the penalty phase of the first-degree murder trial. Most, if not all, attorneys use experts in first degree murder cases to prepare for the penalty phase (and in some cases the guilt phase) of first-degree murder trials. The team of experts may change from case to case, and not all the particular roles are requi-

sites to each case, but there has emerged a kind of standardized group of expert roles that would be filled in preparing the defense of a typical case (Foster and Forsyth, 1993).

Two attorneys are usually assigned to coordinate death penalty cases. If there are two, the most experienced will be the lead attorney and will usually handle jury selection and the penalty phase, the other will handle the guilt phase of the trial. In fact, both work together on all parts of the case.

There are several expert roles that would make up the mitigation team in a typical first degree murder case:

1. A Ph.D. sociologist with expertise in family and criminology. The sociologist uncovers the client's social history including examples of good character, substance abuse, etc.
2. A Ph.D. psychologist who has worked extensively with criminal offenders. The psychologist administers personality and IQ tests to the defendant as part of the pre-trial interview process. In court he describes the defendant's intelligence, personality traits and behavior patterns.
3. A prison expert, who is a criminal justice professional or criminologist with a particular background in institutional corrections. This expert gathers information about the defendant's prior criminal record and behavior in confinement. He/she testifies about the defendant's adaptability to the prison environment as a long-term inmate. This expert would also describe the prison environment for the jury and may also testify regarding the meaning of a life sentence. Jurors may think that a life sentence means the client will be back on the street in a few years. If this testimony is allowed, it becomes the job of the prison expert to produce prison statistics for that state to refute this notion.

Most criminal cases also involve an investigator (note: a good investigator is an expert but may not have advanced degrees/credentials) who is essential to the team's work. The private investigator's job is to gather information needed by the other experts. This typically involves locating and interviewing witnesses who the experts may need to substantiate testimony. The investigator does not normally testify in court, but is helpful in screening information for the experts. This investigator also aids in identifying and evaluating the other witnesses who will be asked to testify during the penalty phase. The experienced sociologist and psychologist will work closely to coordinate their testimony. They

must make sure that their findings are supportive of one another and indeed are not going in separate and contradictory directions.

Two other types of experts have also served in some cases in which the author was involved: a substance abuse expert and a neurologist (M.D.). The substance expert serves if alcohol and/or other drug abuse is an issue, and if the sociologist or psychologist does not have the knowledge and/or experience required to testify in this area.<sup>1</sup> Usually the substance abuse expert will testify about the “exact” mental impairment at the time of the crime, considering the amount of substances consumed. The neurologist may be used if brain damage is to be considered a factor in explaining behavior, particularly impulse control. The sociologist may present testimony regarding the defendant’s life history, in the form of a time line. It has been the experience of this author that such a sociological contributing, in conjunction with the testimony of a neurologist, work well together. Juries that have been surveyed after trials have supported this observation. In accounting for behavioral changes, facts regarding brain damage are meaningful only with descriptions of specific events along with general phases of the client’s life.

The theme of the mitigation team testimony will often center around the testimony of the sociologist. In such cases, the sociologist will be the last of the experts to testify. Essentially all the pieces will have been identified and the sociologist will bring it all together within the context of sociology.

Usually, the sociologist and the investigator begin working on the case as soon as possible after the defendant is charged. They interview the defendant and begin working up a witness list together. The investigator can save the sociologist time by locating persons from whom they need information. Depending on what they learn, other experts may be consulted. Attorneys are kept informed of any written records the experts may need and any developments in the case. This of course requires experienced experts and attorneys. An inexperienced attorney may not feel comfortable giving such independence to experts, and the expert with a lack of experience will need direction. The case should not be allowed in which both experts and attorneys lack first degree murder trial experience. At the start of his career as an expert witness, the author was very fortunate to be associated with a very experienced team of attorneys.<sup>2</sup>

The prosecution will state reasons for your client receiving the death sentence and will offer rebuttal testimony at the trial from their own experts. This will usually not be a direct rebuttal in that the state will

probably not employ a sociologist but will usually bring in a psychiatrist or psychologist who will rebut the theme of the defense. Some of these experts will testify during the guilt phase, others during the penalty phase.<sup>3</sup> The most critical rebuttal during the penalty phase usually comes from character witnesses (none expert witnesses) who may say something that counters what you have said or will say. If given the opportunity, the prosecution will indeed bring up these differences. To remedy this problem the expert should testify after such witnesses and be in court during their testimony.<sup>4</sup>

### **The Sociological Expert**

The expert is very important to a death penalty case; indeed, it has been stated in legal decisions that the attorneys in such cases are only as good as the experts they have (you live and die by what your experts do).<sup>5</sup> Persons are qualified to be expert witnesses if they possess first-hand knowledge that the jury does not have, have the ability to draw inferences from particular facts, and their academic field and/or experience is related to the subject in the present case (Najmi, 1992).

This author serves as an expert in criminology, family relations, substance abuse and general sociological knowledge, offering explanations as to why the client was involved in a particular crime. This expert gathers information about the defendant's family life, education, social history, including drug and alcohol use patterns, and work record by talking with family members, neighbors, teachers, friends, employers and co-workers. The sociologist testifies in court about the overall environment in which the defendant lived, with emphasis on those aspects that would explain violent behavior. This author gives a summary of the defendant's life and highlights those events and patterns that the jury ought to know in order to understand why this first-degree murder was committed.

### **Not Like The Ivory Tower**

Criminal attorneys are advocates who retain scientists who act as experts. Although science is suppose to be objective, the expert who must be impartial and independent has been hired to support a certain position. This experience is alienating for some scholars who must move beyond the academic environment of the university to the unknown arena of the court room. On the witness stand one must qualify, testify, and be cross-examined. If unprepared for any phase of this process the expert can be judged unqualified or his/her ego and opinions annihilated (Najmi, 1992).

## The Testimony

The testimony of a sociologist regarding the good character of the client is an influential part of a mitigation strategy designed to obtain a life sentence. Such evidence is mitigation in its most pure construct because it shows the client to be less deserving of a death sentence.

Presented in an systematic fashion, good character evidence is the nucleus for a successful mitigation effort. Your task is to paint a sociological portrait of a human being whose good character, although not a justification for murder, reveals a human being who is nonetheless not deserving of the death penalty. Indeed, all of the efforts of the defense team for obtaining a result less than a death sentence, are directed toward portraying the client as a person with a complex of character like all human beings. In other words, the expert humanizes the defendant so the jury can understand what motivated the defendant's actions. The humanization process might entail a discussion of his abuse or neglect by his parents or guardians, his mental illness which went neglected or untreated, his substance abuse problem, his wife's abandonment of him and her promiscuity, and any other similar circumstances relating to the defendant. There is, indeed, one significant variation: the client has, at this point in the trial, been convicted of taking the life of another person (Dayan, 1991).

Most individuals have some saving value. In every case the mitigation expert has an obligation to search for this kind of information. Evidence which falls within this category includes military service, school, employment and (hopefully) the absence of criminal records. In the case of a prior criminal record, the records of previous incarcerations should be obtained. The expert should also search for memberships in religious, community or other notable groups. Character evidence can be used to illustrate the crime as a aberration from the client's usual patterns of behavior. In this case a time line of the person's life can be done to illustrate the relative portions of the client's life spent in different kinds of behavior. The overall task of the sociologist is to unearth in the client's social history, examples of good character which can be used as mitigation. The sociologist will use the data obtained in the interviews, records, etc. to shape testimony. The attorney may also ask you to select witnesses from among the interviewees who will both be creditable witnesses and reinforce what you intend to say. Attention must be paid to the order in which the witnesses testify, for maximum reinforcement of what the sociologist wishes to convey. The proclivity of these individuals is to provide conclusionary statements about the good character of the client. But there is a need for very specific anecdotes that corrob-

rate good character. In other words, do as we write in academic papers: give a general statement, followed by a specific quote which substantiates the previous statement. The same kind of anecdotal evidence should be established throughout the client's social/life history.

In the experience of this author, persons in certain positions will tend to emphasize traits or be better sources of information than others. For example, given the backgrounds of the majority of the clients, shop teachers, counselors, special education teachers, assistant principals (in most schools they handle discipline), and athletic coaches are good sources of information.

The gathering and development of good character evidence requires huge quantities of time and energy; the sources and variety of such information are infinite. Such evidence may well be the difference between your client's death or life.

Good character evidence is only one part of the sociologist's mitigation presentation. It is braced with other kinds of mitigation, such as mental health evidence or with evidence of childhood abuse and neglect, or alcohol and/or drug dependency. If there is familial history of mental illness or child abuse or any other behavioral trait pertinent to the case which has been "passed down", the mitigation specialist should construct a genogram. Genograms may be simple or complex, but they are essentially driven by two factors: your needs in the case and the familial history of the client.

Genograms can be shown to juries. They need to be clear and attached to few issues. They are not a family tree! They are a sociological map of an individual who has committed murder and can be an excellent vehicle to express an issue(s) in the case. The client is explained as a product of a particular social environment, which in theory lessens responsibility. Each link in such a diagram must be supported by theory. I have used social learning theory, differential association, and the subculture of violence to tie the paths in this sociological mapping network. The purpose is to explain how the client got to this social location—the killing of another individual. The advice of this author is to keep it simple. Genograms are not made for courtrooms. Displaying a true genogram with an overhead projector would require an extremely large screen. Remember you are trying to convince a jury with your professional opinion and do not need to display an entire familial structure, but only those linkages that are components of your explanation. Construct your own or use a computer design package (McGoldrick and Gerson, 1985). A genogram, like any other display, such as time lines or graphs, becomes

a centerpiece, when used effectively. Questions should lead into a display and should be referred to during an explanation. Displays should contain only information which facilitates your explanation. If used properly they will imprint your opinion upon the minds of the jurors and save the life of your client.

### **Advice For The Expert**

Sociologists need to be very aware of many of the aspects of the work of an expert in court. An expert can devote long hours to researching a case, but put little into the mechanics of testimony. This can be devastating. Devote as much time to preparation as to research.

The expert should prepare a list of questions for the attorney to use in the opening of the direct examination of your qualification. These qualifying questions should address your employment, education, experience, publications and other credentials. Review potential questions with the attorney before the trial.

During the trial, when challenged about insufficient experience, do not take the challenges personally. Comfortably agree with accurate challenges to your credentials. The opposing attorney may claim that your experience is not relevant to the situation at hand. You need to be able to generalize from past experience to the current issues.

Sociologists are sometimes very critical of sociological knowledge. The expert must be particularly aware of this problem in court. Criticize your field as needed and requested, but constantly look for opportunities to regain control. Do not get into “collaborative criticism” (Brodsky, 1991). (This is when the expert involuntarily joins the opposing attorney in a critical evaluation of the expert’s own discipline and present work). Do not change your professional opinion on the basis of a cross-examination.

The expert should never fraternize with the opposing attorney. Some attorneys casually approach expert witnesses before trials and during breaks. This is a tactic to learn about you and your testimony (Brodsky, 1991; Dayan, 1991).

Respond to half-truth statements/questions by first stating the correct part, then strongly denying the deceptive part. You may have built up a long list of characteristics of your client that have contributed to his committing this crime. The prosecutor will challenge each of these singularly because they are “weak” contributors detached from the larger picture. Agree with each challenge but qualify each statement with “AS

AN ISOLATED CHARACTERISTIC” or something having that same affect of drawing attention back to the gestalt.

Knowing the literature is the best defensive weapon. Review current literature on the topic about which you will testify. Your opinions should always be the product of your research. Challenges to professional experience should be met with a knowledge of the literature and affirmations of the worth of your own experience. When attorneys try to intimidate you, use a commanding response. Some may get right in your face, ask them to step back. This is not just their style, it is a tactic.

There will always be the implication of being a bought expert. The media has contributed to this image and the jury is aware of it. Demonstrate that you are aware of the issue. Directly address the facts of fees and the idea of impartiality. State that you are particularly aware of the possibility of fashioned testimony, but shift the focus to impartiality, objectivity and truthfulness.

Meet with your attorney to discuss the best way to present the findings and opinions and also the possible tactics of the prosecutor. These tactics alone, if persuasive, are strong enough to damage the expert. As mentioned, use graphs, charts, etc. when possible. The jury will take a visual image of your testimony into their deliberations.

The expert must always stay on their professional turf and stay away from other areas. As long as you keep your testimony on your turf, you are the master. Do not incorporate legal concepts into your testimony. Keep your knowledge limits clearly in mind and stay carefully in the bounds of your expertise. And lastly, never attempt to be amusing on the witness stand. Respect the dignity of the legal process (Brodsky, 1991; Dayan, 1991).

### **Some Other Problems**

There are some other kinds of problems that emerge in the role as an expert. Some problems may increase the likelihood of the defendant getting the death penalty and others are only a problem for the expert. The greatest of these occurs when experts are brought into the case too late to do their work effectively. Many attorneys presume that cases will be resolved through plea-bargaining. When they are not, and a trial date looms, experts may be contacted. The problem is, most potential experts are professionals working full-time at other jobs. Consequently they cannot concentrate exclusively on a particular defendant for two weeks. Even if they were able to consolidate their work, there are records

to examine and witnesses to contact, neither of which can be done in a brief period. Juries are not very impressed with expert opinions that are the products of hasty encounters with the client. Testimony should emerge from several meetings accomplished over a long period of time. Procrastination in bringing in experts can also be a delay tactic of the attorney. Delay in a criminal trial is almost always good.<sup>6</sup> In this regard, the experts may need to testify at a hearing about what they need to do and how much time is needed.

Some attorneys have problems regarding professional arrogance in assembling a defense. The author has found that this presumptuousness seems to be the result of the defense counsel's inexperience. Some are seemingly not willing to listen and respect the advice of objective and analytical experts, who may have worked on many more death penalty cases than the attorney has. This may be rough at times but as the trial date nears, the anxiety of inexperience usually and hopefully gives way to humility.

The role of the expert witness is an essential component of the criminal trial and the judicial process in general (Moore and Friedman, 1993; Thoresen, 1993). It is productive terrain for the use of sociological knowledge. As such, it represents an opportunity for practitioners to expand their work into this intellectually fertile arena.

#### NOTES

1. The author is a certified substance abuse counselor. The specific characteristics of the defendant's substance abuse may be better explained by an individual substance abuse expert.

2. The Indigent Defender Office of the Fifteenth Judicial District of Louisiana is headed by Paul Marx, Chief Indigent Defender. Alfred Boustany coordinates death penalty cases with Mr. Marx. The other current senior attorneys are Gerald Block, David Balfour, Floyd Johnson and Doug Saloom. Under the direction of Mr. Marx they have assembled a team of experts. The team has been called a model for the nation for death penalty litigation.

3. This author expects that, in the future, as sociologists do mitigation work more often, the state will bring in their own sociologist.

4. Experts unlike other witnesses are usually allowed to view the trial. This has to be cleared with the judge before the trial starts.

5. See *State of Louisiana v. Sepulvado*, Motion for Continuance, Number 77,378—District court, Parish of Desoto, November 20, 1992, pp. 32-33.

6. Delay in a criminal trial is particularly beneficial in those cases involving extremely heinous crimes because a more nefarious sin may occur in the interim.

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