

CHAPTER 23

USING MITIGATION VIDEOS TO BRIDGE THE CULTURAL GAP AT SENTENCING¹

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Introduction

A federal judge recently made the bold assertion that, in the post-*Booker* world of discretionary sentencing, a criminal defense lawyer's primary responsibility and greatest challenge is to "[m]ake the judge suffer."² He explained that, for so long, many judges have become accustomed to employing cookie-cutter calculations in favor 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. As defenders, we must constantly seek out the most powerful ways to make the judge understand the reasons behind, and very often, the mitigating circumstances accounting for, the conduct at issue.

Not only should judges agonize over the proper sentence in each case, but they must truly feel your clients' pain as they do so. Indeed, our clients are suffering. They suffer through traumatic and abbreviated childhoods. They suffer through 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 us, therefore, to create an emotional connection between Judge and client by, to the extent possible, compelling them to walk a mile in our clients' shoes. Put simply, to rise to the challenge of making judges "suffer," a defender must make *empathy* the centerpiece of any effective sentencing presentation. This is especially true in cases where defenders face the monumental task of having to bridge the chasm of the cultural divide.

This chapter is meant to provide the lawyer with the tools necessary to use "moving pictures" to bridge the cultural gap at sentencing. Although the term "moving pictures" is used to describe the technical essence of film/video, it means much more than that. The true goal of this process is not just to create pictures that have motion, but *emotion*. These are not just flickering lights speeding rapidly across a viewer's field of vision. A well-crafted film has the power to move

² See The Honorable John Kane, United States District Court, D.CO., *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.

an audience—not just to laugh or cry, but to *act*. In other words, done right, film can be the ultimate tool of persuasion.

The first section will explain why the film 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. Although every client is worthy of our best efforts, it must be noted that sentencing films are not for every case. The technique is only used when the client's story is compelling, credible and, most importantly, can be told in a visual, emotionally charged way.³ This section also describes the three essential ingredients of a successful sentencing video, including story, character, and images.⁴ Finally, it includes a case-study which elucidates the concepts presented. The final section of the chapter explains the equipment a lawyer needs to undertake a film project, and offers suggestions for locating outside resources for those not interested in doing it themselves.

§ 23.1 Making the Case for Movies

a) Persuasion

Just as every good writer knows that story is the primary vehicle for conveying fundamental truths about life,⁵ every good lawyer knows that story is the most effective tool of courtroom persuasion.⁶ The best lawyers consistently use story as a means to bring to life the truth of

³ Even in such cases, time or budget constraints may make the production of a sentencing video implausible. Thus, a lawyer should keep in mind that any time he/she can make use of moving images, even still photos in a sentencing memorandum, pictures truly do tell a story much better than the most loquacious lawyer ever could.

⁴ This chapter cites liberally to screenwriting and filmmaking sources, as well as examples from well-known movies. This is because the elements of a good sentencing film closely mirror those of timeless Hollywood classics.

⁵ *E.g.*, ROBERT MCKEE, *STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING* 25 (Harper Collins 1997) (“[A]ll writers must come to understand the relationship of story to life: *Story is metaphor for life*”).

⁶ *E.g.*, TERENCE F. MACCARTHY, *ON CROSS-EXAMINATION* 4-5 (American Bar Assn. 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 (Bradford Publishing Co. 2004) (“A story transcends a basic fact pattern... and lets the listener feel emotionally involved.”).

their case. There is arguably no better way to tell a story than through film. Movies connect us to, and reshape our views about, people, places, and issues. So, if great movies have the power to, literally, change the world—it follows that great sentencing movies have the power to change your client’s world. With the increasing prevalence of technology in the courtroom, and the accessibility of inexpensive and user-friendly equipment, the widespread use of film in courtroom persuasion is inevitable.⁷

b) Control

The video process affords an attorney 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 the witness does not say anything terribly 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, giving him 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.⁸

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.⁹ On occasion, a prosecutor or judge

⁷ 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.nyls.edu/centers/projects/visual_persuasion.

⁸ This medium may also help control costs. In some cases, especially those involving cultural defenses, 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 to for a lawyer, investigator, or paralegal to arrange for a family member or other witness’s statement to be videotaped.

⁹ This chapter focuses on the production of moving pictures for use at sentencing only, where wide-open rules for presenting mitigation materials make it a natural fit. That is

may object to this perfectly acceptable form of mitigation. If the need arises, 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.”¹⁰ 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.”¹¹ Given the expansive language contained in these provisions, it is hard to imagine a situation wherein a court could reasonably preclude the defense from presenting such information as mitigation at sentencing.¹²

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 to sentencing proceedings.¹³ If a prosecutor complains he 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.¹⁴

It appears the only limitations federal courts have imposed on information a lawyer may present at sentencing is that the information

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.

¹⁰ FED. R. CRIM. P. 32(i)(4)(emphasis added).

¹¹ 18 U.S.C. § 3661.

¹² Many states have similar wide-open sentencing rules that mirror the federal system. In Arizona, 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).

¹³ 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 (App. 1977).

¹⁴ *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).

must bear “minimal indicia of reliability” and there must be an “opportunity to refute.”¹⁵ A properly produced 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 can use its many investigative resources to locate and interview the witnesses 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 will help force the horse to the water’s edge, only a compelling, well-crafted finished product will convince him to drink.

§ 23.2 Creating a Powerful and Persuasive Sentencing Video

a) Sentencing Videos Should Be Used Sparingly

Although every case is important, a lawyer must carefully consider whether his 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. After answering this question, the lawyer must then determine whether he has access to the three essential ingredients of any successful sentencing film: *a solid story, credible and compelling characters, and emotionally evocative images*. If a lawyer cannot muster all three elements, he must strongly consider saving this technique for another case.

¹⁵ *E.g., U.S. 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*.

b) The Three Elements of a Successful Sentencing Film*1) Solid Story*

A) A Solid Story Is Unique

Not surprisingly, a good sentencing movie shares many of the same elements of a good commercial film, either feature or documentary. When a person pays ten 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, go to places he has never been. Put simply, “a good story means something worth telling that the world wants to hear.”¹⁶ In the world of cinema, there is no greater sin than to bore an audience. Therefore, mitigation movies must not be used for “ordinary” sentencing stories.

B) 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 his client) wants is for the judge to tune out because he is bored stiff. 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 majority of such films clock in between five and fifteen minutes.

Good films, like good trial presentations, reveal a process of “integration.”¹⁷ In courtroom persuasion, this process requires that every aspect of a lawyer’s presentation directly advances the theory and themes of the case. A lawyer may leave a particularly brutal and entertaining piece of cross-examination on the cutting-room floor, if he knows the line of questioning, fun as it would have been, would not further the theory of the defense. Likewise, in a well-crafted film, every scene, line of dialogue, image, and sound serves the story, moves

¹⁶ MCKEE, *supra* note 4, at 20.

¹⁷ RICHARD WALTER, *STORY: SCREENWRITING: THE ART, CRAFT AND BUSINESS OF FILM AND TELEVISION WRITING* 112-114 (Plume 1988)(Coining the term “integration” to describe the fundamental process of synchronizing all elements of a film).

it forward, and illuminates a central theme.¹⁸ That is not to say a sentencing film cannot have multiple story lines. In fact, all great films have “sub-plots.” However, even with sub-plots, the concept of integration still applies, as each sub-plot must still directly relate to the main theme of the story.¹⁹

C) A Solid Story Is Moving

The bridge of empathy is built, first and foremost, with story elements that make the judge *feel* something. Thus, the most essential requirement of an effective sentencing film is that it be infused with story content that evokes emotion. However, this is an area where a delicate balance must be struck. If a film contains too much raw emotion, the audience will feel manipulated. Arguably, any attempt at persuasion involves a modicum of manipulation, but audiences have stink-detectors. They know when they are being played, and they will not tolerate it for long. Consequently, effective persuaders must be subtle in their methods. Sentencing videos should avoid using dramatic voice-over narrations, flashy editing tricks²⁰ overbearing or melodramatic music,²¹ gratuitous scenes of crying loved ones, pointless

¹⁸ What lawyers refer to as “theory” and “theme,” Robert McKee (a renowned screenwriter, author, and teacher) describes as the “controlling idea.” He calls this “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*, it is, “happiness fills our lives when we learn to love unconditionally.” *Id.* at 117.

¹⁹ 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 sub-plot 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 “integrated.”

²⁰ It should go without saying, but 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 your client, a prosecutor could request and likely receive an order for disclosure of all raw footage.

²¹ 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 film and help tell the client’s story. The best scenario for music is when it is organic to the story. For example, if the client or a family member is a musician and it somehow serves the story to showcase their talents.

inclusion of children, cheesy re-enactments, and so forth. This kind of overblown content distracts from the message of the film and wrecks credibility.

D) A Solid Story Employs Small Stories to Tell the Big Story

Story is the most powerful means to convey information about the defendant. A lawyer must avoid the temptation to provide dry data, as opposed to emotionally charged stories that breathe life into flat facts. 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 depth of her client's gambling addiction. The defendant and other witness could have gone on and on about the dull details of how often he gambled, which casinos he frequented, which games he played, and how much money he lost. Such data, if necessary at all, should be saved for a pre-sentence report or a pleading. The real challenge is to find the story behind the story.

In this example, the reality of the defendant's disease is powerfully encapsulated by this story: He recalled the time he was on bed rest, having just undergone stomach surgery. He was staying at his mother's house, as she was helping him recover. In the night, the sights and sounds of the casino echoed in his dreams. The lure of gambling was so powerful, 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 until the early morning hours. This short simple story says it all. Now the viewer can visualize the addiction, *feel* its power, and know it is real.

2) *Compelling Characters*

A) Character Overview

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.²² In sentencing films, the main

²² MCKEE, *supra* note 5, at 138-39.

character is usually, although not always, the client. 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

Good stories have antagonists as well, which are “forces that oppose the character’s will and desire.”²⁴ Antagonists are not always people. Often, protagonist defendants battle “antagonistic forces” in the form of interpersonal conflicts like drug addiction, post-traumatic stress disorder, abuse, and so forth.²⁵ The best stories, including the best sentencing stories, involve the protagonist battling against, and ultimately defeating these antagonist forces.

B) Character is connection

When a film-goer pays ten dollars to enter a dark theater, he expects to connect with characters in the story. Without a compelling cast with whom the audience can identify, care about, and root for, the experience falls flat. Likewise, a lawyer must have characters in his story that the judge can relate to in some meaningful way.

Ideally, the characters in a sentencing film will be attractive, articulate, and likeable. The reality is, most criminal defendants, on the surface, will appear as 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 why 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 connection.

In describing the important distinction between sympathy and empathy in film, Mckee unwittingly underscores the critical importance of building character connection at sentencing. He explains:

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

²³ In film, “[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 *Id.* at 317-318.

²⁵ *See, Id.*

them. We'd want them as friends, family members, or lovers. They have an innate likeability 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. In that moment of recognition, the audience suddenly and instinctively wants the protagonist to achieve whatever it is that he desires. . . . The unconscious logic of the audience runs like this: 'This character is like me. Therefore, I want him to have whatever it is he wants, because if I were he in those circumstances, I'd want the same thing for myself.'²⁶

Again, it is this process of creating empathy that is at the core of every effective sentencing presentation. A client may do bad things, but if the lawyer emphasizes connective character traits, the audience will understand, and hopefully forgive him of his trespasses.²⁷

Think back on some of the great characters in film and television who audiences consistently connect with and root for notwithstanding their evil deeds. The character of 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 at 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 most people respect or admire. Lecter was brilliant. He was persecuted. He cooperated with law enforcement to help catch another serial killer. He demonstrated 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 in control. These are the kinds of qualities people see in themselves, either in truth or in desire. It

²⁶ MCKEE, *supra* note 5, at 141.

²⁷ See KARL IGLESIAS, WRITING FOR EMOTIONAL IMPACT 61-76 (WingSpan Press 2005)(Setting forth techniques for "instant character appeal and empathy").

is because of those connections that audiences root for Lecter, if even on a subconscious level.²⁸ If this technique can work to convince an audience to support a cannibalistic killer, the same technique can work for virtually any defendant, no matter how “unlikable” they may seem.

Perhaps the best example of filmmakers bridging the cultural 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. The reason why *March* became so successful in America (grossing over \$77 million and winning the Academy Award for Best Documentary) is because the filmmakers infused 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. When asked what was 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.”²⁹

C) 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*.³⁰ Character and credibility are very much at issue during sentencing.³¹ The challenge is to prevent the defendant’s crime from defining his character. In a typical sentencing presentation, the lawyer, the client, or his people will *tell* the judge all about the client’s character. Film gives the judge the power to see character in action.

²⁸ 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.

²⁹ GENEVIEVE JOLLIFFE AND ANDREW ZINNES, *THE DOCUMENTARY FILM MAKERS HANDBOOK*, 1ST ED. 497 (Continuum 2006).

³⁰ *E.g.*, SYD FIELD, *SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING* 41 (Dell 1994) (“ACTION IS CHARACTER— what a person does is what he is, not what he says.”); WALTER, *supra* note 16, at 87. (“In movies, as in life, actions speak louder—and more eloquently, more articulately—than words.”).

³¹ *See e.g.*, 18 U.S.C. § 3553 (a)(1)(listing the “history and characteristics” of the accused as a sentencing factor).

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 film more interesting to watch and, most importantly, forges the bonds of empathy.

3) *Emotionally Evocative Images*

Movies are stories told with pictures.³² Indeed, “[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.”³³ Undeniably, “for all its complexity a movie provides but two kinds of information: sight and sound.”³⁴ Therefore, every moment of the sentencing film is an opportunity to create empathy by using truly “moving” pictures to tell the defendant’s story.

Documentary films almost universally include on-camera interviews. However, as stated above, if a sentencing film is merely a parade of “talking heads,” it will be boring and ineffective.³⁵ The judge will ultimately wonder why the lawyer did not just bring the speakers into court or have them write a letter. Therefore, the lawyer must be especially creative in how he conveys the narrative in final form. This is the most important and perhaps most overlooked aspect of the mitigation video production process.

In sentencing documentaries, witness interviews are akin to the foundation of a building. Without a foundation, the building will not stand. However, without walls, windows, a roof, and all the rest, there is no building. In the sentencing film, powerful images are layered upon the foundation to bring to life the spoken words. These pictures add layers of emotion, excitement, and credibility over the story being told. The images are where the audience connects with character. Done right, this is where the judge begins to suffer.

³² FIELD, *supra* note 32, at 8.

³³ *Id.*

³⁴ WALTER, *supra* note 17, at 115.

³⁵ *Id.* at 104 (“What drama is NOT is a bunch of characters sitting around talking, twiddling their thumbs, doing nothing.”).

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.³⁶ In another example, if a witness describes the hardship of growing up in extreme poverty, one picture of his childhood home would speak a thousand words.³⁷

Finding b-roll material is perhaps the most challenging part of the filmmaking 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, booking photos, and so forth. Often, the client or his family will have pre-existing b-roll such as home movies or family photos. 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 create his own material. For example, if the story is about an elderly relative who relies on the defendant for daily care, the filmmaker can shoot the client driving the relative to the doctor, cleaning the home, sorting medications, giving insulin injections, paying bills, and so forth. A filmmaker need not cover up every second of their talking heads with b-roll. However, he should always be thinking “visually” and devising creative ways to infuse the final product with as many 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

³⁶ Computer software allows an editor to easily blend multiple sounds and images to accomplish seamless cutaways. See *infra* §23.3[b][3] & [4].

³⁷ In cases with cultural defenses, a lawyer may have to be especially creative in obtaining b-roll from places great distances away. Lawyers can consider employing friends and family back home to assist (even if it means mailing them a camera). Internet tools such as Google Earth have been used effectively in this context. Often other existing sources of footage exist, for example, from documentary films or news programs that can be used to make witness statements come alive.

“mock trials” in the form of test screenings. After the lawyer assembles the pieces of his sentencing video into a rough cut, he should conduct a test-screening to determine whether the film 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 and adjustments.

d) A Case Study: *United States v. Sabourjian*

Zal Sabourjian³⁸ 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 brought his two children to America and they began to live the American dream.

In 2005, as tensions between Iran and the U.S. were escalating, Zal was accused of conspiring to help an undetermined number of Iranians illegally cross the US-Mexico border using counterfeit visas. With the help of a dubious informant, the government attempted to paint Zal as a professional alien smuggler. The political climate provided a damning subtext and the black cloud of suspicion of terrorism hung over the case.

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. 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 facts were bad, the cultural gap was huge, and the case begged for a sentencing documentary.

All of the ingredients for a successful film were at the lawyer’s disposal. Zal’s story was truly 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 was, quite literally, something out of the movies. There were loads of great characters to tell the story,

³⁸ This example is based on a real case, but the defendant’s name has been changed.

including the client, his children, and their pastor. Zal, speaking in the quiet comfort of his home instead of the sterile and stressful courtroom, came across clear and sincere.

The film was loaded with dynamic visuals that left no doubt in the judge's mind about the truth of the story. The lawyer filmed b-roll showing, among other things, the client hard at work in a high end clothing store, playing organ at bible study, and worshiping at church. He and his daughter, a classically trained pianist, provided a musical soundtrack that was completely integrated into the story. A paralegal working on the film located a 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 crime, 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 an alien smuggler; he was a master tailor working two jobs. He was a single father raising two beautiful and accomplished children. He was not an extremist; he was a man of peace and deep religious faith. Zal's intent was not to sneak a gang of terrorists across the border, as the government insinuated. Instead, he wanted to help members of his extended family still in Iran escape to America, just as he had done several years before. He made a bad choice for the right reasons. At sentencing, the judge carefully considered the video and indicated his appreciation for the defense lawyer's efforts. Even the prosecutor was impressed and made favorable comments. In the end, the client received probation.

§ 23.3 Equipment and Production Resources

a) Overview

The availability of reasonably priced cameras, muscle-bound computers, and user friendly software empowers anyone to create professional-looking moving pictures. It is not an entirely simple proposition, but it is certainly one within realistic reach. For those that are not comfortable with computers and cameras, there are other options for producing a quality product at a reasonable price. It is perfectly acceptable for a lawyer to outsource the production of the video. However, he must take care to never abdicate his role as

director. Only the lawyer knows what will persuade the judge. Thus, he must always retain control of the story and its telling.

b) Do It Yourself (DIY) Video Production

The purpose of this section is to offer advice for procuring essential equipment for a DIY film. There is not enough room here to cover the technical aspects of film making, such as sound, lighting, shot composition, editing techniques, and so forth. However, many excellent books have been written regarding those subjects.³⁹ Of course, the Internet is a great resource as well.

1) Video Camera

Virtually all of the cameras on the market today are *digital* video cameras. They are easy to use, reasonably priced, and have been the mainstay for the last decade or so. Prior to that, Hi-8 video was the popular format. Although a lawyer could feasibly use Hi-8 to shoot his footage, he would likely expend extra time and money converting the footage into digital format for editing. Today, a digital camera with the necessary specifications can be purchased for \$200-\$1000.

A) Recording Media

Like all electronics, digital camera technology is constantly evolving. Early digital cameras used a digital tape format called “Mini-DV” (also known as DVC). Mini-DV cameras are still on the market, but are being phased out in favor of cameras that do not use tape. Tapeless cameras record in digital format directly onto a built-in hard drive or memory card. There are benefits and drawbacks to both formats (tape or hard drive) but either will suffice.

Another currently available digital format that is *not* recommended is called “mini-DVD.” These cameras record on small discs that can be played in standard DVD players. The mini-DVDs are more expensive than mini-DV tapes and record less footage. Moreover, some mini-DVD formats are not compatible with popular editing software. While

³⁹ See, e.g., BRIAN MICHAEL STOLLER, FILMMAKING FOR DUMMIES (Wiley Publishing 2003) and MICHAEL W. DEAN, \$30 FILM SCHOOL (Thompson 2nd ed. 2006).

it is not impossible to create a decent film with a mini-DVD camera, it should be avoided if possible.

B) High Definition vs. Standard

High definition (HD) cameras have become quite popular. However, they are generally more expensive than standard definition (SD) cameras, and may create complications in the editing process, as some software programs cannot handle HD formats. However, most HD cameras allow for standard-def recording, which typically eliminates compatibility issues. There is no great need to record in HD. Indeed, most SD cameras will take good, clean footage. Thus, unless having the “latest and greatest” technology is a priority, investing in an HD camera may not be worth the extra cost.

C) External Microphone Input

Cameras vary in the diversity of their input and output jacks. Because witness interviews are an indispensable element of sentencing documentaries, it is essential that a camera has, at the very least, an input for an external microphone. This is because the built-in microphone on camcorders will *not* work for recording interviews. Those microphones are omni-directional and therefore pick up too much extraneous sound. Under those circumstances, voices are diluted and background noises create serious distractions. Unfortunately, the majority of consumer-grade cameras currently available do *not* have an external microphone jack. Cameras with external inputs are more expensive, though the additional cost is rarely prohibitive.

D) Need for Headphone Input Jack

Similarly, it is also important to be able to connect a set of headphones to the camera while recording. This way, the videographer can tell if the sound is recording properly. Sometimes things go wrong with sound – batteries in microphones die, users forget to turn on switches, signals succumb to interference. It would be inconvenient, to say the least, to return from a witness interview only to find that no sound was recorded. Headphones provide a simple safeguard against lost sound. Again, one may have to work a little harder to find a camera that includes this external input, but they are out there.

Typically, if the camera has a microphone jack, it will also contain a headphone jack.

E) Suggested Models

Below are some suggested consumer-grade digital cameras in various price ranges. On the higher end, the Sony HDR-XR350V Handycam Camcorder is an excellent HD camera with all the right jacks that sells for around \$1,000. The Sony produces beautiful footage in standard mode and works well in lower light conditions. For those with a higher budget, consider investing in a professional grade camera. Some popular models include, the Panasonic Pro AG-DVX100BP (\$2189.95), Sony Professional HVR-A1U CMOS High Definition Camcorder (\$2359.95), and the Canon XH-A1S 3CCD HDV High Definition Professional Camcorder (\$3295).

For those on a substantially limited budget, there are low-cost alternatives. If you already own a digital camera, but it does not have a microphone jack, it may be possible to use other methods to attach an external microphone.⁴⁰ If not, consider shopping for a used camera. Internet sites such as E-bay, Amazon.com, or Craig's List offer many possibilities. Another option is a new compact camera called the Kodak Zi8, which sells for around \$180. This is a tiny HD camera with an external microphone jack that records and stores approximately two hours of video. It also has an SD card slot to expand the amount of video storage. The only downside is that it does not contain a headphone jack.

2) *Microphones*

As previously stated, obtaining good sound from witness interviews is paramount. This is why the camera must have the capacity to connect an external microphone. Below are several options for doing so.

A) Wireless Lavalier Microphones

The best tool for the job is called a lavalier ("lav"), a small, clip-on microphone similar to those clipped on to the collars of talk show hosts and news anchors. Lavs come in wired and wireless forms.

⁴⁰ See *Infra*, § 23.3[b][2][C].

Wireless lavs give the videographer more freedom to move about while filming. For example, one could film a witness while walking and talking without worrying about tripping over the wire that connects the camera to the speaker. Quality wireless lavs can be costly, whereas less expensive wireless setups may compromise sound quality. Two suggestions for quality wireless lavs would be the Sony UWP-V1 (around \$500) or the Azden 305LT (around \$400).

B) Wired Lavalier Microphones

A wired lav is a low cost and high quality alternative. Wired lavs range between \$25-\$100. It is also helpful to purchase an extension cable (less than \$10) for a wired lav in order to increase the distance between the camera and the subject.

C) Additional Microphone Options

One way around the problem of the missing mic jack is to attempt to locate a compatible microphone or adapter for the camera's "hot shoe" interface. The "hot shoe" is found on the top of the camera and is another means of connecting accessories. For example, Sony makes a proprietary (meaning it only works with Sony cameras) wireless blue tooth microphone (ECM-HW2) that sells for around \$200.⁴¹ Another possibility is the Pearstone Microphone Adapter, at a more reasonable \$50.00. With an adapter like this, a videographer can add a decent microphone to a less expensive camcorder, provided it has a compatible active interface hot shoe, to dramatically increase sound quality.

3) Computer

In order to edit digital video footage, one needs a capable computer. Video files can be very large and editing programs require substantial computing strength and speed. Thus, the general rule for computer video editing is the faster the computer, and the more memory, the better. Although most newer computers will generally have more than enough power needed for video editing, here are some general minimum hardware guidelines:

⁴¹ This unit also comes with a headphone jack. For more details, see www.videomaker.com/article/14386.

- Ideally, an Intel Pentium (or compatible) processor of at least 2GHz and at least 1 gig of RAM;
- At least 20gb of open hard drive space;
- DVD+-R burner for DVD creation;
- DV/i.LINK/FireWire/IEEE 1394 interface to transfer video from the digital video camcorder to the computer (unless the camcorder connects via high-speed USB).
- Video and sound cards/drivers that are compatible with Microsoft DirectX 9 or later. Video card should be at least 16-bit/32mb;
- Color computer monitor; and
- Computer speakers.

Consider purchasing an external hard drive to store video footage. Internal computer hard drives fill up quickly when editing video. A full hard drive means a slow computer, and no spare space to store important files. Hard drives are decreasing in price. As of this edition, a 250 gig external drive is under \$70.⁴²

4) Editing Software

The editing process is where all the pieces of the film are assembled. A capable software program is needed to layer b-roll over interview footage, and tie the movie together with titles, transitions, voice-overs, and music.

Both PC (Windows version XP and higher) and Macs come standard with video editing programs. Macs include a very capable program called iMovie. Windows XP, Vista and the new Windows 7, include a video-editing program called Windows Movie Maker. This application is a straightforward entry-level video editing program that allows the user to make simple edits, add titles, transitions, basic effects, audio tracks and voice-overs.⁴³ Movie Maker is a good way to become comfortable with basic editing. Eventually, however, it will be necessary to upgrade to a more complex software package.

⁴² Hard drives with storage of 500 gb or more are common, but not recommended. If, for some reason, a hard drive is damaged, it is better to lose 250gb of material than 500.

⁴³ An enhanced version of Movie Maker is available for free online from Microsoft. <http://windowslive.com/Desktop/MovieMaker>.

The cost of more sophisticated editing software runs the gamut from under \$50 to well over \$1,000. On the low-end are consumer-grade video editing programs such as Pinnacle, Roxio, or Ulead. High-end, professional-grade programs include Avid, Final Cut, or Adobe Premiere.⁴⁴ Many software companies offer free trial downloads of their editing programs, which is a good way to make an informed decision before purchasing. An excellent, reasonably priced program is Adobe Premiere Elements,⁴⁵ a scaled down, user-friendly version of Adobe's professional software package (Adobe Premiere Pro). Adobe Premiere Elements has strong capabilities, from editing to DVD authoring, and costs around \$80. It can also handle HD formats, including HDV, AVCHD, or Blu-ray.⁴⁶

5) *Tripod*

A shaky camera can be distracting. A tripod is especially helpful for witness interviews, particularly when the lawyer is simultaneously working the camera and asking the questions. It is not necessary to break the bank on a tripod. A suitable tripod can be purchased at any major electronics store, camera store, or online. Some examples include the Sunpak 620-092 9002DX Tripod with 3-way Quick-Release Pan Head (\$42.84 on Amazon.com), the Opteka 70" Full Size Professional Photo/Video Tripod (\$34.95 on Amazon.com), or the Digital Concepts TR-60N Camera Tripod with Carrying Case (\$15.32 on Amazon.com).

c) **Out-Sourcing The Sentencing Video**

The aforementioned equipment list may seem daunting. Considering that private video production firms routinely charge between \$5,000 – \$25,000 for one sentencing documentary, the DIY idea becomes much more attractive. However, for those not interested

⁴⁴ A thorough list of various programs can be found at the PC Magazine website. <http://www.pcmag.com/category2/0,1738,4835,00.asp>.

⁴⁵ As of the writing of this chapter, the latest version of Adobe Premiere Elements is Version 8.

⁴⁶ For system requirements and a free trial version, go to: www.adobe.com/products/premiereel/systemreqs/

in the technical side of video production, there are certainly plenty of other options.

For those with higher budgets, consider hiring a production firm that specializes in mitigation videos. Ask to see samples of their work before hiring. Paralegals, investigators, and mitigation specialists are increasingly acquiring video production skills. For those on a smaller budget, consider recruiting students from a local college film program. They will charge exceedingly reasonable fees and be grateful for the experience. Another option would be for the lawyer to do most of the filming, but hire someone to do the editing. If the lawyer gives the editor enough guidance (perhaps in the form of a written script), it may only take an editor a few hours (i.e., a few hundred dollars) to compile the movie. When all else fails, beg for help from family or friends.

Conclusion

It is no secret that well-crafted movies have enormous power to not just entertain, but to inform and persuade. Adapting this medium for use in court proceedings is gaining momentum as it becomes easier and cheaper for attorneys to produce their own professional-looking product. Having the right tools for the job is just the beginning. After that, the lawyer must tell a unique story using compelling 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.