

## Takeaways From A Criminal Pro Bono Case

Law360, New York (September 28, 2016, 11:53 AM EDT) --

During the course of a criminal case, victims often go unrepresented. In many instances, this lack of representation suits all parties: The victim is able to have a limited role in the case, and the government is free to make its case with unrestrained access to the victim without input from the victim's advocate. In certain cases, however, providing legal representation can empower the victim and give him or her a voice in proceedings that are otherwise constitutionally focused on the rights of the accused.



*Allyson Fortier*

Recently, our firm represented two victim-witnesses in a trial of a man indicted in 2009 under a federal criminal statute related to sex trafficking. Due to circumstances precipitated almost entirely by the defendant, a trial originally scheduled for November 2011 did not empanel a jury until January 2016. During this time, the victims waited in the wings. The women, victimized as young girls, were now in their late teens or early twenties.



*Nancy Lynn Schroeder*

Our firm was asked by a nongovernmental organization to represent the victims after the defendant had, in 2014, opted to represent himself, firing yet another in a long line of prior retained or appointed counsel. The victims were concerned with how long the case was taking to move forward and wanted to be able to testify and put the trial behind them.

Representing a victim in a criminal matter is not your run-of-the-mill pro bono case, and involved a number of considerations, strategies, and skills distinct from our daily civil litigation practices. Below, we discuss several of the issues we encountered before, during and after trial, and the approaches and resolutions with each.

### **Before Trial: Building Relationships and Setting Boundaries**

#### ***Empower your client and earn her trust.***

The early stages of representing a victim are the most crucial. As with any legal representation, communication with one's client is paramount. Often, a victim may feel the system has not served them or honored their feelings — trials get delayed and those delays can inevitably feel like the justice system is not taking the victim's wishes to heart. The attorney must ensure that the client understands the attorney's primary role is as his or her advocate. Communicating to the client that you understand their frustrations, while being sensitive to the realities of bringing a federal criminal case to trial, is a balance. It is also of the utmost importance not to undermine the victim's faith in the prosecutors working diligently to bring the case to trial.

In this case, which was directly related to prior abuse suffered by our clients as children, a significant aspect of our representation relied on building a more personal and trusting relationship with these young women. And an important component of that relationship-building was empowering the clients to control at the outset the pace and level of detail of our conversations.

***Engage with prosecutors.***

Ultimately it is the prosecutor's duty to secure a conviction, and communication with the prosecutor or prosecutors is key to making sure that you and your client are aware of developments and upcoming challenges in the case. It is also important to set boundaries as to how and when prosecutors may communicate with your client and what the scope of your representation is. An open, professional dialogue may also simplify instances in which you may need to address the court during the case — for instance, to object to defendant's repeat requests for trial continuances in the face of a victim's right to a speedy resolution (e.g., 18 U.S.C. § 3509(j)).

Nevertheless, to the extent you are working towards the same goal, it is important to work with — not against — prosecutors. This can be challenging if your client's interests are not precisely aligned with the government's, or more importantly where communication with prosecutors can create Brady obligations or implicate privilege waivers. For these reasons, civil practitioners in particular should keep front-of-mind privilege, constitutional, evidentiary and procedural issues implicated in criminal cases.

***Understand the documents.***

At the outset, it is critical to understand the scope of what has been said or written about your client and what documents related to your client have been produced. This can include anything from treatment records to prior statements to medical history. Practitioners should also be cognizant of relevant privileges and confidentiality protections, such as attorney-client, doctor-patient or psychotherapist-patient, which may be applicable to documents or records, even if those records were previously disclosed to third parties. Filing motions and objecting on the basis of a client's privilege is an effective way to protect the client from having sensitive, embarrassing, or personal information revealed in court.

In our case, privileged documents related to our clients' medical histories and even prior legal representations had already been produced to the defendant by NGOs involved in our clients' post-trauma aftercare. However, the clients were not notified before the records were turned over, and as such they had not waived any privilege over those documents. With this knowledge, we were able to file motions to preclude the defendant's use of those documents during cross-examination of our clients.

***Keep an eye on the docket.***

The criminal docket may also be a store of useful information, especially to understanding the charges, the state of play of evidence and other witnesses, and government and defense strategies. For this reason, even if an official appearance has not been made, victims' attorneys should request ECF notifications to keep on top of any filings.

The docket may also contain the operative protective order. Particularly if the victim is a minor — or was when he or she was victimized — there is likely a protective order governing what can be put on the record about the victim. For example, our clients had to be referred to by their initials only. We also learned that one of our clients, still a minor when she testified, had the right to have a companion with her when she took the stand. Moreover, the protective order provided the basis for numerous motions to seal filings where the defendant referred to the victims by their full names, or used embarrassing or graphic language related to their victimizations.

**Trial: Preparation, Vigilance and Support**

***Prepare your client for trial.***

Attorneys should be prepared to explain how a criminal trial works in layman's terms. Clients may have no prior experience with the criminal justice system and likely have never testified in a criminal trial before. Being able to explain what will happen during trial — including seemingly mundane topics such as what they should wear, where they will sit vis-à-vis the defendant, jury and judge, and whether they can attend other parts of the trial — can put a client at ease and allow them to focus on their testimony.

Private counsel should also attend preparation sessions with the prosecutors. Counsel can provide a buffer during preparations, acting as emotional support and ensuring that proper break time is offered to the client. Moreover, armed with any information from the docket and produced documents, the victim's attorney can keep an ear out for potential issues implicating prior testimony, medical or counseling privacy, or other privileges. Finally, the information discussed during these sessions may come in useful later in developing the client's narrative if counsel is also responsible for filing restitution requests, victim impact statements, or follow-on immigration or assistance applications. It is important, nonetheless, to keep in mind that any new information discussed during these preparation sessions in the presence of the prosecutors is subject to Brady.

***Listen vigilantly at trial.***

Trials such as these may be long and difficult to listen to at times. Despite that, it is important to keep an ear out during opening statements and key testimony for any suggestions (or explicit statements, as it may be) as to what the defendant's strategy is. In our case, it was fairly clear from pretrial hearings and filings that the defendant planned to paint our clients as liars intent on profiting from feigned victimhood status. Especially while the defendant (pro se) cross-examined our clients, we sat ready to object to the extent the he asked questions already circumscribed by evidentiary motions, such as

those related to our clients' prior victimization and precluded by the rape shield rule (Federal Rule of Evidence 412). This approach was okay with the prosecutors, who trusted us and knew we wanted only to make the cross-examinations go smoothly for our clients.

***Follow up.***

After your client testifies, he or she may choose not to watch the rest of the trial. Nevertheless, keep your client updated as often as he or she desires as to the status of the trial, deliberations, and a verdict. Once a verdict is made, deadlines for post-trial motions, pre-sentencing reports, and a sentencing hearing are usually made; at least the last two directly implicate work with your client: restitution requests under the Mandatory Victims Restitution Act (MVRA) and your client's victim impact statement.

**After Trial: Allocution and Restitution**

***Request restitution if applicable.***

If the case has ended with a conviction, your client may be entitled to financial restitution under the MVRA. (See 18 U.S.C. § 3663A.) The MVRA obligates judges to consider financial compensation for victims to cover costs reasonably attributable to the crime. Other federal statutes also mandate restitution for victims of trafficking (Trafficking Victims Protection Act, 18 U.S.C. § 1593), child pornography (18 U.S.C.A. § 2259), or other offenses (Victim and Witness Protection Act, 18 U.S.C. 3663). Despite these requirements, restitution is not always requested or granted.

In our case, the prosecutors had experience requesting restitution on behalf of victims in prior cases, and offered to handle that aspect of the case for our clients. If, however, the victim's attorney will be proceeding with the request alone, there are numerous resources available, including the National Crime Victim Law Institute at Lewis & Clark Law School, providing guidance on federal and state restitution funds, requirements, and limitations. Generally, the restitution request must be filed at the same time as the presentencing report and victim impact statement. In federal courts, the pre-sentencing packet is generally prepared and lodged with the court two to four weeks before the scheduled sentencing hearing.

***Empower your client to speak at sentencing.***

At the very least, any victim named in the indictment has the right to speak at the defendant's sentencing hearing. In preparation for the hearing, a victim's attorney should help prepare the victim impact statement, which will ultimately be submitted to the court with the presentencing report. (See, e.g., 18 U.S.C. § 3509(f).)

The information in the VIS should be your client's story, written in the first person, giving context that might not have been covered during direct or cross-examination. How did the crime impact the victim's childhood and family? The victim's social skills, education and relationships with others? The victim's own self-worth? What outcome does your

client want for the defendant? Keep in mind, however, that while the VIS is not “evidence” per se, it should not conflict with your client’s testimony; for this reason, be sure to ask the prosecutors for transcripts of your client’s trial testimony. After the VIS is submitted, your client may choose to allocute during the sentencing hearing. Let your client know that she cannot be questioned by the defendant while allocuting; she should not be placed under oath. Your client may elect to read her VIS at the sentencing, or say something completely different; she may speak for as long or as short as she chooses. Most importantly, we reminded our clients repeatedly that this was their last opportunity to speak directly and without interruption to the defendant and the court about the defendant’s crimes. Their statements were ultimately very powerful.

And the defendant ultimately received a sentence of 70 years — the statutory maximum for his convictions.

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