**National Crime Victim Bar Association Conference**

**Lessons Learned in Victim Advocacy**

Jerome F. O’Neill, Esq.

Gravel & Shea, PC

76 St. Paul Street / P.O. Box 369

Burlington, Vermont 05402-0369

802-658-0220 [/ joneill@gravelshea.com](mailto:/%20joneill@gravelshea.com)

Cases we bring on behalf of crime victims often are unique. The majority of cases are not against the perpetrator directly, but rather against a third party. This paper will attempt to illustrate experiences and suggest best practices for the trial of crime victim cases.

# **Get to know the client.**

# In addition to meeting at the office, we need to go to the client’s house and meet with the client and her or his family there. There is nothing like a visit to the client’s home to provide insights into the individual and the family. It also provides an opportunity to evaluate potential witnesses who can testify as to the difficulty the survivor is experiencing. We gather this information through having conversations with family members in a location in which they are comfortable. Further, it often is easier to gather people together in their home than it is to have everyone come to the office.

# One very easy way to gather the survivor’s family together simply is to have supper with the family. This really is supper, and not dinner. It either can be a meal that the family provides, or whatever takeout the family would enjoy and that we bring. Pizza, Chinese or anything they would like is the supper of the day. Going to the house provides an informal atmosphere in which just to talk with people. It is about meeting people, not about witness preparation. In addition, being in the house permits a look-around to see family photographs. No matter how many times we ask about their photos, we will not obtain what we often find by going to the house and seeing what is on the shelves and walls.

# This is a visit without the formal trappings of being in the office, i.e., no suits, ties or anything that makes us look fancy. This also is a very good way to engender trust by virtue of the fact that we are willing to come out of our office to an informal setting and meet with people in their environment.

# **Listen to the client’s description of the event and check out the facts carefully.**

# Crime victims often suffer from post-traumatic stress disorder and thus their recollections of the event that brings them to us may be scattered and inaccurate. We must obtain the police reports and any other factual information and then have an investigator interview any witnesses. We must fully understand the facts before making assertions to the defendants in the complaint or through discovery. If we make mistakes early on in the complaint or in discovery responses these responses can come back to haunt us at trial.

# **Trust.**

# In sexual abuse cases, trust is always a major issue for the client. We must fully explore these issues in the client’s life as damages. Their experiences with employers, family members, friends, crowds of people, partners and spouses all will illustrate trust issues. We need to find the right witnesses to illustrate the client’s loss of trust. We must also be aware that the client will not trust us at first. We should acknowledge this to the client and must work to earn their trust. This includes being even more timely than usual in responding to calls and emails from the client.

# **Does the Jury Like the Plaintiff?**

# This is the key to every plaintiff’s case. No matter the explanation for when the plaintiff comes across negatively, without likeability, it is nearly impossible to win. This translates to us spending whatever time is needed, often with a witness preparation consultant, to make the client as likeable as possible.

# Other witnesses such as family members and friends can help, but the key is to make the plaintiff likeable. Otherwise, best not to have the client on the stand for any longer than absolutely necessary. If the jury getting to know our client likely will leave a bad taste in their mouth, a short exposure is best.

# In sum, if the client comes across as difficult, snappy on cross-examination or otherwise does not meet the jury’s expectation of how he or she could conduct him or herself, we likely have an insurmountable obstacle to a good result. The best approach is to surround our client’s testimony with the testimony of other, better witnesses.

# **Look hard for witnesses who can illustrate the client’s post crime experience.**

# In almost every client’s life, there is someone who knows them well and who can speak effectively to the damage done to the client. This may be a parent, spouse, sibling, co-worker or a friend. However, finding those people often can be challenging. One method is to visit with the family for supper. Another is to sit the client down and go through a list of friends, co-workers and family, and then meet with those individuals. It only takes one or two damages witnesses to make a case much more solid that it would be with the testimony of only the client. It is helpful if it is a child to have the parents testify. However, some parents are simply not capable of being good witnesses, which means we have to look for other individuals who can provide the testimony we need.

# One solid damages witness who can testify to their observations and experiences with the client post injury can make a difference between a mediocre damages verdict and a full and fair verdict.

# **For the most part, do not plan to use treating therapists.**

# Treating therapists can be very helpful to our clients and may be useful to provide helpful information. The difficulty is that rarely are they forensically savvy. When asked question about “wouldn’t you have liked to have seen this record,” they likely will respond with “oh, yes, I would have.” A forensically oriented psychologist is more likely to respond with “I have looked at the document and do not see anything in it that changes my opinions.”

# There is always a concern about the cost associated with a forensic psychologist. However, my experience is that juries pay little attention to the fees the experts charge. Ironically, sometimes jurors think that the more the expert charges, the more qualified they are to render expert opinions.

# We should not disclose the forensic psychologist until the deadline for expert disclosure. The reason is that the expert needs to be able to say that he or she considered all relevant information available through discovery. By illustration, we could provide the expert’s report or opinion to the defense before all depositions are complete. However, if there is anything in discovery by way of documents or depositions that comes to light after the expert renders her or his opinion, the defense will seek to undermine the opinion with the facts that the expert did not have. The defense often will do so easily by pointing out that the expert did not have all of the facts before arriving at an opinion.

# We should hold the preliminary report from the defense until all factual discovery is complete. Once the client and any others who might provide facts to assist in understanding the client’s difficulties have provided depositions, we can provide the defense with a final report from the expert. The expert at that point will have a full factual basis for their opinions.

# If an extended period of time passes after the client first sees the expert and completes testing, the expert may choose to do additional testing. If the attorney has already turned over the report, it makes it more difficult to update the results. There should be only one expert report, and that report should come at the close of fact discovery, not sooner.

# It often can be very helpful to obtain a preliminary report from a psychologist to determine the scope of the client’s damages. However, it should only be a preliminary report and for your eyes only. If we show that report to the client before the client is deposed, there is a strong likelihood that a court will require us to produce that preliminary report to the defense. If the final version of the report differs from the preliminary report, we may undercut our own expert. In addition, producing the report to the client can be damaging to the client. The client should generally see psychologist reports only through the eyes of a therapist to whom we have delivered it after the case is finished.

# **Focus Groups**.

# Every crime victim case needs a focus group. We have all been trained to see the world through a particular set of legal trained eyes. We will often be surprised, if we have not done a focus group, when we interview jurors after a case is complete to see the issues upon which jurors focused, as compared to the issues upon which we focused.

# There are a great array of focus group methods to help us learn about what may be important to the jury. Playing witness videos of the client for the focus group to evaluate, having a solid defense asserted in a focus group, putting forth exhibits for the focus group to look at, as well as the usual methods we use to present adversarial and concept focus groups help us to understand the issues that the jurors will see themselves.

# Oftentimes, we learn after the fact the mistakes we have made that we could have learned if we had done a focus group before we tried the case. While focus groups are no guarantee of success, they make success more likely.

# Focus groups are dangerous in one respect. We cannot obtain valid information from a focus group about an expected dollar amount from a jury verdict. Focus group members are playing with Monopoly money. The do not have to go home and face a family member, spouse or friend who asks about whether they voted for a $50 million dollar verdict. Focus groups tend to exaggerate the amounts of dollars that they would give in a verdict.

# There can be utility in having a focus group discuss damages, but reliance upon the numbers they suggest as the verdict value of the case is a serious error.