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INTERVIEWING AND DEPOSING THE PERPETRATOR

*"The question that goes unasked goes unanswered."
— Russell Kolins, Security Consultant, Kolins Security Group*

*"The man who asks a question is a fool for a minute;
the man who does not ask is a fool for life."
— Confucius, philosopher and politician*

I. INTRODUCTION

In representing survivors of child sexual abuse, there are several different reasons to interview and/or eventually depose the criminal perpetrator in order to succeed in your case. Interviewing/deposing the perpetrator raises many considerations including: speaking with your client/victim about whether or not to speak with the perpetrator; ethical requirements in speaking with the perpetrator; when and how to speak with the perpetrator to best achieve your client's goals in the representation; figuring out what will motivate the perpetrator to speak with you; and sometimes, strategies for ensuring that the perpetrator won't speak to you or anyone else about the crime.

II. DISCUSS WITH YOUR CLIENT

Upon my first meeting with every client who is a survivor of violent crime, one of the first things I point out is the differences between criminal charge and civil litigation. The goal in the criminal justice system is to find justice in holding criminals accountable by punishing them.

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The goals in the civil justice system are: to theoretically “make the victim whole” through recovery of damages for the survivor; to hold institutions or other defendants who facilitate the crime accountable; to get answers about how and why the crime occurred; *and* to punish the wrongdoers who committed or permitted the crime to take place. Often times by the time you are interviewing the perpetrator, they have already been convicted such that he/she might be more willing to talk to you freely.

By explaining these differences it helps the survivor understand what might be gained from the perpetrator to help achieve these goals. Discuss the pros and cons and why it can be tremendously helpful to hear from the perpetrator directly. I discuss that frequently the best witness in our case in terms of proving notice, causation or breach of duties by the institution is the criminal himself as he/she uniquely possesses the information needed to prove these negligence elements. I have never had a client disagree with my recommendation that the perpetrator be interviewed. Victims often are motivated to bring a civil lawsuit not for money but to get answers about the crime which can be helpful in the recovery process. By interviewing the perpetrator, you gain insight into how to prepare for their eventual deposition or trial and what strategy to employ with this witness and in questioning other witnesses in your case.

I believe it is not only important for you to discuss your intentions in interviewing the perpetrator with your client but arguably ethically encouraged, if not required. The ABA Model Rule 1.4, requires that any attorney shall consult with the client as to the means by which the client’s goals are to be pursued. Further, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Model Rule 1.2(a). The Model Rule enumerates certain decisions, such as whether to accept a settlement offer, or to plead guilty in a criminal case, that require client approval.

ABA Model Rules 1.4(a) and 1.4(b) require that: (1) the lawyer reasonably consult with the client about the means by which the client’s objectives are to be accomplished; and (2) the lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

III. ETHICAL CONSIDERATIONS FOR INTERVIEWING THE PERPETRATOR

Before interviewing the perpetrator, it is necessary to review the ethical rules and professional responsibilities that could be invoked. First, ABA Model Rule of Professional Conduct 4.2 prohibits contact with any person who is represented by counsel about the subject matter of the representation. Comment 3 of the Model Rule makes clear this rule applies even if the perpetrator has initiated or agreed to the contact. Therefore, if the perpetrator is represented (or was represented) by counsel, you must first inquire as to whether or not that attorney continues to represent the perpetrator and seek permission to talk with the perpetrator, with or without counsel present. I have been told by defense counsel that their representation ended and that decision is up to their former client.

Perhaps no criminal charges were filed at all and the perpetrator does not have counsel. The ABA Model Rule 4.3 requires that you follow your jurisdiction's ethical requirements in communicating with an unrepresented person:

Dealing with Unrepresented Person. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

In other words, you are ethically required to make clear that your client's interests are opposed to the perpetrator's interests. If the perpetrator still chooses to speak with you after being informed that you are not disinterested and you are not giving any legal advice other than to secure counsel, you may do so. Model Rule 4.4, Respect for Rights of Third Persons, must also be reviewed. Rule 4.4 provides:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 3.7(a) and most states' ethical rules provide that "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." Therefore, another consideration is having a third party such as an investigator or other witness present during the interview who can serve as a witness or rebuttal witness at trial, if necessary. This protects against the lawyer becoming a "necessary witness" in the case he/she is pursuing.

In discussing with the perpetrator why he/she might want to talk with you, the lawyer must be careful to consult local ethical rules on the issue of discussing whether or not the victim will institute criminal charges or support a prosecutor's recommended plea. The rules vary widely by state. Some jurisdictions allow the threat of reporting a crime as part of negotiation of civil settlement arising from the same crime. See ABA Model Rule 8.4(b). Most states do not permit this practice and could be viewed as extortion. Relatedly, the lawyer cannot make misrepresentations about the lawyer's (or the victim's) influence over the prosecutor or judge in a potential criminal case. See ABA 8.4(e). ABA Model Rule 3.4 prohibits a lawyer from telling the perpetrator that the victim will refuse to testify, withhold or falsify evidence, or "hide or leave the jurisdiction for the purpose of being unavailable as a witness." However, a victim's

lawyer can support a particular plea agreement or ask for the dismissal of charges, subject to the above ethical constraints.

One strategy I have used several times, is getting the agreement of the perpetrator and his/her lawyer to place detailed, truthful (and hopefully helpful) information about the crime in the court's record as part of a plea colloquy which then becomes sworn testimony that can be used at a subsequent deposition or civil trial. Thus, the timing for reaching out to attempt to interview the perpetrator is critical component. If your client agrees to supporting a certain recommended plea deal, you might gain the assistance of the perpetrator to submit to an interview or give a sworn statement (via affidavit or deposition) about the helpful details of the crime towards proving your civil case.

IV. RECOMMENDATIONS FOR INTERVIEWING THE PERPETRATOR

*“. . . treat people with understanding when you can,
and fake it when you can't”*

— Kim Harrison, author

Perpetrators commit crimes for different reasons and stemming from varied backgrounds which often includes substance abuse, poverty, exposure to violence, mental illness (including paraphilia² and paraphilia disorders), narcissism, the need for power, domination, retaliation or control, among others. According to Veronique Valliere, Ph.D., a leading researcher in victim and offender behavior, sexual deviancy can be motivated by “erotic activities” or “erotic targets.”³ Stated simply, they have strong feelings of attraction to persons (or species) other than consenting adult humans. Dr. Valliere explains:

Pedophilia Disorder is another type of deviant arousal that leads to sexual crimes. Individuals with pedophilia are aroused to children without secondary sex characteristics. While many people do not act on those urges, some individuals do, sexually abusing children. Others seek illegal online material, images depicting child sex acts our sexual abuse.. It is vital to understand that most people who sexually abuse children are not “true” or exclusive pedophiles. People who have “exclusive” pedophilic arousal are only sexually

² DSM-5 (2013) defines paraphilia as “any intense and persistent sexual interest other than the sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physiological mature, consenting human partners.”

³ Valliere, Veronique N., Ph.D., *Unmasking the Sexual Offender*, Routledge Press (2023), Chapter 8, Sexual Deviance.

aroused by children. Exclusive pedophiles represent under 10% of those who sexually abuse children (Hall & Hall, 2007).⁴

This backdrop is helpful in understanding what might encourage the perpetrator to speak (or keep speaking) with his victim's attorney. The interview or deposition is not the time to cast judgment on the perpetrator's actions or motivations. Rather, I found that by attempting to find *temporary* empathy for the perpetrator or his situation and discussing the issues surrounding the crime in a matter of fact manner (e.g., "I'm just here to get truthful answers.") that you increase the likelihood of cooperation by the perpetrator. In one case, I approached a serial pedophile and told him that I understood in looking at his pre-sentence report that he had a disorder over which he had little control. I told him it was my understanding that he professed to deeply care for the children he molested. If he truly cared for their well being, now was the time to show that and help us get to the truth and hold the institution he was working for financially accountable so that these children could get help, just like he was getting mental health counseling in prison.

I further suggest talking with the perpetrator about his/her life before committing these offenses. Perpetrators aren't born as offenders — they develop into offenders over time. Start by talking about those times prior to their offenses. This may help in building trust to get the offender to share important details about their offending behavior which is helpful to your pursuit of civil remedies. Cooperation will not be gained with the perpetrator by being combative, judgmental or aggressive with him or her. Refrain from offering opinions or otherwise "judging" the offender. I say "temporary" empathy because the fact is that I don't have any empathy for offenders, but I do long enough to get that perpetrator to help us with details that enable me to advocate for my clients. In one case, after interviewing the perpetrator for several hours, he stood up and thanked me for being understanding and non-judgmental, offering his hand for me to shake it. I refused him and walked out and told him I had no desire to shake his hand as he was a scumbag who ruined many lives. He understood.

In preparing to interview or depose the perpetrator, review as much information from police reports, court filings, pre-sentencing reports, interviews of family members or friends and even your own clients for insight into his history and personality. You can gain information from these sources about: his/her family; religious preferences; education & employment; hobbies; and criminal history. This can help in choosing the most effective approach. Perhaps the perpetrator recently found religion and wants to make amends or has participated in counseling or research study on offender behavior, offering insight into why they might talk to you. The perpetrators may have no visitors and will talk with you simply to have someone to talk to.

Consider how you can establish some degree of trust with the offender by carefully:

- Speaking in a non-threatening manner
- Speaking with an even voice tone and rate of speech
- Considering your body language and

⁴ *Id.*

- Choosing proper vocabulary
- Choosing your style of dress (dress casual)

If visiting a perpetrator in prison, you will need to make arrangements in advance to get on his/her visitor's list or you could make a long trip and be denied entry. You can write a generic letter to the perpetrator to ask to speak with him, keeping in mind that your letter is discoverable. Bring change with you to purchase snacks in the visitor's area. Consider interviewing the perpetrator

At the time of the interview, once a relationship has been established, you can ask about: the details of the crime(s); who knew about or suspected his behavior; or what was missing or not enforced) in the institution's policies that would have protected these children. In one case I found out that the perpetrator himself made suggestions to the institution about invoking a "two adult rule" that was not followed. He wanted it for his protection in order to provide him with a defense. Nonetheless his suggestion was ignored.

Another ripe topic is causation. Ask the perpetrator: "If the institution had these protections in place [like background checks, two adult rule, out of program contact restrictions, etc.] could you have committed these crimes?" or "why choose this victim or location for committing the acts?" See if he will say that he knew after some grooming that this victim would not likely talk about his/her victimization or that he knew he could escape detection at that particular location based upon his (or others') prior actions. This will help you prove causation by demonstrating if protections were in placed, the perpetrator would not have offended within *this institution*. Conversely, he might tell you that nothing would have dissuaded him from committing the crime. That's helpful information too because you will have a preview of what he would say in deposition or at trial and adjust your questions accordingly.

You might point out that you did not him/her as a defendant in your case and it was the institution that was now attempting to blame him/her in the civil case. That you understand he was held accountable and was paying his debt to the victim and to society and now you are seeking to hold only the institution accountable and they just blame him.

There are times that you might not want the perpetrator to say a word in your case. Perhaps they could not have been deterred (or the crime displaced to a different location), would have escaped detection somehow or didn't care about prevention put in place to protect victims. They may feel unjustly punished or that the victim was a willing participant or was somehow to blame. Consider explaining to the perpetrator that if he chooses not to talk to you there is little you can do to force him to, other than asking the court for an adverse inference or that he be held in contempt. If he was already convicted, he does not have a Fifth Amendment right not to answer questions. But if he is serving time, there is not much that a finding of contempt would do to encourage him to speak with you. You might also ask if he intends to answer questions of the institution when he hasn't done so for the victim.

If the perpetrator is not cooperative with you and your client but is cooperative with the institution or its lawyers, you can demonstrate: his/her bias based upon the conviction/sentence (why not talk to us but talk to the institution?); and how the institution is evil by aligning itself with the very animal they owed the duty to protect this victim against.

V. CONCLUSION

The bottom line is that you must know what the perpetrator is going to say about the crime, your client and/or the institution. You might gain helpful insight and evidence on the issues of duty, breach, causation or even damages. However, sometimes you might not like the answers to these questions but you are now in a better position to strategize in your ongoing litigation, having been armed with information of what the perpetrator will say.