PANEL DISCUSSION II

PREPARING THE CASE AFTER THE DECISION TO PROSECUTE HAS BEEN MADE

INTRODUCTION

Our second panel discussed the elements of preparing a case after the decision to prosecute has been affirmatively made. Again, taking into account the victim to whatever degree necessary or desirable, we are now looking down the road towards trial. Obviously, with the group in attendance, we did not need to talk about the specific steps of trial preparation generally; rather, we wanted to discuss the consideration, involvement, or relevance of the Internet victim to each of these steps.

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PANELISTS:

- Richard Hamp, Assistant Attorney General, Office of the Attorney General of Utah
- Jean Smith Vaughan, Special Assistant Attorney General, Chief, Cyber Crime Division, Office of the Attorney General of Mississippi
- Kelly Carter, Assistant Attorney General, Office of the Attorney General of Michigan

QUESTIONS FOR PANEL:

1. What type of “special” discovery takes place when dealing with an Internet victim, if any at all?
2. What input does or should an Internet victim have in the plea bargain negotiation process?
3. What are the difficulties and/or challenges in assessing victim credibility in Internet cases, and is there anything unique about Internet cases in this context?
4. How do you maintain communication with the victim during the trial preparation process generally, and, more specifically, how do you “preserve” the victim during trial preparation?

QUESTION 1

What type of “special” discovery takes place when dealing with an Internet victim, if any at all?

RICHARD HAMP began by discussing the manner in which discovery can be unique in Internet victimization cases:

When I first considered “What is different about an Internet victim?” my first thought was that it’s

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2 It should be made clear, at the outset, that the statements and opinions offered by the panelists and moderator are solely their own and are not offered on behalf of any organization or agency.
really not that different from any other victim, except their location may be a bit removed from my office. But then it dawned on me that there can be a huge difference in an Internet victim, particularly when you’re talking about a phishing scheme or something that now, instead of one victim of that crime, you have 500 or 1,000 victims of a particular crime. So, when you are looking at discovery, if you’re showing a phishing scam that went out to all 500 victims, now do you need to manage discovery of 500 different victims’ computers through several different states as part of your case? And, if so, how do you go about managing all that? How do you keep your lines of evidence intact, your evidence chain? So this can be a huge management problem that you start with up front. So it’s something you need to think through very carefully in terms of your charging decisions as to not only how you charge the case, but also your case management decisions after you have charged the case and are looking to move the case through the trial process.

KELLY CARTER continued and particularly discussed the value of organized, systematic data collection and recording when attempting to manage such large-scale discovery:

Although I’m now doing more child porn and predator cases than in the past, when I was dealing more frequently with the more large-scale auction fraud cases, or cases of that nature, I found that the U.S. Postal Inspector Agents have been very helpful. One of the things that is most helpful in preparing a case is the systematic way in which they approach the evidence. When considering discovery in a case like that, I rely on this very organized agent to communicate with the victims and gather the same types of evidence from the victims. For example, “What was the date of the transaction?,” “How much was the
loss?,” “Do you have credit card records to back it up?” Compiling all of this information systematically and converting all of the information to a spreadsheet is very important. So it's the actual agent that has all the backing documentation. For my purposes as a prosecutor, I've got the spreadsheet which puts everything in a nice package for me so that when I'm talking about my victims I can either organize the information according to the amount of loss or distance or whatever the case may be. So, when we're talking Internet victimization cases, which are often cases with a large number of victims, the important thing as far as discovery goes is the systematic nature in which the information gathering and recording is conducted and how that information is all kept together and available for my use as a prosecutor.

JEAN SMITH VAUGHAN discussed the use of business records when conducting discovery in an Internet victimization case:

    Also, a good deal of the information Kelly discussed might be available as a business record, like through Yahoo! or PayPal, especially if it is kept in the ordinary course of business. This way, you will have all the credit card transactions for example. In the context of child pornography, especially when attempting to show that it is a real child, we work closely with the National Center for Missing and Exploited Children [“NCMEC”]. Once we have the images we need and we think we're going to charge, we send the images through the Postal Inspector, which then goes through a certain process which allows us to maintain the chain of custody through law enforcement. This way, NCMEC can verify for us that these are indeed children that have been identified and who are in a known set of pictures. They are identifiable, and thus, it can be proven that the image
is of a real child.

KELLY CARTER commented:

I think in addition to NCMEC files, I believe that the FBI and U.S. Customs also have collections of known child pornography series or known image. So if you find yourself dealing with a child pornography case and you are at that step of attempting to prove that they are, in fact, real children in the images you have, those are other good resources.

JEAN SMITH VAUGHAN continued and discussed some of the difficulties encountered when you are not able to identify a child through these means, for instance where you get the pictures digitally:

Of course, there are kids you just can't identify. For example, there are kids on a picture that you've gotten digitally. My office is having a lot of cases involving homemade child pornography now. For instance, I have a person hopefully we'll get to plea tomorrow, who's a seventeen-year-old who has made his own child pornography with his nephews. It was an all summer long affair. He had a web-cam, videotaped it, and saved the videotape. He got the nephews to act out in all kinds of sexually explicit poses, masturbating, and on and on. He saved it and then transmitted it to his buddies in chat rooms. I'm also afraid I'm seeing younger and younger perpetrators. So, when you get into discovery in these cases, it is the victim who is in-state. We try and go and have the victim interviewed at the Child Advocacy Center. As with any child abuse case, you don't want the victim's name out in the public, and you kind of want to shield it in discovery with the defendant.

An audience member commented on the possibility of
Confrontation Clause problems that might arise when conducting discovery in Internet victimization cases. Specifically, members of the audience mentioned the U.S. Supreme Court’s ruling in *Crawford v. Washington.*

KELLY CARTER stated:

I’ve actually got that in a couple of weeks. I’ve got a child porn case, and the pictures are from the “Helen and Gavin” series. So I have the records, and I’ve got on the witness list both the NCMEC representatives as well as Constable—what’s-his-face from wherever in Wales, but I’ve also got that cost-of-prosecution hammer that I’ve got going on too. So I’ve put that on my witness list and let defense counsel know that “I’m still prepared to book the ticket for the Constable from Wales, and you’re more than welcome to pay for that if you want, or you can stipulate that these are known children from a known series.” You can remind defense counsel that, since these images are from an identified series, “I can always cross-examine your expert witness on the knowledge of who these kids are.” Of course, I would still be prepared to bring in the Constable from Wales to identify the victim if it is necessary.

JEAN SMITH VAUGHAN continued:

I think you can also bring in the people from NCMEC, and they will come and identify that the pictures are from a series that have been collected for the purposes of prosecuting these crimes. This might not completely alleviate your *Crawford* problem, but it certainly does help in terms of pleading and in preparing for trial with your defendant.

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RICHARD HAMP shared his thoughts on issues related to the chain of custody:

One thing that Utah has, at least in our case law, that does help, not necessarily with Crawford but with chain of custody, is we have a case called State v. Wynia.\(^4\) If you're talking about a tangible item that can't be easily altered, something other than drugs, paperwork, or a gun or something like that, if you do have a violation in the chain of custody, it now becomes the defense's burden, rather than the prosecution's, to prove that the evidence was somehow altered or tampered with.

**QUESTION 2**

*What input does or should an Internet victim have in the plea bargain negotiation process?*

RICHARD HAMP:

Utah is kind of unique in this particular realm. We've got statutory authority in the form of a Victim's Bill of Rights, which requires that we get victim input on a plea. As a matter of fact, we had one case that was reversed because the prosecutor didn't consult with the victim beforehand.

It's kind of an interesting area. It requires you to get input, but then it does not require that you have to follow what the victim says in terms of a plea—but you do have to at least get that input from the victim prior to the plea. Clearly, when the drafters of that statute put it together, we were not dealing with these huge Internet crimes that involve hundreds of

victims. At the time, we were talking about homicides and child sexual abuse that maybe involved one or two or five people, so, at the time, it was a great idea. But now, at least in its practical application, it is quite hampering on a big Internet case to have to get that type of input prior to every plea. Fortunately, we don't necessarily have to follow the input, but the victim does have the right to speak at sentencing. I've had them stand up, on occasion, and they strangely object to what the prosecutor has done with the case.

For example, I had a death penalty case a few years back where I had multiple victims of a serial killer. Some of the families were kind of in the middle and didn't know if they wanted the death penalty or not. I had one family that was entirely opposed to the death penalty and one family who wanted to execute the guy themselves. So, of course, I'm trying to balance all of this in coming to a decision on whether or not to seek the death penalty, which would determine how I would argue it in court. The face of prosecution has changed within the last decade with the victim's rights statutes. I think it's good for the victims, but it has certainly made the prosecutor's job much more difficult.

JEAN SMITH VAUGHAN expanded on the issue of victim's rights:

In my perspective, how importantly I consider the victim's input as far as a plea, I think it is in direct proportion to how personal or how egregious the victimization has been. Clearly, in the $50.00 auction fraud situation, I'm going to put my own considerations first as far as how many cases I've got, which ones I want to plea, which ones I don't want to take to trial. These types of practical considerations are certainly going to impact my consideration of the
victim's input. Of course, I'm still going to ask for the victim's input in those cases because we have an obligation to do that, but as to how much consideration I'm going to give that input, it may not be as great in those cases as opposed to the types of cases where I have a real child victim in a child pornography case. Recently, I've had more cases where I've had adult victims. For example, I had a recent case where the victim was, now, a twenty-seven-year-old woman who had been victimized when she was sixteen. Her role in that case was vital. I would have taken what she said and let it control how I was going to handle the case. Clearly, her level of victimization in that case was, to me, more important than the impact it was going to have on my docket or whether I wanted to try it or not. So, as far as I'm concerned, that's generally the sort of consideration that I'll give the victim with regard to whether I'm going to plead a case or not and where the victim is coming from on it.

Further, I had a case this past summer where it was an emergency room physician, a sixty-year-old who had previously been a pediatrician. Perhaps something had occurred [in his past] that [as a result of which] he was asked to leave pediatric medicine. He became an emergency room doctor. This doctor lives in a different state, but he started to visit his granddaughter on a regular basis. He seemed to prefer one of the two granddaughters over the other. He would read her stories, bring her toys, stuffed animals, this type of thing. I think that the grandmother was very complicit in this instance—I think she knew about the abuse but did nothing about it. He was prosecuted for fondling his granddaughter. In this particular case, the family played a tremendous role in determining what would happen to this particular guy. He was a doctor. The son, who was the father of
the victim, was also a doctor. It was essentially a rift in the family, where the grandfather and the grandmother will no longer see those grandchildren, because they split. The family dynamics [were such that there were accusations that] it was all the fault of the mother or the wife of the father—allegations were made that she'd just made it all up. Not really, the little girl was very articulate and was prepared to testify at trial about the acts of the grandfather.

In this case, this particular family did not want the grandfather, the E.R. physician, to do any jail time. That was more than they could comprehend—more than they could handle at that point in time. So they asked the judge about it and made a plea offer to him. So the guy gets convicted but no jail time. He is a registered sex offender in Mississippi and Texas. When he spoke to the judge, there was actually no remorse there. The remorse was that his wife would no longer get to see the grandchildren, but you know how defendants are sometimes.

It's like they're pleading guilty, but it's like, "Are you guilty because you are really guilty?" Well, he said, "Yes," but his body language and everything else he said was, "No, I'm not taking responsibility for this." So, in this instance, I didn't feel comfortable with that. The judge looked at him very carefully and said, "[I'm] going to watch [you] like a hawk." [The judge] thinks [the grandfather] will be a repeat offender—he's not just someone who woke up at the age of sixty and started abusing his granddaughter. So this is one of those cases that [is] kind of bittersweet—the guy got convicted, but he didn't go to jail. The family just couldn't handle that.

An audience question touched on the issue of the effectiveness and helpfulness of victim-witness coordinators. RICH-
ARD HAMP commented:

In Utah, we have victim-witness coordinators that help out. This was something that I was going to bring up yesterday during one of the presentations, specifically, “How do you explain to the parents of the victim what happened to their kids?” We had a very good suggestion about focusing on what the perpetrator did and not anything that the victim did. The other comment I have is that dealing with distraught victims is, unfortunately, not my expertise. There’s no coursework that I’ve ever been offered or taken that tells me how to deal with victims. So, I’ve kind of just had to learn it as I go throughout my career. Sometimes I think I do it well, other times I don’t think that I handle it well at all. But I know of someone who does it very well, and that’s my victim-witness coordinator who has had that type of training. So, in this type of case, I try to get the victim-witness coordinator involved as early as possible to help out with that angle of the case. That way, I don’t have to worry about bringing a skill set to the table that I really don’t have.

At this point, the discussion shifted from audience discussion to what, if anything, makes an Internet victim unique in comparison to other types of victims and the effect that this might have on the overall analysis about victims and plea bargains in the Internet victimization context. KELLY CARTER opened this part of the discussion:

To some extent, it again depends on the type of crime that’s committed on the Internet. For example, I unfortunately had a child porn case where it was the picture of a known victim that was put up on the Internet. In that case, obviously, the humiliation of that known victim and everybody in her community knowing that those pictures were there and seeing
those pictures, that intensifies her victimization in that type of Internet case. It's not just a situation where some pictures are taken and handed around a locker room. They were actually posted on the Internet, and everybody in her school knew that they were there, and everybody saw them. So, I think, in that sense the Internet victim is, in some ways, more vulnerable, just because of the vast exposure that the Internet provides, certainly in the sense of child situations. In some circumstances, the victim of an Internet crime can feel even more duped than in a typical case. For example, we have the Nigerian situation, and anybody who has fallen for the Nigerian scam letter probably feels a little more foolish than the average fraud victim because of how widespread and obvious that particular scam was. So the notoriety and, again, the widespread nature of some of the crimes make the Internet victimization more intense.

JEAN SMITH VAUGHAN continued:

Kelly has hit on something, and that's the continued victimization of a particular person, because once the picture is out there, it's accessible for a long period of time. One case that comes to mind is where two college students were killed by a man. He was on trial for it. It was a death penalty case. There were some problems with the case, and so there was going to be a retrial. In the meantime, someone with some interest went to the clerk of court and checked out the record, got the autopsy photos, and posted them on his website saying, "This is what happens (in this particular type of crime)," or something like that. He was anti-death penalty, anti-black on white crime, and there were racial overtones posted on the website. Another jury was going to be sworn in quite quickly after this happened, and we were able to get the pictures sealed and put back into the court docu-
ments. But, again, it's that same type of thing, like the Dale Earnhardt autopsy photos and people who wanted to put those on the Internet, it's a type of victimization, but it is a continuing victimization.

Next, the Panel discussed the very real sense of invasion of privacy and loss of trust that Internet victims experience. RICHARD HAMP commented:

There's two points to remember in this. The first is, and I think it is on the FTC website, there's a study that came out [saying] that victims of particular identify theft and that type of financial crime feel a lot of the same feelings that rape victims do, particularly with regard to the invasion into the victims' personal space of their financial identity. They feel the same shame and remorse and depression. There have been studies that show where they [a victim and his or her spouse] have ended up being divorced as a result of the victimization. Lost jobs. I mean, this is a crime that really does affect the victim much more than just in the pocketbook.

Plus, the system self-perpetrates the crime again and again on the victim, particularly when you're looking at the credit score. The information from the crime spree keeps showing up over and over and re-victimizing the victim. The victim will go through a year or two or three to get it off, only to then have it put back on by another reporter in the credit bureau system that's picked it up from another source and then puts it back against the credit rating again. That's why we say that identity theft is the crime that keeps on giving.

**QUESTION 3**

*What are the difficulties and/or challenges in assessing victim credibility in Internet cases, and is there anything unique*
KELLY CARTER spoke on this question first:

Generally, when it comes to Internet cases, I think sometimes you have the possibility of your victim seeming more sympathetic in the sense that people who have been on the Internet and experienced certain things may be slightly more sympathetic to your victim in the sense that they are thinking, “Okay, well, there but for the grace of God, go I. That could have been me—I’ve been in that situation, and that could have easily happened to me,” because there are so many people who are putting themselves out there and in potential jeopardy. So, it’s possible that, depending on the circumstances, your victim may be more sympathetic and may be a slightly more credible witness; however, I think that it also cuts the other way as well. Sometimes people might think, “Yeah, but that wasn’t me because I took the steps to make sure it didn’t happen to me. I made sure that I didn’t put my picture on the Internet so that someone else could put it out there and post it.” And, I think in that sense, it could make your victim’s credibility more of a problem in that you have that, “Why did you do that?” sort of mentality where people ask, “How could you not consider that as being an issue?” In this type of situation, your victim might seem potentially less sympathetic. Unfortunately, I think that’s probably going to depend on the circumstances of the case and whether it’s a child porn case or an auction fraud case, whether it is older victims, younger victims, or middle-aged victims—all of that will come into play. I think being an Internet victim is going to weigh both ways on the credibility of your victims, potentially.

JEAN SMITH VAUGHAN expanded on this topic and
offered an example:

I had one case in particular. It involved a lawyer who was a victim of a vicious email. It was sent to all of his colleagues, and it damaged his reputation. If truth be told, maybe his reputation was not so wonderful to begin with. It’s kind of like, “How much do you want to protest ( . . . ‘the lady doeth protest too much.’)?” He was satisfied, actually, with an apology from the person who sent the email and an acknowledgment [from that person] that he sent the email and a letter to the Bar refuting it. So we talked with the victim about, “How much do you want to say, this is not true?” [He adamantly responded,] “It’s not true. It’s not true.” There was a question as to whether or not the continuing denials lent credibility to the content of the email.

Then I have another case where the victim is a cheerleader. She’s a twin. Her picture—the picture of the twin—was posted on the Internet in a sexually explicit pose. It was like good twin, bad twin. So the good twin, the one who is actually a cheerleader, was posed as the bad twin with the message, “I like sexually explicit things. This is what I want.” As a result, the good twin lost her job as a cheerleader, so she suffered actual damages. There was also reputation damage as well as actual harm to her. But, in terms of sympathy from a jury, I’m not sure how much there would be. So the lesson is, you take your victims as you find them.

RICHARD HAMP discussed the value of meeting with the victim face-to-face and the difficulty in having this type of meeting, especially in Internet victimization cases that span over several jurisdictions:

One thing I’ve found is, I like to bring the victims
into my office and do a face-to-face with them so that not only do they get to know me, but I get to know them, and I can kind of feel them out as to how good of a witness they will be. This also helps to gauge their credibility level. Oftentimes, when you have an Internet victim that is several states removed, you don't have this opportunity. I rely on a lot of visual clues that may not be apparent, or that you can't get over a phone or [from] some other way of communicating with the victim. So, in many Internet cases, it makes it a little bit harder for me sometimes to pick up on stuff that I would normally rely on before putting the victim in a court situation.

**QUESTION 4**

*How do you maintain communication with the victim during the trial preparation process generally, and, more specifically, how do you “preserve” the victim during trial preparation?*

**JEAN SMITH VAUGHAN** stated:

I have a traveler case. The girl was sixteen, and she was solicited on the Internet. The guy drove to Indiana, picked her up, brought her back to Mississippi, had sex with her, and said, “Well, there’s nothing wrong with that. The age of consent is sixteen.” But, under the statute, the relevant age for exploitation of the child age is eighteen. She didn't look like a child at age sixteen, and now she looks even sluttier. In this case, she really encouraged this guy, so that’s going to be a big factor. They talked about what kind of sex they were going to have. She was running away from her grandparents and this, that, and the other. So she’s not going to be the perfect witness. And, of course, he’s making himself out to be the perfect angel who goes to work and to church and that kind of thing; however, in his spare time he’s sending out pictures of his naked self to other under-
age people, and so we have those chats as well. I also have some other victims. One is a meth-head and she's not very attractive either, but she's under the age of sixteen. So, as you can see, how they appear and how they dress can be a big factor of how they are viewed as victims.

KELLY CARTER continued and discussed the victim who's not there because the case is the result of a proactive law enforcement investigation where the victim was actually an undercover police officer:

On the issue of trial preparation, my experience has been that as far as victims are concerned, if I've got a child pornography case, the victim is preserved as it happened through the actual images, so it isn't going to be an issue. It may have been a while ago, and the victim may look a lot different now, but, nonetheless, I don't think you lose that much sympathy for a victim when you're seeing the actual victimization. But one thing I would like to talk about is when the victim's not there. So, in the undercover cases when you've got the sort of traveler situation [involving a defendant] who had been talking with the undercover cop online, there really is no victim. Of course, the defendant is real quick to point out the fact that there is no victim in these cases. When I'm preparing for a trial in that sort of case, I'm jumping all over the fact [that] there was a fourteen-year-old—that the defendant thought there was a fourteen-year-old. So I'm going to refer not to the officer, but I'm going to refer to the name of the officer's persona. Regardless of the persona, I'm going to use the name that the officer was using when he was chatting as that fourteen-year-old. In a sense, what I'm going to do is create the victim that doesn't actually exist. Because, for all intents and purposes, this guy thought that there was a fourteen-year-old and that
she was a real person. I think it has a lot of impact on a jury to tell them, “Okay, we got lucky here that there really wasn’t a fourteen-year-old on the other end, and some girl was saved the trauma of this circumstance.” So, in these cases, it’s the non-victim victim that we’re trying to create and preserve in that circumstance.

Another point on the non-victim victim situation is that I am many times presented with people who consider themselves victims even though they are not victims under the Act. So, I will often hear from the wife or the family of the guy who shows up to meet the fourteen-year-old [and the wife will be] presenting herself as a victim—like, “What am I supposed to do, and how do I deal with this?” That’s a difficult situation to deal with in that this is a person who truly has been victimized but not in our legal sense under the Act. So, in those circumstances, I will try and deal with that person. I also had a situation where the stepsister of this guy showed up during his sentencing and asked to be able to address the court to say that while she was young, he had in fact abused her. This was a traveler situation, and he had on several occasions been convicted of prior sex abuse, but this was a situation where there had never been a conviction based upon her testimony. She was just now showing up, and I had a difficult time dealing with defense counsel on that saying, “I know she’s not a victim under the Act, but she wants to be able to address the court with regards to sentencing here.” Some of the child sexual abuse situations do create victims that we don’t necessarily anticipate, but that may present us with the situation where we have to deal with them as victims as well.

RICHARD HAMP closed the discussion on victims by providing a type of frame-work with which to consider differ-
One thing that I wanted to mention about victims, and we’ve kind of touched on this in our discussion, is I find that you’ve got about three main categories of victims. You’ve got the child sex victims who are very, very sympathetic victims. You’ve got your financial victims who, although real people, are really stupid people and it’s kind of hard sometimes to sell them to a jury. Then you have the final category, which are corporations, large business victims. I find a lot of times when I’ve done jury trials with them, my juries are less sympathetic to the large corporations than they are to the other types of victims. So, I’m finding when I’m doing trial prep that I have to make the corporation seem to be more human by having the president of the corporation there or a good representative from the corporation in the courtroom on direct so that I can try and personalize the corporation. I’ve had cases where juries, although the evidence was clear, returned a verdict of not guilty simply because they didn’t feel there was any victimization to the corporation, because they have plenty of money to cover the problem. And this poor little guy that was ripping them off; no big deal, blah, blah, blah. So it’s something to watch out for when you’re prepping these cases for trial and thinking about the likelihood of different outcomes. Maybe in those cases I could have done a better job of saying, “Look, this victim is no different than any other victim.”