Providing Effective Legal Services to Intimate Partner Victims: What Every Military Lawyer Needs to Know

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Session Overview

Day in the Life of a Survivor

Trauma Impacts & Why Should We Care?

What are victims’ rights?

What do these look like in action?

Practice tips
Who is NCVLI?

Mission: To actively promote balance and fairness in the justice system through crime victim centered legal advocacy, education, and resource-sharing.
Imagine . . .

A day in the life of a crime victim
Immediate moment
And what is happening in the body & brain?

- Amygdala, hippocampus, prefrontal cortex, adrenal glands..... Oh my....
And remember

Domestic violence is a dynamic only 1 part of which is physical assault.
• Perpetrators engage in consistent behavior, both subtle and straightforward, to psychologically terrorize
• Perpetrators often create a dynamic of dependency unseen by those outside relationship.

Overtime neural networks are created:
• automatic response to perceived threat
• automatic defense against any vulnerable emotions by either shutting down or dissociating
• seemingly counterintuitive behaviors
  • (e.g., non-report, recantation, ongoing contact/relationship)
And Then We Say to the Survivor...
And that’s not all . . .
The Media & Comments

“Look at the tape. She hit him first.”

“C’mon ladies . . . Look who you are choosing to marry.”

Commenters responding to Ray Rice video
Comment forums are rarely moderated.

Though few write comments (2.5-16%) a majority read comments (66-85%).

Proximity to news is helping make these comments “news” & readers may select stories to view based on quantity of comments.

Literature is clear that readers interpret stories through frames internal to story itself but also through comments.
So real day in the life of a crime victim
“As part of its legacy, trauma leaves its victims with fear networks etched into the amygdala, networks that can be triggered by a multitude of cues that would ordinarily not evoke fear. Trauma also leaves its victims with fragmented and discontinuous memories of what happened to them. As a consequence of these legacies, the...victim faces enormous challenges in the judicial process. To participate in that process - to endlessly recount their trauma, to appear in the court room where the [perpetrator] sits - is equivalent to the zebra consciously choosing to return to the water hole where the lion attacked.” (Lisak, 2002)
In the words of Judith Herman, M.D., “if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.”
Is this just the price of access to justice system?
Or .... Why should I care?
Research is making clear

re-victimization (associated with PTS(D) and other physical, mental, and sexual distress; impacts trust in legal system)

OR

empowerment with therapeutic impacts
What does re-victimization look like?

- May experience trauma symptoms
- May not seek assistance or disclose
- May not discuss true or full situation
- May not continue with process
What makes the difference?
A number of factors but literature shows three trends

1) Treatment by personnel within system

2) Treatment during proceedings

3) Extent to which victims are able to have choice and voice in participation
And it is not just about the victim... System is impacted!
Components of our Justice System
Defendant/Offender
Defendant / Offender

State/Public
Defendant / Offender

Victim

State/Public
Defendant / Offender

Victim's

Public

What is created if system has this overlap
What is created if the overlap looks like this

Defendant’s Rights

Public (present in prosecutor & law enforcement)

Victim’s Rights
• “Law is most usefully seen . . . as a branch of rhetoric; and that the kind of rhetoric of which law is a species is most usefully seen not, as rhetoric usually is, either as a failed science or as the ignoble art of persuasion, but as the central art by which community and culture are established, maintained, and transformed.”

What are victims’ rights?
Continuing evolution = codification of victims’ rights

- Several federal acts protect victims, including the Crime Victims’ Rights Act, 18 U.S.C. § 3771.

- Every state (+D.C.) has statutory and/or rule-based protections for crime victims.

- More than 30 states have constitutional victims’ rights provisions.
• **Guarantees crime victims rights to:**
  - Be reasonably protected from the accused
  - Reasonable, accurate & timely notice of public court proceedings
  - Not be excluded
  - Be reasonably heard at any public proceeding
  - Confer with the attorney for the government
  - Full and timely restitution
  - Proceedings free from unreasonable delay
  - Be treated with fairness and with respect for their dignity and privacy
But do the rights make a difference?

Rights in the law books are mere words on paper.

**Meaning** comes when:
- people ask for their rights
- courts enforce them, **AND**
- systems routinely complies with them
In walks legal counsel (in all its forms)

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He is unfamiliar with the rules of evidence . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings.” Powell v. State, 287 U.S. 45, 68-69 (1932).
The Relief Counsel Asks For in a Criminal Case
– Get to Know your Counterparts
A look at a few rights in action in criminal cases & discussion of how these intersect with general representation
A crime victim has the right to “The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused” 18 U.S.C. § 3771(a)(2).

In re Doe, 567 F3d 1000 (6th Cir. 2009) (directing district court to rule on victim’s motion to unseal case to allow victim to be informed).
Use in non-criminal justice moments:

Track what is happening and so you can be prepared and prepare your client. Sometimes knowing when & where a perpetrator will be somewhere is most critical piece of information.
A crime victim has “[t]he right to \textbf{not be excluded} from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.” 18 U.S.C. § 3771(a)(3).

- \textit{In re Mikhel}, 453 F3d 1137 (9\textsuperscript{th} Cir. 2006) (summary exclusion of victim deemed improper).
- \textit{U.S. v. Edwards}, 526 F.3d 747 (11th Cir. 2008) (concluding criminal D has no constitutional right to exclude witnesses from the courtroom).
Use in non-criminal justice moments:

Empowerment and new neural networks of choice
“The right to be reasonably **heard** at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” 18 U.S.C. § 3771 (a)(4).

**Kenna v. United States Dist. Court, 435 F.3d 1011, 1013 (9th Cir. 2006)** ("The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims’ Rights Act sought to change this by making victims independent participants in the criminal justice process.").
Use in non-criminal justice moments:

Empowerment and new neural networks of choice; economic stability/recovery through claims for restitution
A crime victim has “[t]he right to confer with the attorney for the government.” 18 U.S.C. § 3771(a)(5).

- **U.S. v. Heaton**, 458 F. Supp. 2d 1271 (D. Utah 2006) (refusing to dismiss charge on government’s motion because no evidence that right to confer had been afforded).

- **In re Dean**, 527 F.3d 391 (5th Cir. 2008) (holding victims right to confer extends before indictment).

- **Doe v. U.S.**, 950 F.Supp2d 1252 (S.D. Fla. 2013) (holding victims can pursue discovery on a claim that they lost right to confer before filing of charges).
Use in non-criminal justice moments:

When charges go away access to certain rights can go away (e.g., restitution, notice) so being on top of this is critical.
Victims have the right to “be treated with fairness and with respect for the victim's dignity and privacy.” 18 U.S.C. § 3771(a)(8).

- *United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495 (W.D.N.C. May 26, 2009) (order) (holding that if “protecting the name of the victim is what is sought,” the only way to accomplish that is using a pseudonym).

- *In re Zito*, No. 09-70554 (9th Cir. Feb. 26, 2009) (order) (holding no records could be turned over without notifying and hearing from victim).

Use in non-criminal justice moments:

*Combined with protection – no civil discovery*

For many victims, “privacy is like oxygen; it is a pervasive, consistent need at every stop of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”

Practice Tips
1. Anticipate but don’t assume – ask

2. Understand narrative post-trauma and ask your client in the right way
   - Not “what happened next?”
   - Their vocabulary – survivor?

3. Lawyers/Counselor – know and discuss the good, bad & ugly

4. Understand your power

5. Develop patience
   - wait time
   - disclosures
6. Mediate your physical and facial response – to facts & to their choices

7. Root out victim blaming & myths

8. Be creative in your advocacy

9. Embrace mindfulness
   • For yourself
   • For your client
Questions?

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