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ADVICE FROM THE BAR: Crossing Over: A Civil Litigator's First Criminal Trial – Prosecuting Warren Jeffs

by Will Haley



Jeffs

FIELDS ALEXANDER of Houston's Beck, Redden and Secrest, L.L.P., is a civil litigator who crossed over to criminal practice for the prosecution of Warren Jeffs. He offers the story of his role in the prosecution and tips for civil attorneys looking to expand into criminal practice.

How did you first get involved with the Warren Jeffs prosecution?

One of my former partners, Eric Nichols, left the firm roughly five years ago to handle special prosecutions for the State of Texas, and we were fortunate enough to have Eric rejoin the firm in January of this year.

In connection with Eric's work for the State, he had been working on prosecutions of various individuals from the Yearning for Zion ("YFZ") community that had been established outside of San Angelo. Eric had so much experience with the YFZ prosecutions that the firm decided that it made sense for us and the for the State of Texas to allow Eric to continue working on those cases on a pro bono basis rather than have the State try to get somebody else up to speed on what Eric had been doing for the last several years.

So, once we made that commitment I talked to Eric and offered my help if he felt he could use my assistance in prosecuting the YFZ Prophet, Warren Jeffs, because I would be honored to serve the State and because the case sounded like it would be a lot of fun.

At what point in the timeline of the case were you brought in?

I was formally brought in only a couple of weeks before trial. Obviously in a criminal case, unlike a civil case, that's a little different animal because there aren't a zillion depositions and other discovery to work from. So I was deputized by the District Attorney for Tom Green County in San Angelo roughly a month before trial and was formally part of the prosecution team from that moment on.

You mentioned how there was some pre-trial differences between this criminal trial and your usual civil practice. What were some of those differences for you?

The differences really manifested themselves once the trial got going. Everybody knows that in civil litigation we are covered up with expensive and time-consuming pre-trial discovery. By comparison, there is virtually none of that in a criminal proceeding. There is some, but you don't take a bunch of depositions, you don't have a lot of written discovery, there are disclosures, and there are constitutional obligations that have to

be met. But it's just a whole different animal.

Without that opportunity for discovery, which maybe civil lawyers are more used to, what did you do to get up to speed about the case?

There were two things: I talked to Eric a fair amount, and I buried my head in the file.

What all was in the file by the time you were brought onboard?

We produced voluminous filings of witnesses, witness statements, and investigative materials, and we designated experts. Eric referred to our disclosures in this case as "open-file plus." That is, we tried very hard to go above and beyond our obligations under Texas criminal law to provide the defense team with everything they were entitled to, and then some, so that we could do our utmost to make sure that they had what they needed and were entitled to. Otherwise, we could have faced a motion to continue the trial setting for lack of the State's meeting its discovery obligations.

What differed in your trial techniques in this criminal case from civil practice?

Candidly, I was obviously not first chair in the trial, though I did have a role at trial. So most of what I'm talking about is what I observed from watching Eric and from some of the other aspects of the trial. Although civil and criminal trials are similar, and any trial lawyer could follow what was going on and understand the trial tactics involved, there were a lot of differences.

One of the main differences that I had never seen play out in an actual criminal proceeding was the defendant's right to effective assistance of counsel. That is something that is constantly in the mind of the prosecutor in how they present their case and how they try to make sure that that's not an issue that could be raised post-conviction.

On the effective-assistance point, it came out before the trial that Warren Jeffs wanted to represent himself without his defense team. How did you and Mr. Nichols deal with that curveball?

The best way I can put it is that we dealt with it as it came. I want to first give kudos and a lot of praise to our trial judge, Barbara Walther, who I thought did a very, very good job of handling what could have been a media circus and a mess, frankly. I thought she did a wonderful job of preserving the defendant's right to make those kinds of choices while sternly

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admonishing him with regard to what he was giving up and what he was agreeing to forego by choosing to represent himself for a part of trial. Judge Walther insisted on and ordered that standby counsel be available, and they were available throughout the proceeding. From Eric's and my viewpoint, we just had to take it not only day-by-day but hour-by-hour because you never knew what was going to happen next.

The other thing that I would point out is that we didn't change any of our trial techniques or take any shortcuts as a result of Mr. Jeffs' decision not to have counsel involved in the first phase of the trial. We laid our predicate, we established chain of custody, we authenticated documents and other evidence; we did everything we would have done had he had defense counsel involved.

Did your storytelling have to change at all because of the criminal setting rather than a civil setting?

Yes. I think jurors generally take their job seriously in any proceeding. But it was clear to me, given the stakes involved and the magnitude of what we were asking in terms of punishment, that the jurors took this job very seriously. And if they were going to find any defendant guilty of the kinds of things we were accusing Mr. Jeffs of, then they were going to require us to meet our burden of proof, which is obviously a tall burden in a criminal prosecution.

In addition to that you have the issues of freedom of religion, the First Amendment issues that were at the forefront of Mr. Jeffs' view of the case and at the forefront of any American's view of this type of proceeding. It was important to address how these claims and these charges interact with our rights as Americans to worship as we see fit. So we were very careful about handling those issues in a way that we thought would prove our case and establish to the jury that we really weren't attacking Mr. Jeffs' religious beliefs or his religion.

After the end of this case, did any of the jurors express their views about these potentially sticky issues?

There were some jurors that spoke to the media, and they were aware of the variations that we were just talking about. Those jurors certainly weren't gung-ho to convict when the case started. They wanted to see what the State was going to prove and whether or not we could convince them that Mr. Jeffs should go to jail despite his defense that everything he did was a result of his religious convictions.

Now that you have had this cross-over experience in a criminal prosecution, how would you advise civil attorneys who are looking to be involved in criminal work?

The first piece of advice that I would give them is to make sure that you team up with someone that really knows what they are doing. I had the great fortune of trying this case with Eric Nichols, who is an outstanding criminal lawyer. There are a lot of traps for the unwary that the criminal bar can exploit against a civil lawyer until they get their bearings.

Beyond that, I firmly believe that a trial lawyer is a trial lawyer is a trial lawyer. So if you know how to try a lawsuit, then you

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can try one for a plaintiff, you can try one for a defendant, you can try commercial, or personal injury, or criminal on either side of the docket and ought to be able to put on the hat of an advocate for whoever is calling.

What are some of those traps for the unwary?

One is the ineffective assistance of counsel point, which I think is very foreign to the mindset of a civil lawyer. Generally on the civil side, if we see our adversary making mistakes in handling

their side of the lawsuit, we think this is a benefit to our client so we're going to let him step in it. On the criminal side, at least from the prosecutor's standpoint, you've got to be very aware of the fact that those missteps that the lawyer is making, whether intentional or not, may very well be raised later to assert ineffective assistance of counsel.

Just as a hypothetical, if a lawyer on the other side is not asking certain questions in *voir dire* that might otherwise reveal jurors that are ill-disposed to his client, then the prosecution may very well consider asking those questions themselves just to take away that issue from a later appellate proceeding. That's one of many examples.

There are disclosure requirements that at the end of the day are just a matter of reading and understanding the rules, but the criminal procedure rules differ in a lot of dramatic respects from the civil rules, and you would be ill-advised to try to represent a client your first time out without some sort of co-counsel that knew what they were doing.

Given your experience, how would you advise young attorneys who are looking to build a dual civil and criminal practice?

Young attorneys especially should get themselves in a courtroom as much as they can. Get in front of juries, get in front of judges, by all reasonable means possible. As we all know, especially on the civil side, it's getting more and more difficult to get real trial experience, and criminal law certainly provides a wonderful arena for that. There are defendants looking for counsel appointments all the time, and judges are looking to make those appointments. Do this either if you might want to establish a hybrid practice and shift into the criminal arena or because you just want to learn how to be a trial lawyer. I would recommend if your law firm permits it, that you strongly consider knocking on the doors of some of those criminal judges and seek appointments.

Do you have any final thoughts or words of wisdom from your experience?

The case was sure a heck of a lot of fun. Criminal cases move fast, their stakes are high, they are very interesting, and you generally have a very good defense bar and prosecution bar because many criminal lawyers try dozens of cases a year. Generally, the experienced attorneys have tried well more than 50 to 100 cases over their career. That means that you're dealing with talented adversaries. So that coupled with the high stakes of the Jeffs proceeding and its constitutional implications made it quite an interesting case to try. ■