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Conquer Your Fear: Taking on a Child Sex Case

BY KATHLEEN STILLING

In 2013, the U.S. Department of Health and Human Services estimated that over 60,000 children were the victims of sexual abuse.[1] This volume of cases may explain why so many clients come to criminal defense lawyers' offices charged with or about to be charged with a crime second only to a capital offense in terms of the impact it will have on the lives of clients and their families. When defense lawyers initially meet with clients, they often have concerns about the viability of a successful defense. The lawyer may have the same questions a jury will have: Why would a child lie about something as serious as sexual assault? How did the child acquire specific sexual information if the child did not experience the assault of which the client is accused?

It may be tempting to pass the dreaded child sex offense client to a lawyer more experienced in managing these complex and emotional cases. While experience is important, a lawyer prepared to spend the time and resources researching the facts and background information and thoughtfully analyzing the issues can successfully defend cases that may appear hopeless at first glance.

This article will give criminal defense lawyers a basic plan for preparing, analyzing, and investigating child sex cases.

Laying the Groundwork

Few things are impossible to diligence and skill.

Great works are performed not by

strength, but perseverance.

— Samuel Johnson
English author, critic & lexicographer (1709-1784)

Particularly in child sex cases, success lies in preparation. In order to prepare the best defense, defense lawyers need to understand everything possible about all the people in the case and the social dynamics of the child, the child's family, and other people in the child's life. No single template exists for the child sex case because developing a winning strategy will depend on understanding each child's circumstances and developmental capabilities.

Experienced criminal defense lawyers know at the outset the most important question jurors will ask: Why would this child make an accusation of sexual abuse if it was not true? Most jurors will expect the defense to answer this question, even though the law does not impose such a burden on the defendant. If defense coun-

sel can offer jury members any explanation that makes sense, they will find the arguments made by defense counsel and facts elicited by counsel in her examinations more compelling.

The key to this question will usually be found in the child's relationships and life experiences. The defense team will find the answer, or at least a reasonable hypothesis, by relentless investigation and a careful sifting of the information it discovers.

The Initial Interviews

Get the facts, or the facts will get you. And when you get them, get them right, or they will get you wrong.

— Dr. Thomas Fuller
Gnomologia (1732)

Client and Family Background

According to studies, most child sex accusations involve children and adults who know each other. Thus, conducting a thorough interview of the client and his family is the best place to start. Set aside several hours to gather information from each person separately. Joint interviews often lead to errors and confusion about the facts. Start by learning everything possible about each person's background, including education, residences, employment, marital status, children, and family history. It is possible that a potential witness's education or life experience makes the witness's observations particularly useful or credible.

Obviously, the most thorough and detailed interview will be with the client as the defense attempts to discover everything the client knows and, just as important, everything he has said to others. In addition to the questions specific to the factual allegations and background information, the interview will need to cover issues involving the legality of the arrest as well as any searches or interrogations that have taken place.

The Disclosure

The client or witness should then be asked to describe how the allegation arose. Ask each person: When and how did you become aware there was an accusation? Who told you about the assault? Precisely what language was used to describe the assault? Particularly with small children, the language used in the disclosure may provide an argument that the child's words were misunderstood or taken out of context. The client and his family should be asked to describe every contact with every law enforcement agent, social worker, family member, or friend who had something to say about the alleged assault, even if that person is only reporting what they have heard from others.

It is very important to identify the circumstances surrounding the "disclosure" and all the people present or involved in the "disclosure." Jurors will evaluate very differently the credibility of the niece who, only after her parents discover she is sexually active, reports repeated sexual assaults by a beloved uncle, and the credibility of the teen who reports an allegation under more neutral circumstances. The student who reports a sexual touching by her teacher after he disciplines her will seem less sympathetic to a jury than the girl who has no conflict with the teacher. The second child who comes forward and reports a sexual assault after another child close to her has accused the same defendant may simply be trying to get the same attention the first child is seen receiving.

Early disclosures made to friends and family, before the involvement of law enforcement professionals, are also rife with the possibility of taint and suggestion. Even well-meaning adults can taint a small child's memory by pointed and emotional cross-examination. Therefore, it is essential to know everything possible about each occasion the child told an adult or another child about the assault, including all details about the discussions, and, importantly, how adults reacted to the possibility that the child had been molested.

The Child Accuser

After investigating the disclosure, it is time to learn everything about the child accuser and his or her family, friends, teachers, neighbors, and other contacts. Defense counsel should ask about the child's intelligence, grades, interests, activities, medical conditions, mental or emotional issues, and personality traits. It is essential to ask what the client or witness knows about stressors within the child's family, such as drug or alcohol problems, domestic violence, mental health problems, sibling rivalry, divorce, re-marriage, relocation, layoffs or job losses, deaths in the family, or any legal problems in the family. Defense counsel will want to know about all people living in the home, such as mom's new boyfriend, relatives living there temporarily, or babysitters. Understanding how the adults in the child's world feel about each other is another important task. Is there a rift or feud? Many jurors are familiar with the child who is in the middle of parents in a bad divorce and how a parent may try to obtain leverage by manipulating the child into making a false accusation. However, conflicts between other family members may also result in a child developing a negative view of the client, which may result in a false accusation. The defense team must try to gather as much of this detail early in the process before memories fade. Seemingly unimportant details may become significant as more information become available.

The Search for Exculpatory Documents Or Physical Evidence

If I have ever made any valuable discoveries, it has been owing more to patient attention than to any other talent.

— Sir Isaac Newton
mathematician and physicist (1642-1727)

Public Records

After the initial round of interviews, if possible even before the preliminary hearing or discovery is received, the defense attorney should determine whether public documents exist that will reveal more about the individuals involved. Some public means of inquiry include record checks, family court files, civil court files (evictions, small claims, personal injury, tax intercept cases), Google or other Internet search engines, and newspaper websites. Many states have "open records" laws under which the defense can request police reports of contacts with the complainant's home or individuals who may be witnesses, human sexuality and health curriculum for public schools, and Child Protective Services protocol and standards. Some of this information may also be available on the social services agency and school district websites. This information may confirm what the defense attorney has already heard from her client and may illuminate what the child

has been told about "bad touch" and what to do about it.

If a 911 call or dispatch tapes could exist, request those recordings and follow up with a motion and order to preserve the recordings because many law enforcement department policies allow for their destruction within a short time period. Also, a potential goldmine of information is available on social networking sites, such as Facebook, Twitter, Instagram, and other social media sites about the parents, children, and teens in the case.[2] These sites may reveal information about the witnesses' alcohol and drug abuse, sexual behavior, and personal motivations.[3] An investigator who is familiar with these sites can help defense counsel find the pages for the complainant or other witnesses. These social media sites have places for pictures, favorite quotes, self-descriptions, or discussions about recent activities. Teens and young adults seem particularly prone to post pictures of themselves in compromising situations where they can be seen drinking to excess, engaging in sexualized behavior, and otherwise acting in a manner that is inconsistent with their claims. Even a site without scandalous behavior may contain nuggets, and therefore defense counsel should copy the pages and file them away to evaluate later. As adults move onto social media sites, such as Facebook, teens and middle school children have moved to other sites, such as Omegle, Kik, and Meetme.com to meet people. Staying abreast of the trends is important.

Some teens have left Facebook and moved to other sites, such as Omegle, Kik, and Meetme.com. Staying abreast of the trends is important.

The Scene

Sometimes a parent, grandparent, or guardian of the child accuser may have serious doubts about the truthfulness of the accusation, and may be supportive of the client. The parent or guardian often feels pressure from social services workers, who may declare the child in need of protective services if the child's mother does not support the child's accusation. In any event, a parent or guardian who fairly admits some doubt about the accusation may provide early access to the scene of the alleged offense even if he or she is reluctant to antagonize social services by providing access to the child. The key is to get access to the child's living quarters early when people are still unsure what has happened and before family feelings have solidified against the client.

If access can be obtained, defense counsel should always visit the scene of the alleged assault as quickly as possible and take photographs of all the rooms and prepare a rough diagram. Later, if necessary, a drawing to scale can be prepared. There is no substitute for being in the space that the witness is describing. Often, the layout of the room, the objects in the room, or the size or placement of furniture in a room may take on greater importance as defense counsel discovers more about the story. For instance, a child may claim that she was assaulted when she was watching a Disney Channel program in a room that had no cable TV. Another may allege that an assault took place at night when she was asleep but the bed she shared with her younger brother, who noticed nothing unusual, turns out to be quite small. Or a child witness who says that her assailant stood behind her during the assault may have forgotten that the area where the alleged assault took place is too small to accommodate a second person. From a visit to the scene or at least a careful review of good photographs, defense counsel will often see discrepancies and physical impossibilities and be prepared to use them.

If the child visited or resided in a home to which the defense has access, have the client's family search the room and closets thoroughly, and empty the wastebaskets. They may find notes, diaries, or other writings. Sometimes the writings contain positive statements about the client that are inconsistent with what the accuser is claiming now. Sometimes they will reveal motives to lie, such as the desire to cover up issues at school or with a boyfriend. Favorite books, movies, or music may also contain clues about the origin of the story the accuser is telling. Sometimes, very young children may weave parts of a story they have heard into the allegation or an older child may realize that an allegation of sexual or physical abuse will result in an unwanted adult being removed.

Finding out everything about the child's curriculum on health, sexual development, and sexual abuse is an essential step. A reasonably intelligent child who listens to a lecture in school about how to handle sexual abuse or sees one of the multitude of movies about sexual abuse is going to get the idea pretty quickly about what to say and do to get an adult in trouble.

It is important to question the adults about the child's access to computers and the level of supervision the child receives when using them or watching television. Many children in middle school are given a laptop or tablet to use. Getting access to the equipment and having an expert make a copy and search the files may win the case. Questions about how a young middle school child would have sexual knowledge may be resolved quite easily by a search of the sites the child has visited. An increasing number of children are accessing online pornography at a young age. Even a child's access to popular culture through television may provide ample information about sexual behavior that is beyond what jurors think is the sexual knowledge of an average child. Network television has become fairly explicit in portraying sexual activity, and many children have free access to cable channels that put "R" rated movies to shame. Defense counsel should assume that information about the child's interest in particular television programs and other popular culture may become meaningful later when she obtains the police reports and videotaped interview and continues to analyze the case.

The Context

Learn as much as possible about the child and her life. As defense counsel asks questions about schools, teachers, friends, and family, he must not forget to ask whether he can get access to any records, photos, or physical evidence that may reveal more about the child. If the client is a parent or guardian of the child, defense counsel should immediately have him sign releases or authorizations to get the child accuser's school, medical, or other records. Requests to such providers should be sent as soon as possible.

Often the client's family will have photographs of the child interacting with the client, the family, and other people who may be important. Have the client and his family find those photographs and show them to defense coun-

sel. The activity may trigger memories that will suggest other areas of investigation. They may also show the child interacting comfortably and happily with the accused at a time that is inconsistent with the allegations. Pictures often document events such as birthdays, anniversaries, graduations, or sports activities that are important to children and which the child may use to pinpoint the time of an assault. For example, a child who says she was assaulted on a certain birthday can be confronted with the happy pictures taken an hour later. A child who claims to have been sexually assaulted hundreds of times by the client may have trouble explaining the dozens of pictures that show her joyfully interacting with him.

More and more often, as the statute of limitations for child sex offenses is extended indefinitely, the defense lawyer may encounter a child sex offense case in which the complainant is no longer a child. That teenager or adult may have forgotten that the family archives contain this kind of impeachment material. School yearbooks are useful to document activities, identify school friends who may be witnesses, set a time frame for events, and show changes over the years.

The Preliminary Hearing

In many states, a preliminary hearing is required to determine probable cause for a bind over. In states where the alleged victim is required to appear, this presents a golden opportunity to see and hear how the accuser may hold up in court at trial. When the accuser is a younger child, state law may allow the prosecutor to use a videotape of the interview in lieu of her testimony. When this is allowed, the defense is often not permitted to call the alleged victim as a witness at the hearing. Increasingly, states, such as Wisconsin, are permitting the use of hearsay to establish probable cause.

However, even when the prosecution presents only a videotaped interview or a witness who interviewed the child, the preliminary hearing may still be worthwhile. In order to introduce the video recording, state law may require the prosecutor to provide evidence of authentication, the child's knowledge of the meaning of the oath, or other matters to fulfill the conditions of admissibility. This may force the government to put on the social worker who interviewed the child, thus giving defense counsel an opportunity to learn what happened during breaks, to ask questions about her assessment of the child's maturity or understanding of the oath, or to find out what, if anything, was discussed in front of the child before the interview. Similarly, the investigating detective may be able to provide information about the interviews that are not contained in the reports.

Formal Discovery

Every jurisdiction has its own rules about what discovery the defense is entitled to receive. At a minimum, the defense should receive the police investigative reports and the videotape of the child's interview. Defense counsel should also consider other items that may fall within the definition of discoverable items but may not be in the prosecutor's file. For example, many criminal discovery statutes require the government to turn over a witness's own written statements about an offense. Consider demanding any private writings made by the complainant about the offense, such as diaries or journals. If these writings exist, they provide another useful source of information and impeachment. If the complainant has a diary and the government concedes that the diary does not mention the assault, ask for a stipulation or file a "Request to Admit" under the state's civil procedural statutes that acknowledges that fact to use at trial.

A few jurisdictions allow the taking of depositions in criminal cases, which gives the lawyers an enormous advantage in formulating their strategy. But even in the majority of jurisdictions that do not permit depositions and interrogatories, other ways exist to use the civil discovery rules to obtain additional information. For example, in Wisconsin the rules of criminal procedure state that the "rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction."[4] In other words, the defense lawyer can request that a witness produce documents relevant to the defense or that the defense be allowed entry to the scene with an investigator in order to take its own photos and videotape for use at trial.[5] Given that the scene and items of physical evidence are not always in the control of the state, a separate action may be required.[6]

Defense counsel should talk to the client and other witnesses about items in the possession of the complainant's family that could provide demonstrative evidence for the case. Then, counsel should consider the use of a subpoena *duces tecum* to compel the complainant's family to produce these items, such as photographs or even furniture. If defense counsel believes that jury members will find the child's claim about the details of the assault incredible if they see the size of the love seat where she said it occurred, issue a subpoena directing the complainant's mother to bring a cushion from the love seat to the trial. The client may not have access to the photographs that depict him and the complainant looking relaxed and happy together, but defense counsel may be able to make the complainant's family bring them to the trial or argue that the photographs are exculpatory evidence that should be produced before trial.

The Search Continues

Nothing in life is to be feared.

It is only to be understood.

— Marie Curie
scientist (1867-1934)

These are steps the defense can take during the initial weeks of the case to begin to discover the evidence and define the issues in the case. With time, patience and diligence, preparing and trying the child sex case becomes more manageable and less intimidating to the new practitioner. The better the practitioner understands the child witness and the people around her, the better equipped the defense will be to work toward a successful result for the client.

(Continued on page 62)

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tainly looked" for culpable individuals, but that, "in this case, there … was not someone who we could prove to a court beyond a reasonable doubt … had committed an offense." No individuals were identified — even though Barclays had spent *$250 million* in internal investigations looking for who was responsible.

Judge Sullivan saw this failure to go after individuals as a sign of leniency, calling it a "sweetheart deal." Garrett likewise wonders whether the government could at least have proven willful blindness on the part of the executives, if not intentional criminality. And maybe Judge Sullivan and Garrett are right. Maybe the failure to charge individuals here is an example of leniency.

Or maybe not.

Barclays pleaded guilty to violating the Trading with the Enemy Act and International Emergency Powers Act, both of which require that the perpetrator acted "willfully," meaning with the knowledge that the conduct was generally unlawful (even if the perpetrator did not know of the specific law being violated).[1] This is exceedingly easy to prove when the defendant is a corporation, because under the "collective knowledge rule," a corporation's mental state can be seen as an accumulation of its employees' individual knowledge.[2] But a prosecutor still must identify individual employees and prove that together they had the requisite unlawful intent.[3]

Neither the government nor Barclays was apparently able to do this. The implication from the courtroom exchange is that neither the company nor the government could find anyone at Barclays who knew what had been going on, let alone anyone who knew that the actions of Barclays had been potentially unlawful. And yet Barclays pleaded guilty and the prosecution accepted its plea.

Maybe this was leniency. Or maybe it was the government accepting a plea because its case was weak and big money was on the table. Maybe it was a corporation doing what corporations frequently do when faced with litigation — pay a settlement to make the case go away, whatever the strengths of its defenses.

After all, we know in part thanks to Garrett that innocent individuals sometimes plead guilty to crimes they did not commit because doing so "is a better option than the severe sentence they might receive at trial."[4] Maybe corporations are doing the same thing, and maybe NPAs and DPAs have made it easier for a prosecutor to secure "wins" when the case might not otherwise have been pursued given the strength of the evidence. Knowing all that we can know, we still have no idea whether the punishments in these cases met the alleged crimes.

Notes

1. *See, e.g., United States v. Brodie*, 403 F.3d 123, 147 (3d Cir. 2005).

2. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987).

3. *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1275 (D.C. Cir. 2010) (discussing *Bank of New England and Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 (D.C. Cir. 1996).

4. Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 152 (2011). ■

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The opinions expressed in reviews are those of the reviewers and do not necessarily reflect the opinion of NACDL.

Conquer Your Fear: Taking on a Child Sex Case

(Continued from page 40)

Notes

1. http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf.

2. For interesting discussions on the use of social networking websites in discovery and investigation, see John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 Or. L. Rev. 1201 (2007); Daniel B. Garrie, Anna S. Park & Yoav M. Griver, *Social Networks and Electronic Discovery*, N.J. Law., October 2013, at 33.

3. In a CLE presentation, William Gallagher discussed the potential impact of this material: Defending Difficult Cases: Women & Children Witnesses & False Confessions, NACDL Spring Meeting, Santa Fe (2009).

4. Wis. Stat. § 972.11(1).

5. Wis Stat. § 804.09.

6. "While it is correct that D.D. is not a party to this action, she is not immune from providing information that will resolve the controversy." *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45 ¶39, 625 N.W.2d 876. ■

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