DEFENDING THE INDEFENSIBLE

STRATEGIES FOR DEFENDING PERSONS CHARGED WITH SEXUALLY ABUSING CHILDREN

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SECTION 1 - SCOPE

There are any number of offenses related to sexually inappropriate conduct. This discussion involves a specific niche of cases; child accusers. Omitted from this discussion are cases involving adult accusers. (NOTE: I refrain from using the word “victim”, it assumes guilt. You should too. A victim only exists after guilt is established, until then, they are an accuser.) Adult sexual abuse cases are relatively easy compared to

those involving children. Adults have reasons to lie, adults can give consent and adults having sex with adults is much less repulsive than adults having sex with kids. There is an immediate and visceral "ick" factor in these cases. The tactics and concerns related to a child accuser are much different than those of an adult accuser. Adult accusers can be impeached. The likelihood of your finding a lengthy criminal history and meth use of the 8 year old are slim. What to do?

SECTION II - PRE-ARREST

It happens more often in sexual abuse cases than any other. You receive a call from somebody, appointed or no, that is being asked to come down to the station to give a statement because their child, a child, any child, says they touched them in a bad way. If it is their child, they may have a concomitant DHS investigation and they are concerned about losing their children. They are being told by DHS, law enforcement and maybe a paramour to just go give a statement and straighten this out. WRONG! WRONG! And WRONG! Again.

First, there is no cop, DHS worker or other social worker that does not believe the child and assumes the worst. Second, they want or need a statement because there likely is no physical evidence or any evidence that can corroborate the statement of the child. Third, your client is not smarter than them, albeit a low bar. Finally, confessions are, well, difficult to overcome. "But I have an explanation?" There are no ears more deaf than those of cops or other workers tasked with protecting children. Do not assume rationality. Emotions run high in these circumstances, and, it is always, ALWAYS, the best practice to let the accusation float without your client chiming in. Time tempers emotions.

Tell your client this. You cannot stop or undo the arrest. If they have enough to arrest you, they will. Your client cannot talk themselves out of it. Talking to the cops will only make matters worse. They will (should) understand.

SECTION III - THE BEGINNING

JUMP: [If your client has given a post-miranda, articulate and voluntary confession without promises of leniency, skip to the end, CREATIVE PLEA NEGOTIATIONS. If you are so fortunate to have a complete or at least a partial denial, proceed.]

A. KNOW THE LAW.

Yes, I realize this is academic, but in the world of sex abuse, there are many definitions that are not intuitive. For example, what is a child? Younger than sixteen? Twelve? Some offenses are age specific, i.e. Sex abuse in the 2nd degree where the accuser must be younger than twelve years of age contrasted with lascivious acts with a child where a child is defined as fourteen years of age or younger. When it comes to sex abuses cases, do not assume you "know" anything. Even if you have experience with this area of the law, check and recheck the specific elements and definitions of the particular offense you are looking at to make sure your memory is correct.

What is sex or a sex act? Again, this seems simple enough but it is not. The law is very specific about what sex acts are and then carves out the difference between sexual abuse, lascivious conduct and indecent contact. It is important to know what a sex act is in particular when questioning the accuser either during a deposition or at trial to ensure that the act or touching they describe actually crosses the threshold of a sex act as opposed to what otherwise would be described as sexual conduct. In other words, it is not necessarily illegal to be lewd with a child, the core question is how the person acted on the lewdness.

Finally, at the risk of resurrecting the dead horse only to beat it again, you must know the law to accurately advise your client of the consequences of any conviction whether by plea or otherwise. In no

other area of criminal conduct are the collateral consequences so numerous and meaningful. You must know what crimes qualify for registering as a sex offender and for how long. You must know if a particular conviction has any form of residency restriction. You must know if the "special" sentence applies. Especially in this time when the reviewing courts are hyper-sensitive about accurate advice on collateral issues, defending sex abuse cases is rife with potential PCR pitfalls. So, know your law.

B. RIP THE BANDAID OFF/BE HONEST.

Your client needs to know they are in a world of hurt. The child accuser is the most dangerous in contrast to the "easy" cases involving adult accusers. Your client needs to know it is an uphill climb. They need to know the presumption of innocence just did a 180. Why, because you are thinking the same. The accusation signals guilt. You know it because you thought that same thing, if not openly. If your client has denied anything from the beginning, god bless them. If they remained silent, god bless them only slightly less. If they admitted to feeling bad about what they did….tease that out. They may feel guilty about something that is not a crime. See above, Know The Law. If your client admitted to everything and the interview was a custodial Mirandized interview, skip to the JUMP.

Beware the family, or, in other words, the enablers and the walking free. They are enablers because they refuse to believe Johnny could do such a thing. They are walking free because Johnny learned it from Cousin Joe. Most often, this behavior sprouts from a family of this history. They will challenge you and want to know why you are not defending them more vigorously. Why? Because they have not seen the video confession. Why? Because the have not heard Johnny say, "yes, I have a problem." But do not, ever, ever, tell them what you know. They will want you to. They will assume you are a terrible lawyer and bad

advocate. But your ego matters not. Confidentiality and the sealed record matter much much more. Just tell them, quite earnestly, "I know more than you know, and I cannot tell you why. You understand."

C. DON'T BE THEM OR EVERY HUMAN BEING.

It is easy to join the ick crowd. You have to dig deep for empathy in these cases. Most often, you will be your client's only friend, unless, of course, they have an enabling mother. As with many cases but with these in particular, you must fight the temptation to be dismissive and half-assed, with that little devil on your shoulder telling you he is just a pedophile. Slap yourself and dig in to do your best work, that's what defense attorneys do. If you are saying to yourself as you read this that you have never felt that way or you do not understand what I am talking about, also slap yourself. Either you are not being honest with yourself or you are avoiding being self-aware, you need to slap yourself in either case.

SECTION IV - THE MIDDLE OR THE INVESTIGATION.

Congratulations, you and your investigator now get to delve into the depths of a depraved family. Nine times out of 8.93 times, an allegation of sexual abuse by a child is not something new to a family, what's new to them is that law enforcement got involved. In the past, the family was able to bury the claim to save uncle Johnny, not now. Now, here are some things to look for/investigate to help find a chink in the State's formidable armor.

A. RELATIONSHIPS - FAMILY HISTORTY.

You need to establish the family history. Often you will be confronted

with mixed families….step fathers, step mothers, baby mommas, girlfriend/fiancé/wife. Do not assume your client's description of relationships are accurate. There are many fiancés and wives roaming about that your client has not bothered to put a ring on. So, make sure you question what someone actually is.

Ask your client and their family members how they all get along. Who hates who. How children interact with your client. Do they all become quiet and run to the corner of the room when Uncle Johnny walks in or do they play with him, laughing and having a wee old time.

Find out what daily life is like. Who does what in the home. Who cooks, cleans, changes diapers, takes to school etc. You need to determine who is in the child's life and what they are exposed to on a daily basis. All of this information has varying importance also related to the timing of the allegation.

B. CONTEMPORARY OR OLD ACCUSATION.

If grandma walks in on her son sleeping naked with her granddaughter, that is a tough row to hoe. However, if you have a 16 year old now claiming she was abused when she was 11, you have several matters to look at. The key question to ask is, if she was indeed abused as an 11 year old, what else should be true? Or, at least, what else do people (I.e. Jurors) assume would be true.

First, there should be an attitude change toward your client. If your client did something bad to the young girl, the family should have noticed a change in her interaction with your client. So, ask if so. If they continued to get along swimmingly, that is one arrow in your quiver. Beware the "he told me he would kill me if I told anyone" reply to this assumption and the "expert" that will testify about why children do not reveal the abuse discussed further below.

Second, their grades will suffer. People assume that having to do with the mental trauma of abuse will make it difficult for the child to concentrate and do well in school. So, see if you can obtain the school

records of the child for the relevant time period. If they remain relatively similar to pre and post claimed abuse, you have another arrow. If her grades tanked….move on and do not share what you know with the State.

Third, behavioral problems. People assume there should be some form of acting out by the child in response to the abuse. Ask if the child was ever in counseling during that time period. Utilizing the same school records, look to see if there were any behavior problems identified during that would jive with the abuse being true. If not, another arrow. See how easy this is?

Finally, when you have somebody in their late teen years claiming old abuse….look for the motive to lie. Are they upset they did not get a car? Do they have friends that have claimed abuse? Is there evidence of disciplinary problems between your client and the child. Does the child have a history of lying? What does there social media activity show. The closer a "child" comes to adulthood, the better the chance you can convince a jury that they are being manipulative.

C. MOTIVE TO LIE?

Recall the presumption of innocence in these cases is a fiction. When a child accuses an adult of abuse, they are assumed by juries to be telling the truth. After all, what benefit do they derive from saying those things? Or, as the prosecutor likes to point out, why would they put themselves through this if it was true? All good questions, all need answered in some fashion. Some things to look for…..

OLD ENOUGH TO LIE THEMSELVES?

What age is it? Who knows. It is safe to assume that most jurors will believe someone is capable of making it all up if they have reached their teenage years. That is likely when most folks will recall having their own problems as a child and when their children, if they were to become

behavioral problems, really had their manipulative jets kick in. It is equally true, however, that if the child is younger than a teenager, you will have a difficult time persuading a jury that they came up with all of this on their own so you need to look for an outside influence.

COACHED TO LIE BY ADULT

Presumably your digging into family history/dynamics would reveal divorces, custody disputes etc. Your client will believe his ex put the kid up to it so you should look into it. Jurors will more likely accept a manipulative parent in a custody battle than a lying 8 year old. If there is a concurrent DHS investigation or custody battle going on, do your best to obtain the reports and paperwork involved in each. They may help.

LANGUAGE

Easily one of the best ways to flush out if a child is lying, being coached or otherwise being fanciful is to look at the language they use to describe the abuse. Pay particular attention to the words used. You should watch the CPC interview and then watch it again. Eight year olds do not use words like vagina or penis or, in a more crass way, dick or pussy. Pay attention to what language they use to describe body parts and also the action or touching they describe. If the words used and the descriptions given betray their age, it is evidence of outside influence or coaching.

DAD'S HOME PORN STASH

Find out in your investigation if pornography was easily available in the home. Movies, magazines etc. The cops will have likely already seized any computer in the home, much sure you avail yourself to those reports as well as cell phone information to check and see how often those devices were used to access pornographic sites. While interviewing

family, ask them if pornography was rampant, what safeguards they had in place for access etc. In other words, anything to show the child learned of these acts from outside sources, not from personal experience with daddy or uncle Johnny.

D. MISTAKE?

The best factual scenario and argument is that the child is mistaken, not a liar. It is much easier to convince a jury that, in these days of hypersensitivity to potential abuse, the child correctly reported what was believed to be an inappropriate touch. Of course, if the evidence is DNA from semen on the child, the mistake matters not. However, if physical evidence is lacking and what is described is touching….you may have a chance. Some things to look for…

HYPER SENSITIVITY - GOOD TOUCH BAD TOUCH

With school aged children, a part of your investigation should involve obtaining any curriculum they may have been exposed to at school related to Good Touch/Bad Touch. The idea being that the child has been keyed in on any contact, no matter the nature, of the private parts. Moreover, if the language used in the curriculum jives with the descriptive words used by the child, your argument of its influence is strengthened.

E. NOT DEFENSES.

No matter your clients sincere desire to proceed with their own theories, do your best to dissuade them of the following defenses: 1) it slipped , 2) I was teaching him how to masturbate and 3) she's a 6 year old hussy.

IV. PRE-TRIAL PRACTICE

A. DEPOSITIONS.

Anybody that knows me knows that I am not a fan of depositions. I think they are overused and people do not critically weigh the need for depositions vs preparing the prosecutor for your case and giving the State a chance to fix problems before a jury hears them. One of the few exceptions I have to this general rule is in child sexual abuse cases. There are two reasons for this exception.

The first reason relates to the uphill climb we all have, a jury will want to believe the child. Depositions are a way to show inconsistencies in the story in hopes of developing the case as a lie. To paraphrase Mark Twain, when you are telling the truth, you do not have to remember what you said. More often then not, child sexual abuse cases involve statements alone with not physical evidence. One of the few ways to assail the State's case is to obtain and compare and contrast statements. So, in the typical case you will have the 1) statement to the first adult (aunt or grandma or teacher), 2) statement to law enforcement summoned to investigate, 3) statement to the CPC and 4) the deposition. Then hope there is enough variance in all of those statements to give you something to work with.

A couple of hints about depositions. First, if possible, you want as much time to lapse between the CPC interview and the deposition. Time fades memories making it harder for the child to remember what they said. Second, just ask the child to tell their story again from start to finish. Do not go in armed with questions attacking the child. There is no jury there to see it and you will not win this case in a Perry Mason moment where the child breaks down on the stand, crying and yelling, OK

I LIED, MOM MADE ME DO IT. Also, you do not want your questioning to be tainted by the direction the investigation took and the statements previously made. Just have them tell it again, then regroup and compare and contrast all four statements.

Regarding questioning children in general. You will not endear yourself to the jury by attacking a 10 year old. While you may prove yourself smarter than a 5th grader, the jury already assumed you were. Now they think you are just cruel. Instead, elicit the testimony you want, the retelling of the story with inconsistencies and save your indignant comments for closing argument. Calling a child a liar will get you nowhere. Calling into question whether the State has met its burden and questioning how a person can be convicted on only inconsistent statements is much safer and palatable.

The second reason is you need detail which relates to the first point of this discussion, know the law. You need to know exactly where on the body the child claimed they were touched. "In the butt, Bob" is not accurate enough. The law requires contact with specific parts of the nether regions so, as politely as you can, you have to get the child to be specific. You also need to be very specific about any motion that may have occurred…wiggling fingers etc. if you have a case of mistake or the State has a specific intent element. The CPC interviewer will not have gone into such detail because they do not care, you do.

B. MOTIONS TO SUPPRESS/IN LIMINE

If you client gave a statement, go through the check down of custodial interrogations and Miranda. This may be anecdotal, but my experience has been that law enforcement dances around promises of leniency in these types of cases more so than others because they need a confession to book end the child's statement. So, when reviewing video, pay close attention to the language used by law enforcement and know

your case law on promises of leniency. This is one of the few areas of law that is somewhat pro-defense.

You might as well start this fight early to completely develop your record. In all likelihood the State will want to call someone from Child Protective Services to explain why children do not come forward immediately or something along those lines. Object. Object. Object. It is not relevant, invades the province of the jury as fact finding, inappropriately bolsters the witness etc. And, whatever else you may think of. There is somewhat evolving case law on this, know it.

And prior bad acts. The computer they seized, yes, had child pornography on it. There is a sliver of cases in close call sexual abuse cases wherein the State may be able to introduce the child pornography as a prior bad act to show identity. This is especially likely when the victim is dead or too young to testify. Do not assume that it is a no brainer, the Iowa Supreme Court says so.

V. CREATIVE PLEA NEGOTIATIONS

A. PRISON.

Anything you can do to keep them out of it is a good thing. This is prosecutor dependent and, of course, varies wildly from county to county. One thing to consider, however, is obtaining a private psycho-sexual evaluation of your client. If the evaluation tends to show whatever happened was an isolated incident that your client has addressed through counseling, it can be used as a tool to explain why incarceration is not necessary because your client is no longer a threat. If the evaluation labels your client a sick pedophile, bury the report. Actually, you should not have anything to bury, you should have asked for an oral report before you opted to have anything reduced to writing.

B. SPECIAL SENTENCE.

Congratulations, your client is special. If they are convicted of a qualifying B or C felony, they are on parole for life, a D felony or below, for 10 years. And they get to register as a sex offender for the entire time they are on parole. If the county attorney is not willing to decrease the level of offense, if it is deferrable, a deferred judgment is the next best thing. At least as of this writing, conviction does not mean a deferred judgment for 903B purposes so the special sentence is not imposed if judgment is deferred. Given the collateral baggage avoided with a deferred judgment in these types of cases, it is a very good thing.

Another way to avoid the special sentence is to convince the prosecutor to allow your defendant to plead to some form of enticement. By my reading of the code, the special sentence only applies to 709 violations, incest and sexual exploitation of a minor. It does not apply to enticing away a minor. This may work best in Romeo and Juliet cases, the non-forcible sex abuse thirds. After all, there is a factual basis given the 20 year old did entice away the 15 year old for an afternoon. However, the argument goes, these defendant's do not need to be on parole for life and the way to avoid that result is to allow them to plead to something under the enticement provisions. Something to consider anyway, look to 710.10.

VI. TRIAL

If you have made it this far, sorry. Plea negotiations fell through and you are left to try this dog. Well, buck up, its what we do.

Step 1 - pick a pro sex offender jury.

Kidding, good luck with that. It is very difficult to find a jury to

look at your case the way you want them to. Suffice it to say, you need a very strong beyond a reasonable doubt crowd.

In all seriousness, you should consider waiving a jury. I am not one that is quick to do so because I like my chances with 12 persons versus 1 and with the wrong judge a bench trial is only a long plea. Sometimes, however, you have to split a legal or definitional hair that, in light of all of the other salacious evidence, would fall on the very deaf ears of a jury. The argument might, just might, find some traction with a judge. Also, a judge knows the consequences of a verdict and, if the prosecutor is being heavy handed, the judge, if so inclined, can render a verdict to lesser included offenses with an eye toward the consequences.

The important thing is to not have, as I often do, jury blinders on. Remember to step back and look at the whole picture, your argument, the judge, the likelihood of success with the jury etc. At least examine the possibility. If you chose not too, that is fine, but do not forget the option especially in these cases.

VII. REFLECT

After the trial, no matter the verdict, take some time for yourself. Hopefully, you are human and what you had to see and read and testimony you heard had an impact on you. It takes its toll acknowledge that it does and give yourself some time….rest, reflect and rejuvenate to fight another day.