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Feature

CHILD SEXUAL ABUSE: DEFENDING THE ALLEGED ABUSER

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Sexual abuse allegations, which have been increasing in all contexts during the past decade, still account for less than 4 percent of all contested custody and visitation cases. See, e.g., McIntosh & Prinz, “The [Incidence of Alleged Sexual Abuse in 603 Family Court Cases](#),” 17 *Law & Hum. Behav.* 95 (Feb. 1993) (3.5 percent of all contested cases, 0.83 percent of contested custody/visitation cases); Thoennes & Tjaden, “The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes,” 14 *Child Abuse & Neglect* 151 (1990) (less than 2 percent of more than 9,000 cases in 12 states).

Because in a domestic relations case the judge is mandated to enter an order in the child's best interests, the most effective defense against child sexual abuse allegations is to remain child oriented. Present your case in a way that focuses on those interests, instead of on the wrong being done to the accused parent.

If your client did not, in fact, molest the child, it may be difficult to get beyond his or her emotional outrage and desire to punish the accusing parent. However, it is important that the client be focused on the child's needs and demonstrate sensitivity to the child's situation. In the eyes of the judge, this sensitivity may help distinguish your client from a molester who can focus only on his or her feelings and needs for emotional or sexual gratification.

Before you attempt to represent a parent accused of sexual abuse, think seriously about your own response to these matters. If you find sexual abuse to be so repugnant that you can't help but communicate that feeling directly or subtly to the client, you should decline the case. It will be very difficult for clients to tell you the truth if they sense that you cannot represent them unless you are convinced of their innocence.

If you decide to continue with the representation, be open with your client from the first interview. Give your client permission to tell the truth about what happened. Begin by explaining that knowing the truth will put you in the best position to advocate for the client in court, and that even if the client did molest the child, there are steps that can be taken to assure a more favorable outcome.

If possible, determine the facts at the outset. Your defense strategy will differ depending on whether the child was molested--by the client or somebody else; whether the client acted inappropriately--even if the conduct did not constitute molestation; whether the allegations represent a good faith but erroneous misinterpretation of behaviors; or whether the allegations are deliberately fabricated.

It is important to realize that the process of disclosure may be just as gradual for the abuser as it was for the molested child. Therefore, if the client did molest the child, the story is likely to come out in bits and pieces over time. Usually the most detrimental information will come out later in the process as the client tests the attorney's reaction to less damaging admissions.

One way of facilitating honest disclosure is to focus on the child and the child's needs. For example, you can say, "Children really need two loving parents with whom they can be safe. A parent who has molested a child can still be an important part of that child's life."

Explain the availability of therapy to help parents who have molested their children and to help rehabilitate the parent-child relationship when no abuse has occurred but the child or the other parent believes it has. Emphasize that a child who is afraid of a parent, even based on deliberate fabrication and coaching by the other parent, is nevertheless really afraid and that some therapeutic work will be needed in the future to ensure a safe and supportive environment *from the child's perspective*. Help the client to understand that it is not sufficient to force visitation as a means of demonstrating to the child that no molestation will occur during future visits.

Allegations of sexual abuse create turmoil for everybody in the family. By focusing on the child's needs, the accused parent can react in a healthy way. Rather than focusing on feelings of anger and righteous indignation, the accused parent can address the needs of the child, who is suffering either from actual abuse or from the turmoil of the accusations.

By getting the parent into a child-oriented stance early in the case, you can maximize disclosure and show \*54 that the client is genuinely concerned for the child and willing to cooperate with a plan that will maximize the child's interests. Judges are more likely to respond favorably to this approach.

One caveat: If the client admits molestation, consider consulting with or having the client retain a criminal defense attorney. What may be a beneficial strategy in the domestic relations or child protective services case may be contrary to the client's interests in a criminal case. If prosecution is likely and the client did molest the child, the most prudent course is usually to forgo contesting the domestic relations action.

Although I do not believe that polygraphs, sodium amytol, or penile plethysmograph interviews are helpful in determining whether a person molested a child, I often ask clients whether they are *willing* to undergo such procedures. Their responses often tell me as much as the questionable results of the tests.

### **Hire a specialist**

The expert testimony of professionals who evaluate the child and the various other parties will be important evidence to use or discredit during negotiations and at trial. Unfortunately, there is no magic bullet to definitively determine what happened and who did what. Except in the most extreme cases, there will always be some degree of uncertainty. No battery of tests can *prove* that a person molested a child or *exonerate* a wrongly accused person. There also may be distrust among experts regarding methods and conclusions.

Experts with limited credentials or experience in the highly specialized field of child sexual abuse often hold themselves out as having far more knowledge and clinical judgment than they actually have. Some who sell themselves as expert witnesses for a cause take extreme positions based on shaky evidence and always reach the same conclusion.

It is essential to find well-qualified, reputable experts who have both clinical experience and knowledge of the current empirical literature in the field. Look for an expert's affiliation with such organizations as the American Professional Society on the Abuse of Children or the International Society on the Prevention of Child Abuse and Neglect, which provide multidisciplinary empirical and clinical information for members. Pediatricians and psychologists who provide evaluations for teaching hospitals and child protective service agencies are likely to have far more experience than other professionals, because most private practices do not include large numbers of sexual abuse cases.

Sometimes--especially in cases involving very young children--the facts are never known. In these situations, suggest to the court therapeutic management techniques to safeguard the child while permitting ongoing relationships. One excellent

methodology involves a one- to two-year process during which the parents and child agree on guidelines for touches. The child is given explicit permission by the parents to “tell” about bad touches, and the visitations between the child and accused parent are monitored to varying degrees by the managing therapist. See S. Hewitt, “Therapeutic Management of Preschool Cases of Alleged but Unsubstantiated Sexual Abuse,” 70/1 *Child Welfare*, 59 (1991); reprinted in part in A. Haralambie, 2 *Handling Child Custody, Abuse, and Adoption Cases* App. 16-5 (2nd ed, Shepard's/McGraw-Hill, 1993).

It is always difficult to prove a negative, and sexual abuse “risk assessments” are no exception. Normal adult sexual relationships do not preclude a person from molesting a child. Not all child molesters are pedophiles in the sense that they are sexually aroused primarily or solely by children. Child molesters have no definitive psychological characteristics and do not necessarily show evidence of psychopathology on standard tests.

### **No reliable test**

Some instruments and procedures widely used with admitted sex offenders, such as penile plethysmography (which physically measures arousal to certain sexual stimuli) and the Multiphasic Sex Inventory II (H. Nichols & J. Molinder, *Multiphasic Sex Inventory II* [1990], a written test, cannot diagnose a sex offender. Some risk assessments also use polygraph examinations, which may be particularly unreliable when used with intrafamilial sex offenders, who often do not believe they have done anything wrong and therefore do not produce the assumed indicia of lying. See, e.g., T. Cross & L. Saxe, “A Critique of the Validity of Polygraph Testing in Child Sexual Abuse Cases,” 1 *J. Child Sexual Abuse* 19 (1992).

There is not yet consensus in the field that would support expert testimony to prove a person did not molest a child or did not fit “the profile” of a child molester. See, generally, J. Becker & V. Quinsey, “Assessing Suspected Child Molesters,” 17 *Child Abuse & Neglect* 169 (1993). For that reason, risk assessments are not particularly useful with parents who deny the allegations. They may be more useful for measuring progress in therapy for someone who has admitted molesting children in the past.

Psychological evaluations by clinicians with experience in the child sexual abuse field are probably more helpful than specific risk assessments, but they cannot definitively disprove the allegations.

Except perhaps in the case of a confession, no psychological evaluation can determine whether any person did or did not commit a particular act. However, an evaluation can look at \*56 whether the client has impulse control or judgment problems--often seen in people who molest their children, and whether the client has age-appropriate expectations of the child, and whether the client has appropriate boundaries and sensitivities to the child's privacy.

Further, the expert can evaluate the client's level of stress, degree of isolation, and emotional support system, all of which are relevant to the circumstances that may create an environment in which an opportunistic molestation may occur. Even though the evaluation cannot rule out molestation, the expert can at least document the absence of indicators showing that the client is likely to have molested the child.

### **Your client did it**

When criminal prosecution is a real possibility, the client may be unable to take the most therapeutically appropriate posture in the domestic relations case--usually to admit responsibility and seek therapy. However, in some cases, prosecutors may agree not to use any statements made in therapy or as part of the custody/visitation case, other than admissions to new incidents. Such agreements reduce criminal exposure. Lawyers should get any such agreement in writing and instruct the client to reveal admissions only in the manner that is protected by the agreement.

When there is no criminal exposure, decide whether you will fight the allegations, put the other parent to the proof, or try to settle the case. My own preference is usually for the latter course. Settling the case is less expensive and less emotionally

draining for both parties and the child. Further, settlement may reduce the client's criminal exposure and may preclude the use of collateral estoppel in a subsequent tort action based on the molestation.

If the client admits to the molestation, it may be worthwhile to have the client meet with a child psychologist or other expert for advice on what is appropriate for the child. If the child is in therapy or has been evaluated, the child's therapist may be the best person to talk to. However, ethical considerations may preclude the child's therapist from doing therapy with the molester. The goal of talking to the expert is to rehabilitate the parent and repair the parent-child relationship. This will best serve the client's long-term interests in maintaining an ongoing relationship with the child. If the other parent sees that the molester is serious about remedying the problem, the entire family may be able to work together for the child's benefit, and the judge may be more willing to permit visitation.

### **Inappropriate conduct**

Many times the client's conduct might not rise to the level of molestation but might be considered inappropriate, e.g., sleeping or bathing with a child of the opposite sex past a certain age (experts differ on a cutoff age), allowing children to observe sexual conduct between adults or to watch sexually explicit videos, and engaging in romantic embraces and kisses that fall short of being overtly sexual.

This type of conduct might be a prelude or grooming period prior to a molestation, or it might be a reflection of poor judgment or a lack of awareness of appropriate boundaries. For example, a parent might not be aware of the child's growing sense of body awareness and need for privacy. What was an appropriate caress of a two-year-old's bottom might be viewed as an unwanted invasion of a nine-year-old's privacy.

A child development expert with experience in the child sexual abuse field is a good educational resource for the client who is unclear about appropriate conduct. The goal is to teach the client appropriate boundaries, increase the client's insight into the child's perspective and response to the conduct, and obtain the client's voluntary commitment to refrain from such conduct in the future.

If the child has expressed discomfort with the inappropriate conduct, ask the expert to facilitate preparation of a joint list describing appropriate boundaries. The child and parent then know what is acceptable, and the child is given permission to report any transgressions.

If the case goes to trial, it is important to convince the court that it is not in the best interests of the child or the accused parent to label inappropriate conduct as sexual abuse, especially if the conduct was the result of poor judgment rather than the grooming phase of a molestation. Obviously, the parent does not want to be labeled a child molester, but it is equally important not to mislabel a child as an abuse victim (or "survivor").

The child's self-esteem will suffer if insensitive conduct is interpreted as sexual abuse. The sense of violation and betrayal that accompanies molestation has long-lasting negative effects. Consider having a child psychologist testify about these effects. The court is more likely to be persuaded by a child-oriented defense than by a client/parent focused one.

### **Good-faith allegations**

The largest group of false allegations appears to fall into the category of erroneous but good faith. With growing public awareness and school prevention programs has come a more acute sensitivity to symptoms of child sexual abuse. Unfortunately, with the possible exception of overt sexual behavior by young children, the warning signs of child sexual abuse are the general symptoms of childhood depression and anxiety. Although sexual abuse may certainly result in depression and anxiety, other situations, including marital discord, separation, and divorce, may \*57 also produce such symptoms.

Based on the child's behavior, a well-intentioned parent who is trying to protect his or her child may have legitimate concern, which warrants further investigation. As a matter of public policy, such investigations should be encouraged.

There is nothing unusual or sinister about a parent's following up on a child's statements about possible abuse or unusual behaviors. In fact, it would be bizarre for a parent confronted with a child's statement of molestation to adopt the posture, "Don't say anything else; I don't want to contaminate the interview; wait until a neutral party talks to you." Parents do not respond in that manner to other circumstances involving their children, and it would be an unfortunate perversion of the parent-child relationship to impose such a requirement in the case of sexual molestation allegations.

One of the most serious errors that attorneys make in these cases is to treat the allegations as deliberate fabrications. That response polarizes the parties, makes meaningful cooperation impossible, and places the client in the position of trying to prove an extreme case, usually unsuccessfully. Further, it burns bridges and threatens to scar permanently the child's relationship with both parents. Even in a heated custody case, ascribing malevolent motives to a parent who may only be seeking to protect a child may backfire.

It is helpful to ask the accused client: How would you feel if the child told you the same thing about the other parent? What actions would you take? Wouldn't you be angry with the person you believed had molested your child? Isn't it possible that you would hate that parent?

This exercise helps the client understand the intensity of emotions behind the accusing parent's language and actions. Rather than responding in kind to the accusations, again encourage the innocent client to assume a child-centered posture. The child may have been molested by somebody, even if the client is not the molester, or the child may be in distress over some other life circumstance. *Both* parents should focus on discovering the truth and protecting the child.

Conduct a thorough evaluation to determine whether the child was molested and to identify the perpetrator. If the child was not molested, he or she may still need therapeutic intervention to deal with the disturbing life circumstances. The attorney can help focus the client on cooperating with the effort to determine what has happened to the child and to respond protectively.

If the child was not molested, the parent making the accusations needs reassurance from a well-qualified professional who has seriously considered but ruled out the possibility of molestation. If the accused parent has not overreacted to the allegations by responding with countercharges of fabrication, it is more likely that the accusing parent will be able to look beyond molestation for an explanation of the child's statements or behaviors and \*58 accept the expert's reassurance.

Parents who have been molested as children may be hypervigilant to signs of abuse and misinterpret innocent conduct as molestation. In such cases, the accusing parent usually will need therapy to address his or her own victimization, as well as to understand why it is not healthy for the child to have innocent conduct interpreted as sexual abuse.

If the child believes that he or she has been molested, the child will also need reassurance and possibly a period of therapeutic work with the accused parent to reestablish a normal relationship. Again, the accused parent's willingness to understand that an erroneous accusation may nonetheless be made in good faith and to address the child's needs will facilitate an agreement with the accusing parent or a successful defense at trial.

### **Fabricated allegations**

Statistically, this is the least likely scenario, even though most defenses appear to be based on the assumption that the allegations are fabricated. Fabricated allegations appear to be more common in divorce and postdivorce litigation than in other contexts, but they are still relatively infrequent. See, e.g., N. Thoennes & P. Tjaden, "The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes," 14 *Child Abuse & Neglect* 151 (1990). Cf., J. McGraw & H. Smith, "Child Sexual

Abuse Allegations Amidst Divorce and Custody Proceedings: Refining the Validation Process," 1 *J. Child Sexual Abuse* 49 (1992).

Objective professionals who are experienced in sexual abuse cases consider the possibility of fabrication when they evaluate allegations of sexual abuse. However, no scales, instruments, or batteries of tests can diagnose fabrications. One of the most widespread measures, Richard Gardner's Sexual Abuse Legitimacy (SAL) Scale, is deliberately skewed toward finding fabrication. See R. Gardner, *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse* (1987). Even Dr. Gardner has now repudiated it. See R. Gardner, *True and False Accusations of Child Sexual Abuse* (1992). For a detailed critique of the SAL Scale, see A. Haralambie, 2 *Handling Child Custody, Abuse, and Adoption Cases* § 16.08 (2nd ed, Shepard's/McGrawHill, 1993). Attorneys should not present evidence based on such measures, because they are easily attacked.

A more effective strategy is to use a well-qualified mental health professional to do a thorough evaluation. The person should not be a hired gun who always finds that allegations were fabricated. The expert should have clinical experience with children who have been molested as well as broad and current knowledge of the literature in the field. The person should approach the evaluation objectively, considering possibilities of both molestation and fabrication. The expert or a team of experts should evaluate the child and, if possible, both parents.

Especially with allegations involving young children, a skilled clinician should be able to uncover deliberate fabrications. Often the children will reveal they had been told to say things that were not true. Further, such brainwashed children will be unable to maintain the fabrication over time. When asked to recount the incidents, they will use the same words in the same order and will be unable to elaborate or respond to questions asked out of sequence or rephrased. The situation may be more difficult with teenagers, who can be more sophisticated and consistent in maintaining a lie.

Fabricated allegations are a form of child abuse. Not only do false allegations unfairly disrupt the relationship between the child and the wrongly accused parent, but in the case of young children (who may actually believe they have been molested), they also unfairly stigmatize the children, whose self-esteem may suffer from a sense of violation and betrayal--the most damaging effect of molestation. The expert should provide testimony concerning this abusive effect of the allegations and point out why under these circumstances it is not appropriate to enter an order that presumes the allegations to be true just to "be safe."

### **Real fears**

Regardless of the truthfulness of allegations, once they have been made, they inevitably affect the relationship between the accused parent and the child. The child may be afraid of the accused parent, even without a reason. The fear is real whether or not it is based on fact.

Although it may be particularly difficult for a wrongly accused parent to accept anything less than unrestricted contact with the child, it is almost always in the best interests of the parent and the child to have therapeutic assistance in reestablishing a safe relationship. An outcome that merely provides unrestricted contact may be a Pyrrhic victory if the child is apprehensive during that contact.

Further, some period of supervised visitation may provide evidence of the accused parent's appropriate interactions with the child, reassuring both the accusing parent and judge that the child is not in physical or emotional danger. It also protects the accused parent from further allegations of abuse, especially if the supervisor is a neutral person. In addressing the immediate issue of the allegations, it is important to maintain a long-term perspective that will result in a healthy ongoing relationship between the child and the accused parent.

Footnotes

Note

1. *Ann M. Haralambie practices family law in Tucson, Arizona. She is the author of Handling Child Custody, Abuse, and Adoption Cases (2nd ed, Shepard's/McGraw-Hill, 1993).*

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