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Family Advocate
Winter, 1995

Feature

CHILD SEXUAL ABUSE: REPRESENTING THE ACCUSER

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Sexual abuse cases are a nightmare for most matrimonial lawyers. They intensify the emotional landscape of the case and require knowledge of the specialized field of intrafamilial child sexual abuse.

The accuser in a sexual abuse case, statistically most likely to be the mother, often faces a disbelieving court. In part, this is because domestic relations judges typically hear litigants exaggerate minor incidents in an effort to win custody. This makes them more skeptical than judges who routinely hear child abuse and neglect cases. Further, there is much about child abuse that is counter-intuitive. Even badly abused children may love their abusive parents and act lovingly toward them. Abusers may look like model members of the community. They may have sexual relationships with other adults, and they may never have molested a child until the separation or the breakdown of their marriage.

Determining the facts

If you take the case, your first obligation is to investigate whether the allegations are justified by the evidence. It would be abusive to the child and unethical to pursue allegations that have no basis in fact. The best insurance against this is to hire a qualified expert rather than a highly polarized expert witness who always finds abuse.

Experts should have specialized and up-to-date training in the dynamics of intrafamilial child sexual abuse, including attendance at conferences and regular updates of the peer-reviewed literature in the field. The expert may also belong to such organizations as the American Professional Society on the Abuse of Children or the International Society on the Prevention of Child Abuse and Neglect. Experts may also be affiliated with teaching hospitals or serve as consultants to child protective service agencies, thereby seeing enough cases to develop good clinical judgment. Unfortunately, in some communities, consultants are predisposed to find abuse. Others may be predisposed to disbelieve cases that arise in the context of a divorce.

If the allegations do not appear to be true, determine whether they were deliberately fabricated or merely good-faith misinterpretations. If they were misinterpretations, the expert should explain to the parent why the indicators--typical of childhood depression or anxiety as well as sexual abuse--reveal other problems that need to be dealt with. It would be unfair to incorrectly label the child as abused and to interfere with the child's relationship with the other parent. The accusing parent will need to be reassured that the child is safe.

If the allegations constitute inappropriate conduct that is not molestation, such as sleeping or bathing with an older child (the experts differ on the cutoff ages) or failing to give a developing child adequate privacy, the expert should suggest a strategy for educating or sensitizing the parent.

Deliberately fabricated allegations, which indeed do occur from time to time, are relatively easy for properly trained experts and attorneys to disprove. However, because many judges and expert witnesses believe that there is an epidemic of false allegations,

the attorney attempting to prove sexual abuse must be prepared to address that concern in most cases. It is the most likely defense to be offered by the opposing party.

Basic strategies

The primary focus of the case should always remain on the child: What happened to the child, what was the effect on the child, what special needs does the child have, and what are the ramifications for custody and visitation? It is a mistake to focus the case on how bad the other parent is or how good your client is. Further, even if the parent is responding badly to the allegations (interrogating the child, coaching the child to elaborate on what really happened, etc.), the child must still be protected. The critical inquiry is which custody/visitation scheme best protects the child's interests. That may involve deciding between two parents, both of whom have problems.

Attorneys often argue that the judge should not lightly brand a parent an abuser. But, by the same token, the court should not lightly place in a position of jeopardy a child who is illequipped to protect himself or herself. This is particularly true because of the deep and far-reaching effects of sexual abuse on a child.

Ask your expert to testify clearly about both the short- and long-term effects of abuse. Many judges do not realize how pervasive the consequences of abuse are to a child. They do not understand the powerlessness a child feels when he or she is not believed or not protected. The expert must make the judge aware of just how crucial the decision is to the *child's* well-being and how necessary it is to give protection of the child a high priority.

Make a special effort to educate the judge about intrafamilial child sexual abuse. There are psychodynamic explanations for why a child may first be molested during the parents' separation or a change in visitation or why a child may first disclose abuse under those circumstances. The timing may appear to be too convenient, but a good expert can show the judge underlying reasons for it. Some judges resist ***62** this education, but the expert's evidence is proper and necessary to a fair adjudication of the claims.

Expert testimony

It is essential to present effective expert testimony. This may require calling a witness who is not directly involved in the case as well as any professionals who may have evaluated or treated the parents or children. In addition to being a qualified professional (e.g., social worker, psychologist, or physician), the expert must have a good theoretical background and practical experience in this particular facet of child abuse. Many cases are lost because the family physician or therapist did not have sufficient expertise in intrafamilial child sexual abuse. These cases are difficult enough for experienced specialists. Otherwise competent professionals who lack this specialized training and experience may often miss or misinterpret important data.

The American Medical Association has recently published *Diagnostic and Treatment Guidelines on Child Sexual Abuse* (1992). The American Academy of Pediatrics and other professional organizations have also published guidelines for abuse cases. It is important for the expert to have familiarity with the relevant guidelines. Often the guidelines can be used during cross-examination to impeach the opposing expert. Attorneys who handle abuse cases should maintain a folder of current guidelines from all the relevant professions.

It is important to establish the expert's *particular* specialized knowledge and not to accept a stipulation to the expert's qualifications. Ask questions specifically directed to training and experience with intrafamilial child sexual abuse, not just child abuse in general. What does the expert do to keep up with the rapid expansion of knowledge in the area, such as attending seminars and conferences, subscribing to abuse-specific journals, and joining professional organizations dealing with abuse issues? Has the expert determined that some children have and others have not been molested?

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The expert should detail any writing or speaking experience in the particular area and identify the audience. Was the expert speaking to members of his or her own profession or a multidisciplinary group? Was the speech part of a required training program for professionals whose job it is to detect or treat that type of abuse? Even if a CPS worker was unable to substantiate abuse, a person who *trains* CPS workers may be able to give the judge enough information to override the opinion.

You must demonstrate, if true, that the opposing expert really is not trained in the specific area in question. This is a good type of cross-examination, because you need not impugn the integrity or general competence of the expert but merely show that intrafamilial child sexual abuse is a highly specialized area and that this expert just isn't well-trained in that narrow slice of the pie. The cross-examination process is the reverse of the direct examination of the specialized expert. Establish a lack of specific training in the field, a lack of attendance at specialized conferences and seminars, a lack of readings in specialized journals, an absence of membership in specialized organizations, and an absence of speaking or writing in the specialized area.

There are witnesses who purport to be specialists in child sexual abuse and who consistently testify that any given child was not molested. The pattern of their testimony is often easy to establish: The witness may never have found a child to be molested. That type of bias undercuts the value of the testimony. Some of these professional experts have little or no clinical training or experience in child sexual abuse. Theoretical knowledge without the practical application of that knowledge provides a much weaker base from which to testify.

Evaluations

Although the presence of physical evidence is probative of sexual abuse, negative findings *are not* probative. Most acts of child molestation involve fondling, exhibitionism, or oral-genital contact, which will not leave physical evidence. Most children who are molested by family members are not physically injured during the molestation, and even rubbing that leaves skin irritated generally does not leave marks that remain for very long. Because the genitals are moist and highly vascular, even lacerations that may cause bleeding often heal completely in just a few *days,* without leaving a scar or any other evidence.

On the other hand, positive findings can be extremely powerful. A child who has a venereal disease of the same strain as the accused is very likely to have been molested by that person. One useful tool for the physician is the colposcope, which provides magnification during a genital examination. It is important to make sure that a physician whose testimony is based on a colposcopic examination is properly trained, however. Not many pediatricians have extensive experience in distinguishing between normal variations, congenital abnormalities, and evidence of trauma. Negative colposcopic evidence, however, is not inconsistent with molestation, even when there was originally some physical damage.

There are a number of articles, instruments, and techniques that purport to tell experts how to distinguish between true and false allegations of ***63** sexual abuse. As of the end of 1994 there are *no* instruments that are capable of making such a differentiation. A complete evaluation must consider many pieces of information, observation, and clinical judgment. The expert witness you use must be able to refute the anecdotal “research” that is published and used to unfairly cast aspersion on allegations of actual abuse or molestation.

A number of experts continue to use psychiatrist Richard Gardner's Sexual Abuse Legitimacy (SAL) scale, despite the fact that even Dr. Gardner has repudiated it in Gardner, R., *True and False Accusations of Child Sexual Abuse* (Creative Therapeutics 1992). Dr. Gardner's writings in the field are self-published and have not been subjected to the peer-review process. An excellent article, which “alerts professionals to the emergence of oversimplified approaches to the complex problem of alleged child sexual abuse in the context of custody disputes,” was written by two child psychiatrists, two psychologists, and one social worker. See Corwin, Berliner, Goodman, Goodwin & White, “Child Sexual Abuse and Custody Disputes,” 2 *J. Interpersonal Violence* 91 (March 1987). It is useful in rebutting any checklist approach to the diagnosis of intrafamilial child sexual abuse.

Judges are familiar with the inadmissibility of polygraph results, which inherently attempt to distinguish between true and false allegations. The various instruments, articles, and techniques that provide a formula or checklist to distinguish between true

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and false allegations are no more worthy of acceptance in the courtroom. The attorney for the accuser might consider a motion in limine to preclude testimony derived from such instruments because they lack the requisite acceptance in their scientific community.

Oprah Commissions Child Abuse Legislation

Talk show host Oprah Winfrey, herself an abused child, supplemented the education and advocacy she does on her internationally syndicated television show with a novel approach. She was moved by the story of Angelica Mena, a four-year-old Chicago girl who was molested and strangled to death by a neighbor in her apartment building. Winfrey vowed "to do something, to take a stand for the children of this country."

After meeting with a multidisciplinary group of experts about what was needed and achievable to help protect children from abuse, she determined that because pedophiles insidiously seek employment where they will have contact with children, there should be a national system to allow child care organizations to do criminal background checks of their workers. She retained counsel to draft and lobby for legislation that would create such a system.

Former Illinois Governor James R. Thompson, a partner at Winston & Strawn in Chicago, agreed to help. The first draft of the National Child Protection Act (also known as "the Oprah bill"), was presented to the Senate Judiciary Committee in October 1991. Winfrey did more than just hire the lawyers; she met with senators and representatives, hosting a lunch and testifying in person about the bill.

Unfortunately, despite its nearly unanimous support, the bill died the first time around, because it was included in an omnibus package that was rejected. However, it was reintroduced and enacted on December 20, 1993, as the National Child Protection Act of 1993, Public Law 103-209.

Is the private commissioning of federal legislation a feasible strategy for social activists? Winfrey says yes. "[I]t can have a large impact on society, but it is expensive, cumbersome, and slow." If she had it to do again, Winfrey would take the proposal to the public first and then try to motivate the legislature to move more quickly.

Governor Thompson believes that this kind of involvement is a good way for large law firms to discharge a portion of their pro bono obligations on behalf of state or federal legislation and he said that Winston & Strawn may be willing to do it again in the future.

In other efforts on behalf of children, Winfrey's lawyer and business partner, Jeffrey Jacobs, has organized the Civitas Initiative to help train professionals dealing with abused children. Part of that program is the Civitas Childlaw Center at Loyola University Law School in Chicago. The three-year program provides scholarship assistance; subsidized internships; and an integrated, multidisciplinary curriculum.

As we near the new millennium, we must continue to seek new and creative approaches to the problem of child abuse. As family lawyers, we can play a central role in the search for solutions.

A.M.H.

Difficult facts

Cases with difficult facts create proof problems. Child sexual abuse allegations in custody or visitation cases usually involve difficult facts. Young children often reveal abuse to a parent in private, bringing that parent's credibility into play. Many times young children are unwilling to repeat what they have told a parent, even to trained investigators. Further, there are often

"windows of disclosure" in sexual abuse cases and a significant chance that investigators and evaluators will never see the child during one of those windows. A parent who tapes the child's conversations to prove that he or she said what the parent reported may be accused of coaching the child.

Without a good expert, it is virtually impossible to win a case with close facts. The expert must spend time with the child, develop a good rapport, and see the child during a window of disclosure when the child is willing to repeat what happened. Further, the ***64** expert should use all appropriate evaluative tools, including play therapy, drawings and dolls, etc., as part of the evaluation. The expert should have full access to the child's records and discuss the child's behaviors with babysitters, day-care workers, teachers, and others who have seen the child on a regular basis.

Other cases

In many contested cases, child protective services (CPS) or the police have already investigated the allegations and elected not to proceed. The effect of those decisions is often to substantially weaken the domestic relations case of the parent attempting to prove the abuse. Therefore, you must neutralize the power of that negative evidence. The purposes and criteria for proceeding with CPS and criminal cases are different than those applied to custody cases involving parents. Although judges realize this, they may confuse the agency's decision not to proceed with a factual determination of the truth.

Particularly when the parents are estranged, defendants have fertile ground for implanting doubt in the jury by virtue of the relationship between the parents and by suggesting that the accusing parent is motivated by revenge or an interest in gaining an advantage in the domestic relations case. Prosecutors may decide not to proceed with a case even when they are convinced the abuse occurred, because they are not confident they can convince a jury beyond a reasonable doubt.

If CPS investigated but did not substantiate the abuse, the CPS worker involved, any CPS worker or administrator, or an expert with a history of training or working with CPS may be able to testify about their triage procedures. Insufficient abuse on which to file a dependency and neglect petition may nevertheless constitute grounds for a custody decision or supervised visitation. Further, CPS often forgoes filing a petition if one parent appears willing and able to protect the child. If the parents are separated or divorcing, or if the nonabusing parent is willing to seek court protection for the child, the case may be closed even though the agency believes that the abuse occurred. The judge needs to be aware of these considerations.

Terms such as "substantiated," "valid," "founded," and "unsubstantiated," "invalid," and "unfounded," are often misunderstood. The "un-" terms are frequently but inaccurately construed to mean "false," "untrue," or "fabricated." Many CPS agencies do not even have an "I don't know" category. Even if the abuse did not occur, for custody purposes there is a big difference between a parent vindictively fabricating allegations and a good-faith but erroneous belief that the abuse occurred. After all, society has a public policy interest in having parents take action when they believe their children have been abused. A parent should not be penalized for seeking to protect a child.

It is essential to have the CPS worker or other expert explain what the phrase in question means and to clarify whether the negative finding implies bad faith. Even if the CPS worker testifies that the agency determined that the abuse never took place, the worker may have been unaware of additional information that has come to light since the worker's investigation. Had all of that information been available to the worker, the findings might have been different.

Sometimes workers are put off by a hostile parent who accuses the other of abusing the child. Some workers investigate cases much less thoroughly when a custody case is in progress, either because they believe that the allegations are inherently less reliable or because they feel that the child will be protected in another forum. In such cases it is important to expose those preconceptions. For workers who believe that the allegations are inherently unreliable, ask the worker: Isn't it true that many of the petitions CPS files state that the mother does not believe the allegations and is therefore unable or unwilling to protect the child? Don't you routinely advise mothers whose children are being abused to leave the abusive spouse or to file for divorce?

Do you think that a mother is lying if she believes the abuse, leaves her husband, and files for divorce before CPS tells her to? Regardless of the witness's answers, the point is made to the court.

Many parents of abused children make terrible witnesses in a custody cases. They may be angry, frustrated, and vindictive. The goal is to differentiate between cause and effect. Did the allegations arise out of the client's anger and vindictiveness or is the client's anger and vindictiveness a response to the abuse? It is not difficult to understand anger, hatred, and even vindictiveness toward a parent who has hurt one's child. Convince the judge that this response to abuse is perfectly natural, and even desirable.

Client anger

You must also encourage the client to be circumspect about expressing his or her anger. Explain that it is safe to express anger to you--as his or her attorney--or to a therapist who is treating the client and understands the basis for the anger. It is not wise to express anger with abandon to evaluators and the court. This does not mean that the client should deny the anger. It is a question of how much emotional energy the client expends. Consider recommending that your client seek supportive ***66** short-term therapy to get through the process. Sometimes a therapist can effectively explain the parent's anger and hostility to the judge.

A more difficult situation is presented by the client whose anger predates the allegations. If the parent was already angry, it is easier to assume that the allegations are a product of the anger. But this is not necessarily the case. When this is not the case, have a well-qualified mental health professional evaluate the client and analyze the content and timing of the anger as well as the parent's motivation to fabricate abuse. Remind the judge that children of angry parents can still be molested.

The client's anger may be related to a continued pattern of abuse that is consistent with the abuse of the child. Perhaps, in part, dysfunction in the family sets up the conditions that allowed the abuse to occur. In any event, the client's anger is an issue that must be thoroughly investigated and discussed at trial to prevent the judge from assuming that because the client appears so angry he or she must be fabricating or at least greatly exaggerating the allegations.

Leading questions

A frequent charge against the nonabusing parent is that he or she has influenced the child by coercive or leading questions or has coached the child about what to say. This sometimes does happen. But sometimes the parent's comments to the child are misconstrued, even by otherwise careful evaluators.

It is unreasonable to expect a parent not to talk to a child who has reported sexual abuse. However, such typical and expected conversations with children are often viewed in a sinister light when the abuser is the other parent and domestic relations litigation is pending between them. Emphasize through testimony and argument the “real world” context of parents talking to their children about something that has hurt the child.

When a parent takes an abused child to be interviewed by the police, CPS, or an evaluator, he or she generally explains to the child where they are going and why. The parent might say to the child “Be sure to tell Dr. Smith everything you told me about what happened. That's the only way she can help you.” There is nothing wrong with such a statement. However, after the child has related what happened, Dr. Smith might say, “Did anyone tell you to say those things to me?” The child will say truthfully that the mother said to say them. The mother did, but not in the way Dr. Smith might interpret. Therefore, it is crucial to have the investigator or evaluator distinguish whether the child is telling something that did not happen because the parent told him to say it, or whether the child was simply told to tell the investigator what had happened. If the expert did not clarify the meaning, which is likely, point that out.

A damaging inquiry

Sometimes a parent asks leading questions while trying to ascertain what has been done to the child. This can contaminate the investigation, but it does not invalidate the fact that the child may have been molested. A major role for the attorney is to stop the client from asking the child questions, except as specifically authorized by the evaluator.

Next to having a good expert evaluator, having a well-trained attorney for the child *who has experience in intrafamilial child sexual abuse cases* can be the most important tool in protecting a molested child from a court order that facilitates further abuse. Often such attorneys can be found among those who are appointed by the juvenile court in child abuse cases filed by the state. The child's attorney can rise above the charges of vindictiveness leveled against the other parent. In fact, a well-trained attorney for the child should take the lead in proving the allegations, with the protecting parent's attorney playing a secondary role. Such a strategy can enhance the presentation of evidence and erode the judge's preconceptions about parents who raise abuse allegations in custody cases.

Inconclusive findings

When abuse cannot be proved by a preponderance of the evidence, a strategic decision must be made. The expert should take the lead in determining how likely it is that further evaluation will reveal the existence of abuse and how much the child is in need of protection. There is a well-conceived model of therapeutic intervention in such cases, which the parents or a court may be willing to adopt. See Hewitt, S. “Therapeutic Management of Preschool Cases of Alleged but Unsubstantiated Sexual Abuse,” 70/1 *Child Welfare* 59 (January-February 1991), reprinted in part in Haralambie, A. 2 *Handling Child Custody, Abuse and Adoption Cases* app. 16-5 (2nd ed. Shepard's/McGraw-Hill 1993). This model involves individual sessions with the child, individual sessions with each parent, and sessions with each parent and the child, during which that parent and child agree on lists of appropriate and inappropriate touching and give the child permission to reveal any abuse to the therapist and continued monitoring for at least one year. The accused should realize that if in fact there has been no abuse, this model is more likely to result in everyone's accepting a positive finding of “no abuse,” rather than the more ambiguous finding of “we don't know one way or the other.” Further, the child will be learning useful self-protection skills, thereby becoming less likely to be abused and less likely to fail to report any abuse that does occur, even at the hands of a third party. Finally, the accusing parent should realize that his or her concerns are being taken seriously and the child is being protected.

Conclusion

Representing the accuser in a child sexual abuse case in the domestic relations forum is not for the feint of heart. The ramifications of an incorrect judicial finding in either direction are enormous. You must be willing to find and use the best available experts, to prepare the case carefully, to preclude or impeach evidence of dubious scientific value, and to keep the case centered squarely where it should be: on the best interests of the child who depends on the adults in the case for his or her protection.

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