The WISCONSIN DEFENDER

Protecting justice for all since 1977

Summer/Fall 2008
Volume 16, Issue 2

Developing the Defense in Child Sexual Assault Cases

By: Kathleen B. Stilling*

"*Child Sex Assault Charges in Brookfield*"

"He was trusted by parents to teach their children self-defense, but now, a martial arts instructor is accused of sexually assaulting a 13 year old in his class."

Headlines, similar to this one, are found in newspapers in towns and cities across our state. You can substitute a different city or a different profession but we face the same difficult issues as we represent clients on child sex cases. Many people, both in the community and the court system, consider the offense of child sex assault more heinous and more incomprehensible than murder. We can all imagine being in a murderous rage, but most people cannot conceive of feeling and acting on a sexual attraction to a child. Clients convicted of murder, who are paroled, have a better chance of resuming a normal life than the convicted sex offenders, who face all-encompassing restrictions and community prejudice. Clients are now much more aware of these consequences as a result of the widespread publicity these cases receive. It is often a daunting prospect to develop a defense under these difficult circumstance and it is a task that requires all of our creativity and diligence.

Gathering the Tools for a Successful Defense

The Client Interview

As we do in any case, we need to start out with the best information we can discover. Our first source is generally the client and his family. We need to conduct a thorough and complete interview with the client. This interview may take up to two to four hours and should include a discussion of the clients background, family history, knowledge about the complaining witness, possible witnesses, possible sources of information, existence of any electronic information, all potential motives or biases of the witness, and the history of the client's relationship with the witness' family. You also need to know in as much detail as possible, the conversations your client has had with law enforcement agents, social workers, family members and friends about the allegations. Your client may also be able to tell you about the circumstances of the disclosure, which is often the key to identifying the motive for a false accusation. You should obtain authorizations for release of the client's medical and psychiatric information and, if possible, releases for the

***Kathleen B. Stilling** is an attorney in the Brookfield law firm of Buting & Williams, S.C. She received her undergraduate degree and her law degree from the University of Wisconsin. She is a founding member and past president of the Wisconsin Association of Criminal Defense Lawyers, and a member of the National Association of Criminal Defense Lawyers and Association for Women Lawyers. Ms. Stilling was an Assistant State Public Defender in the Milwaukee trial office from 1981 - 1989 and her present private practice is entirely criminal defense, both trials and appeals. She represents adult and juvenile clients in cases involving sexual offenses, drugs, alcohol and domestic violence. She lectures in the areas of sexual assault cases, ethics and trial practice.

complaining witness' school records, medical records and psychiatric records.

If the complaining witness is a member of your client's family your client's family should also thoroughly search any room or area where the child has stayed or lived. If other family members accompany your client you should take the opportunity to interview them as well. Often, family members will have a very different perspective on the complaining witness and the client that may assist you in developing a defense.

At the end of the interview, you should understand as much as possible about the relationship between the child and the client. You should also understand the relationship between the client and all other people, especially adults, who are important to the child. With young children in particular, the origin of the false accusation usually lies with the adults in the family. By middle school, children have developed more independence and possible individual motives should be explored along with those of their family members.

You should also have warned your client in no uncertain terms that the only people he may speak with about the offense are you, his clergy and his therapist. He should only talk to the therapist or clergy after you have spoken with them and ensured that they understand that the case has been referred to the police and there is no duty to report anything. It is probably safest to caution the client to only discuss feelings and reactions to the charges, not the facts themselves. Despite the possible pitfalls, encouraging therapy and/or a connection to faith traditions can be very helpful to clients and allow them to navigate the case in a better frame of mind.

Information Gathering Before the Preliminary Hearing

In Wisconsin, access to information about the case before the preliminary hearing is limited to information the attorneys can obtain on their own or through their clients. *State v. Schaefer*, 2008 WI 25, 746 N.W.2d 457. However, prior to the preliminary hearing, there is much that we can learn about our case and the people involved in it. If you have access to investigators, it may be a good time to start conducting some background investigation on the complaining witness and the family. If you can view the area where the assault is alleged to have occurred that is ideal. If not, then try to obtain good photographs to help you evaluate and prepare for the preliminary hearing.

Open Records Requests

It is also a good time to prepare open records requests to municipal police departments and other sources of information. Some municipalities destroy certain types of information, such as 911 tapes and dispatch tapes, after a short period of time so it is important to request that these records be preserved. The initial call to the police may have some enlightening information about the allegations close in time to the "disclosure". Certain municipalities take a long time to fulfill these requests and it is a good idea to get them in almost immediately. In the right case, you might want to request reports regarding all local police contacts with the complaining witness' address or with other individuals of interest. Sometimes, these records may give you insights into the family dynamics, which may include incidents of domestic violence, drug or alcohol use or behavioral problems with the juvenile witness in your case.

The New Frontier: MySpace and Facebook

In the information age, there are many avenues you can utilize to obtain public records about almost anyone. Many juveniles, and even some adults maintain web pages on My Space or Facebook. These sites may contain photographs that will give you a greater insight into the child's life or degree of experience in sexual matters. They may also contain information that will lead to additional witnesses, such as close friends or romantic involvements. Sometimes, these pages will include information about favorite activities, music, books, magazines, and other interests. Although the relevance of this information may not be clear in the

initial phases of the witness, these nuggets may become useful as you learn more about the case. Make a hard copy of the information in the event the page is later removed.

What About That Preliminary Hearing?

The decision whether or not to hold a preliminary hearing in a child sexual assault case is often complex and full of potential pitfalls. In some communities, it may seem that there is no point in having a preliminary hearing because the prosecution will object to most of your questions on the grounds of discovery and the court will sustain most of those objections. Under those circumstances, it may seem useless to even try and test the case in the preliminary hearing. This should never be the deciding factor. If you carefully evaluate your case and focus your questions on the circumstances surrounding the assault, the witness' memory and factors that can affect memory, and issues about timing, physical evidence and layout, you will have a strong basis with which to respond to those objections. You will also undoubtedly learn details that are not contained in the police reports.

In some jurisdictions or in some cases, the prosecution may tell you that holding a preliminary hearing and "forcing the child to testify." will cause the state to withhold a favorable negotiation. This is a difficult decision if the prosecution has already offered a reasonable negotiation. You and your client may decide that it is wise to maintain the prosecution's position by waiving the preliminary hearing. In many cases, the prosecution simply makes a vague reference to negative results that may flow from the decision to hold a preliminary hearing. In those cases, it may still be in your client's best interest to vigorously contest the case as early as possible.

The Advantages of a Preliminary Hearing

There are many advantages to confronting the child witness at an early stage in the case. First, there is often little time for the prosecution or social workers to prepare the witness for testimony. This is an opportunity for the defense to test the child's story before he or she has been coached to tell the story. If the child is lying or has been manipulated by an adult and has not been prepared with her prior statements, the inconsistencies will surface. You may also have a chance to cross examine a parent or other person close to the child about their observations of the child and her behavior. A second advantage to holding a preliminary hearing is that it gives you an opportunity to see and hear the witness under circumstances similar to the trial. You will be able to better evaluate the developmental age of the child, her ability to respond to questions, her amenability to suggestion and other intangibles. This may be your only chance to see and hear the witness and make these critical observations. A final advantage to holding a preliminary hearing is that it signals to the witness and the prosecution that you intend to seriously contest the allegations. If it is a false accusation, this is an important message to send to all concerned.

A preliminary hearing also brings together the prosecutor, citizen witnesses and law enforcement witnesses. It may give you an ideal opportunity to discuss the case with some or all of the interested parties. Sometimes, these conversations in the hall may provide illuminating information about the evidence, the witnesses and the prosecution's attitude.

Learning about Children

Learn about children. Children do not think and behave like little adults. Young children's memories are very malleable and they can easily come to believe a false accusation. The center of a young child's life is her family. Look at the adults around her to determine if the motive can be found there. On the other hand, some older children may have motives that seem similar to adult motives, while others reflect a more childish attitude. For example, a teenager's belief that she will be ostracized if she admits that she lied

becomes a powerful motive for maintaining the lie. Learn about the stages of child development, information about false memories, brain development, and emotional development. Some resources for learning about kids:

Basic Child Development – see books by Jean Piaget, The Child's Concept of Movement and Speed, The Child's Conception of Time, The Construction of Reality in the Child.

Maggie Bruck and Stephen Ceci, "The Suggestibility of Children's Memory", Annual Review of Psychology, 1/1/1999.

A complete list of articles by Stephen Ceci can be found at **http://people.cornell.edu/pages/sjc9/** and a partial list of articles by Maggie Bruck can be found at **http://www.hopkinsmedicine.org/Psychiatry/faculty/B/Bruck.htm**

The National Child Abuse Resource and Defense Center has a list of publications and other resources on their website at: **http://www.falseallegation.org/index.html**.

If you don't have children, spend time with nieces and nephews or a friend's children. You can also watch children talking and interacting with others on **www.youtube.com**. The videos the older children do independently are especially enlightening about their beliefs and attitude about life.

Social Workers as a Resource

In some cases, it may be helpful to attempt to talk with the social worker. Generally, Human Services workers are trained in appropriate techniques for interviewing children. If you have a possible contamination issue, you may be able to successfully highlight the problems with the initial interviews by the parent or law enforcement by cross examining the social worker about the techniques designed to get an accurate and truthful account.

If you have a chance to talk, ask the social worker about his/her training and the methods he/she uses to interview children. Social workers will say they are very concerned about suggestiveness in their interviews and that they have received hours of training to avoid the problem. You may decide to subpoena the social worker with training materials. For example, The Child Protection Center in Milwaukee has guidelines for the Stepwise Interview that they are supposed to follow. One section of the guidelines discusses the need for the investigator to develop multiple hypotheses to avoid getting locked into one theory and spending their time trying to prove the theory rather than discover the truth.

There are other resources that may prove helpful. For example, The National Children's Alliance is an organization that certifies and serves CAC's or Child Advocacy Centers. Many centers that perform interviewing will be members. Training materials published by the National Children's Alliance can be purchased at **www.nca-online.org**. This includes a manual entitled Intake and Forensic Interviewing in the CAC Setting, available for $35. You should also become familiar with the standards used by the child welfare agency in Wisconsin. The agency web site has standards for investigation which includes appropriate methods of interviewing and investigating the offenses and handbooks for parents. The web sites also references common problems investigating child abuse in divorce situations. For the Wisconsin web page see:
http://dhfs.wisconsin.gov/dcfs_info/num_memos/2000/Parent%20Standard.pdf

Contrast the Social Worker's Training with the Reality of the Case

In most cases, the child has been interviewed more than once before meeting the social worker. The child usually discloses the abuse first to a parent and then is interviewed at least once by police officers. Social workers may acknowledge that there is always a danger that a child will give the answer she thinks will

please an adult who is questioning her. This is why they are trained to be careful not to suggest answers to a child. You may then get an admission from the agency worker or trained child interviewer that the danger of suggestibility is particularly acute when the questioner is a parent who is upset and whose emotions may influence a child. Being familiar with the training materials allows us to use the social worker to illustrate that all the safeguards built into her interview are absent from other earlier (and later) interviews by Mom, police, teachers, etc. As well as the social worker may have done her job, and as fair as the videotaped interview may appear, the damage was done and the child was committed to the story before the social worker ever got involved

Even a police officer experienced in interviewing children may relapse in to the use of interrogation techniques if the child does not "disclose" abuse quickly enough. Listen carefully to the questions and answers for suggestiveness, rewards, and praise. These mistakes may form an important part of your cross of the child and the officer or interviewer.

Discovery and Investigation

Discovery

In most jurisdictions you will get the discovery shortly after the preliminary hearing, sometimes seconds later. The prosecutor will give you police reports, photographs, records from the victim's forensic medical exam, recorded interviews of victim by police/social workers, recorded interrogations. The prosecutor must also disclose exculpatory information such as previous sexual assaults on child victim as defense may be able to use such evidence to show alternative source of sexual knowledge and impeach child witness. *State v. Harris*, 2004 WI 64. Due process and right to confrontation trump rape shield laws in these instances. *State v. Stephen F.*, 141 N.M. 199, 152 P.3d 842, (N.M.App.,2007), *State v. Rolon*, 257 Conn. 156, 777 A.2d 604, (Conn.,2001).

Be sure to include a Brady demand in your discovery demand and give specifics about information you believe may be in your case. Even if you are not certain, ask anyway. Asking for specific types of information, such as prior sexual assaults, mental health problems, reputation for lying may create an affirmative duty for the prosecutor to ask the witnesses those questions and determine if the information exists.

If you have any reason to believe that the "disclosure" was made during therapy, which happens most often in high school cases, demand the alleged victim's treatment records concerning the sexual assault. There is no privilege when treating therapist reports sexual assault to authorities (presumably) pursuant to mandatory reporting duties. The Wisconsin Supreme Court found that this scenario mandated release of those records to the parties because there was no privilege pursuant to Sec. 905.04(4)(e) . *State v. Denis L.R.* 2005 WI 110., *People v. Gearhart, 148 Misc.2d 249, 560* N.Y.S.2d 247 (N.Y.Co.Ct.,1990).
Later, if you have reason to believe that the treatment records have been disclosed to disclosed to the state's expert in preparation for testimony, demand those as well. Failure to disclose the records to the defense is error. *State v. Sells*, 82 Conn. App. 332, 844 A.2d 235 (Conn.App.,2004).

Another example of information that should be disclosed to the defense on demand is written expressions of sexual desires because they are not considered conduct or behavior and may be admissible. *State v. Vonesh*, 135 Wis.2d 477 (Ct. App. 1986).Prior demonstrably false claim of sexual assault is also not barred by the rape-shield law. *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001).

Subpoenas
You can use subpoenas creatively to obtain demonstrative evidence and physical evidence that may help you demonstrate the falsity of the accusation. For example, you can use subpoenas to require the alleged victim or her family to bring items from home that are relevant, e.g. family photos, furniture, books, diaries, phone records. As long as the subpoena is reasonable in scope and related to the issues, you should survive a motion to quash. You need not subpoena the whole love seat to trial to show how small it is because a cushion may be sufficient for that purpose and is easy to carry.

Motions to Enter Land.
In Wisconsin, civil procedure rules can be used in a limited way to obtain information.

> **972.11. Evidence and practice; civil rules applicable**
> (1) Except as provided in subs. (2) to (4), 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. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895 and 995, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

Arguably, this would allow the use of a number of other civil discovery methods including **Sections 804.08, Interrogatories; 804.09, Production of Documents and Things and Entry Upon the Land; 804.10, Physical and Mental Examination and 804.11, Requests to Admit.** In many instances, the state will argue that the context of the rule "manifestly require a different construction"but you will never know if you don't try. This may be one method to get an investigator in the house to document important details about the scene.

Pretrial Motions

Motion practice is often brisk in child sexual assault cases as the state looks for ways to create a negative picture of your client and you look for ways to find out more about what is really going on with this witness and her family. Some things to think about as you evaluate motions that often arise in the child sexual assault case.

Defense Mental Examination of the Witness
A defendant is entitled to a pretrial psychological examination of the witness when the state gives notice that it intends to introduce evidence generated by expert hired specifically for purpose of examining witness and supplying testimony at trial or the expert is the victim's treating provider. *State v. Maday*, 179 Wis.2d 346 (Ct. App. 1993). Some states allow the examination upon demonstration of a compelling need. *Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (Nev.,2006).

Discovery of Confidential Records
In many jurisdictions including Wisconsin, a defendant may obtain an *in camera* review of privileged and confidential records when there is a preliminary good faith showing of a specific factual basis demonstrating a reasonable likelihood that the records contain relevant exculpatory information necessary to a determination of guilt or innocence and aren't merely cumulative to other evidence available to the defendant. *State v. Green*, 2002 WI 68, *State v. Shiffra*, 175 Wis.2d 600 (ct. App. 1993), *Pennsylvania v. Ritchie*, 480 U.S. 39(1987), *State v. Worthen*, 177 P.3d 664 Utah App.2008, *United States v.*

Hansen, 955 F.Supp. 1225 (D.Mont.1997), *United States v. Alperin,* 128 F.Supp.2d 1251 (N.D.Cal.2001, *State v. Heemstra*, 721 N.W.2d 549 Iowa, 2006. If complaining witness (or other record custodian) refuse to release records for *in camera* review, the court may suppress the witness' testimony. *State v. Behnke,* 203 Wis.2d 43 (Ct. App. 1996).

Examples of Successful Motions in Wisconsin
State v. Robertson, 2003 WI App 84. The defendant met a preliminary showing when he demonstrated that the victim, who suffered from depression with psychotic features, may have simply been exhibiting mental health problems as a alternative explanation for her bizarre behavior. *Id.* at 368.
State v. Walther, 2001 WI App 23. A child's treatment records were relevant to support defendant's claim that the child previously alleged he was actually assaulted at the treatment facility and that he suffered from a mental condition that had an impact on his recollection, perception and credibility. *Id.* At 625.

State v. Ballos, 230 Wis.2d 495(Ct. App. 1999). The treatment records of witness to an arson were relevant because they would demonstrate that the witness was "obsessed with building bombs to support his theory that the witness committed the offense. *Id.* at 501.

State v. Navarro, 2001 WI App 225. Inmate claims that he acted in self-defense because he was aware of the officer's reputation for violence was sufficient to warrant a hearing on his motion for release of personnel records.

State v. Denis L.R., Id. Child abuse exception to therapist-patient privilege applied to any confidential communications made by child at counseling sessions regarding sexual assault allegedly when therapist discloses this information to law enforcement.

Experts and Pretrial Motions Concerning Defense Expert Testimony

Experts on Memory and Suggestibility of Child Witness
The defense has come a long way in the past several years on the issue of demonstrating the suggestibility of children. Expert testimony demonstrating how suggestive interview techniques used with young child can shape a child's answers is admissible. *State v. Kirschbaum,* 195 Wis.2d 11 (Ct. App 1995).

> " Many jurisdictions recognize that young children can be susceptible to suggestive interview techniques and that such techniques can undermine the reliability of a child's account of actual events. *Idaho v. Wright,* 497 U.S. 805, 812-13, 110 S.Ct. 3139, 3144-45, 111 L.Ed.2d 638 (1990); *Maryland v. Craig*, 497 U.S. 836, 868, 110 S.Ct. 3157, 3175, 111 L.Ed.2d 666 (1990) (Scalia, J., dissenting); *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372, 1379 (1994); *People v. Michael M.*, 162 Misc.2d 803, 618 N.Y.S.2d 171, 177 (N.Y.Sup.Ct.1994); *Territory of Guam v. McGravey,* 14 F.3d 1344, 1348-49 (9th Cir.1994). The concern is that persons conducting interviews with the child will, either inadvertently or purposefully, suggest facts and promote fantasies that the child will later "remember" and testify to as the truth. See John R. Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 707 (1987).

> Many jurisdictions also recognize the utility of expert testimony on the suggestive interview techniques used with a young child and how suggestive techniques can shape a young child witness's answers. *Michaels*, 642 A.2d at 1384 ("Experts may thus be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed");*State v. Malarney*, 617So.2d739,740 (Fla.Dist.Ct.App.1993) (reversible error to exclude defendant's expert psychological testimony on unreasonably suggestive interviewing techniques used with victim); *Michael M.*, 618 N.Y.S.2d at 177 ("In recognition of a child's suggestibility, many courts ave allowed the admission of expert testimony at trial on the effects of suggestive questioning"); *McGravey*, 14 F.3d at 1348-49(although concluding that a jury instruction on the suggestibility of children was not required, recognized that "[defendant] also could have, but did not present expert testimony on the issue of ... the susceptibility of children to suggestion") *Sheldon v. State*, 796 P.2d 831, 839 (Alaska Ct.App.1990), *People v. Diefenderfer*, 784 P.2d 741, 753 (Colo.1989), *Timmons v. State*, 584 N.E.2d 1108, 1112-13 (Ind.1992); *State v. Erickson*, 454 N.W.2d 624, 626 (Minn.Ct.App.1990), *State v. Floody*, 481 N.W.2d 242, 248 (S.D.1992);*United States v. Geiss*, 30 M.J. 678, 681 (A.F.C.M.R.1990)."

But, the court upheld exclusion of the same testimony in *State v. Walters*, 2003 WI App 24 (*reversed on other grds*), finding that majority of expert's testimony would cover matters within general knowledge and experience of the community which would not require expert testimony; the doctor's testimony would not have highlighted specific examples of improper police questioning of child witness nor explained how these techniques could have affected child's statement and evidence would be minimally relevant in light of fact that state was not relying on child's statements to police.

Even if you can't get an adverse examination and don't have a strong contamination issue, consulting with a child psychologist can still be very helpful. A child psychologist may have different insights about the evidence, including the interviews and can give you useful tips for cross examination based on the investigative materials and the videotaped statements.

***Jensen* Testimony**

The state will frequently use an expert to testify that child complainant's behavior is consistent with that of sexual assault victims per *State v. Jensen*, 147 Wis.2d 240 (1988). A witness may not testify that another witness is telling the truth. *State v. Haseltine*, 120 Wis.2d 92 (Ct. App. 1984). This rule bars testimony that the expert believed the witness or was certain that witness was a sexual assault victim and telling the truth since this is for the jury to decide. *State v. Romero*, 147 Wis.2d 264 (1988), *Oliver v. State*, 977 So.2d 673 (Fla.App. 5 Dist.,2008). But make sure the qualifications of the "expert" are explored. They may not pass muster. *Perez v. State*, 25 S.W.3d 830 (Tex.App.,2000).

Also, testimony by an expert in the *Jensen* area must be carefully monitored. Some of the testimony may be admissible and other portions may not. A motion in limine to preclude this testimony coupled with a "continuing objection" to the testimony is insufficient to preserve the objection to the inadmissible portions of the expert's testimony- specific objections must be made to the inadmissible testimony. *State v. Delgado*, 2002 WI App 38. You may also consider filing a motion to exclude expert testimony. We are often

provided vague and insufficient discovery. A motion to exclude the testimony on this or another basis can force the prosecutor to cough up more information about the proposed testimony and can sometimes lead to a motion hearing allowing us a pretrial cross examination of the expert.

***Maday* Motions**

In the right case you may move to have an expert conduct a pretrial examination of the complainant if state has retained an expert to examine victim and give *Jensen* type testimony. This requires a pretrial motion under *State v. Maday*, *Id*. See sec II. F of this outline. When a state's expert has not interviewed the complainant, the defense is not entitled *to a Maday* psychological examination. *State v. Anderson*, 2005 WI App 238 (*reversed on other grds*). The state may decide to retain the complainant's treating therapist which may trigger an analysis under *Maday*. *State v. Rizzo*, 2002 WI 20. But, when state's expert who was also complainant's treating therapist limited testimony to general information about delayed reporting and expert stated he could assess that aspect with a personal examination of complainant, adverse examination of the child is unnecessary and properly denied. *State v. Rizzo II*, 2003 WI App 236.

***Richard A.P.* Evidence**

You may also decide to retain an expert to testify that your client lacks the psychological characteristics of a sex offender. The defense may present evidence of a pertinent character trait, thus this testimony is admissible per *State v. Richard A.P.* 223 Wis.2d 777 (Ct. App. 1998) and *State v. Davis*, 2002 WI 75. Be aware that if expert relies on and/or testifies to defendant's version of events as part of expert opinion, state may be entitled to have own expert examine client under the *Maday* analysis. *State v. Davis*, *Id*. Make sure that the examiner uses standardized tests and doesn't do an interview regarding the alleged offense to prevent the state from obtaining an examination under *Davis*. If court permits state expert to examine defendant to rebut defense *Richard A.P.* expert, state may only admit this testimony in rebuttal. *Davis*, *Id*.

Admissibility of *Richard A.P.* evidence is discretionary per *State v. Walters*, 2004 WI 18. But when state argued that a defense expert was not properly qualified, the exclusion of expert was held to violate the defendant's constitutional right to present a defense; such exclusion infringed upon a weighty interest of the accused to present fundament elements of a defense. *State. v. St. George*, 2002 WI 50.

Suppression Motions

It is also critical that you familiarize yourself with the law and motion practice in 4th, 5th & 6th Amendment litigation. In particular, listen carefully to all recorded interrogations and interview client about non-recorded pre-custodial interrogations. Be on the lookout for coercive techniques, express and implied promises and threats - a lot of theme development and persuasion goes into interrogation in sex cases and there may be viable suppression issues.

***Whitty* Evidence**

This is often the most difficult evidentiary issue that a defense attorney faces in a child sexual assault case. There are several ways in which this thorny issue may arise. One, the state may seek to present evidence that your client was previously convicted of a sexual assault crime. If the crime falls within the meaning of Section 904.04(2), the state will be allowed to present evidence describing the actual offense in addition to the evidence that the defendant has been previously convicted of a crime.

WSA 904.04(2)

(b) In a criminal proceeding alleging a violation of s.

> 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

Even if the prior conviction does not fall into one of the categories described in (b), the court will most likely still allow evidence of a previous sexual assault conviction under the "greater latitude rule". *State v. Veach*, 2002 WI 110, ¶ 9, 255 Wis.2d 390. In *Veach*, the court gave lip service to the prohibition on admitting "other acts evidence" and required that trial courts conduct an evaluation of the evidence under the three part test of *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (Wis. 1998).

However, the courts will generally allow the evidence under the "greater latitude rule". You should still be prepared to argue against the admission of this evidence by distinguishing the facts and circumstances of the previous incident, which resulted in the conviction state is seeking to admit. If the evidence is admitted, focus on the weakness of *this* case and differences between the two incidents, if they exist. Try to get the jury to promise to critically evaluate the evidence and not rely solely on the prior conduct.

This state may also seek to admit evidence of an inappropriate or illegal sexual contact with a minor that did not result in a conviction. The same rules will apply when the court is evaluating this evidence even though no conviction resulted.

Finally, the state may seek to admit evidence of other sexual acts with the complaining witness in your case. In most cases, the court will also admit this evidence. You should handle these allegations in a similar manner to the charged offenses. Examine the allegations of uncharged conduct carefully and evaluate each allegation by comparing it with statements the witness and other witnesses have made regarding events occurring within the time frame. Sometimes, you will find weaknesses in the Whitty evidence that may help you contest the charged offenses.

The Concurrent Chips Case

Opportunities and Pitfalls

In virtually every case involving a parent or stepparent as the defendant there will also be a child welfare case. This development provides opportunities but also problem areas which require careful discussion with your client. In cases where the parent is the defendant and the named party in the child welfare case, the parent can obtain reports and social service records very early in the process, which they may then share with you. However, this may also mean that the client will potentially be involved in discussions with social workers, police, prosecutors, foster parents and juvenile court judges during which you are not present to advise them. They need representation but it is helpful also to explain some basics to a client facing this proceeding.

Detention Hearing

Often there are meetings with social service before the decision is made where to place the child in an allegation of child sex abuse. Usually, the placement will be in foster care, but, occasionally it is possible to get a placement with family. Your client can advocate for that result but the family member must be approved and willing to abide by the no contact orders.

If your client can get a family placement, maintaining the connection between the child and family may be beneficial to the client in a number of ways. For example, family members are unlikely to contaminate the child with suggestive comments that would potentially harm the client.

Pretrial Meetings

Throughout this process your client must be told not to discuss the allegations with anyone in the juvenile court unless you are present or the client has consulted you. The client may talk to the workers or others about the child's welfare, school, treatment and is entitled to do so without giving information about the factual allegations. The parent is also entitled to be consulted and give approval for treatment, school decisions, and change in placement.

Discovery of Your Client

If the state attempts to conduct discovery of your client through depositions or interrogatories, you should advise your client to have counsel present and to assert his or her Fifth Amendment right to appropriate questions. If there is some nexus between the risk of criminal conviction and the information requested, this will be upheld. *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir.), cert. denied, 449 U.S. 1025, 101 S.Ct. 593, 66 L.Ed.2d 486 (1980). However, if the child welfare case goes to trial the jury may be permitted to draw an adverse inference from it. *Karel v. Conlan* (1913), 155 Wis. 221, 144 N.W. 266, *Milwaukee v. Burns* (1937), 225 Wis. 296, 274 N.W. 272.

Client's Discovery Rights

A parent is entitled to demand discovery before entering a plea. You should utilize state discovery opportunities to the fullest. A fundamental right is at stake and the court will be hard-pressed to deny these rights even though reluctant to appear to assist a criminal defendant. Often juvenile court time frames are very short and allow for significant information gathering before the criminal case has gathered steam.

> **Sec.48.293, Wis. Stats. - Prior to plea hearing.**
> The client is entitled to the following upon demand. It need not be a formal motion:
> Copies of law enforcement officer reports.
> The client is also entitled to the videotaped statements of the child before a fact-finding hearing.
> All records relating to the child which are relevant to the subject matter of a proceeding shall be open to inspection . . . upon demand and upon presentation of releases when necessary, at least 48 hours before the proceedings.

The client may conduct formal discovery as follows: **804.05 Depositions upon oral examination. 804.06 Depositions upon written questions; 804.08 Interrogatories to parties; 804.09 Production of Documents and things and entry upon land for inspection and other purposes; 804.10 Physical and mental examination of parties; inspection of medical documents.**

Confidentiality Issues

Records relating to a child welfare investigation and court case are confidential. Sec. 48.396 (1), Wis. Stats. but may be requested by the parent, guardian or a legal custodian of a child or with the written consent of the above. This includes police records, court records and social service records. Sec. 48.78 (2)(a) and 48.981 (7); Sec. 48.396(1) (b) and (d); and Sec.48.396 (2) Disclosure of the documents to anyone other than the person designated in the statute is prohibited. Sec. 48.981 (7)(e). A violation is punishable by six months or $1,000 or both. Sec. 48.981 (7).

A person seeking a court order for the release of juvenile court records in an unrelated case must show

relevancy for the request. The juvenile court should conduct an *in-camera* inspection to determine which records are relevant and only those records will be released when faced with a discovery request under Secs. 48.293 (2); 48.396 (2)(a) or 48.78 (2)(a). *In Re Caleb J.F. v. Ramiro,* 269 Wis. 2d 709 (Ct. App. 2004).

Safety Tips

Be careful that your client structures any negotiated disposition to avoid unnecessary admissions. Admissions in juvenile court if released to prosecutor may be used as party admissions in a criminal action. *State v. Bellows,* 218 Wis. 2d 614.

In cases of child sex and physical abuse, make sure your client's counseling and treatment providers know that the alleged abuse has been reported and that they need not report the case to the authorities.

Some Thoughts on Developing a Theory of Defense

As you work on the case and learn more about your client, the child and the other witnesses you will undoubtedly develop a number of hypotheses. This is essential because we can see how the state is blinded by developing one theory only. We must do what the state does not do. We must develop a number of theories, however farfetched, about why the complaining witness is lying, exaggerating, has been manipulated or all of the above. Otherwise, we make the same mistake as the state, that of trying to make the facts fit the theory we have developed. Remain flexible as you look for the holes in the state's case and look for a plausible theory consistent with you client's innocence. In cases involving young children, the parents or close family members are the most likely entity to drive the accusation. The child may simply be repeating what she is taught to say. In other cases, a young child may make an ambiguous statement that is misunderstood with disastrous results for the client. If a concerned family begins to question the child in a suggestive way, it may contaminate them for future interviews. It is also possible that the child is being abused and trying to protect someone she loves from the truth by saying another person is responsible. There are the most frequent explanations for false or mistaken accusations.

Once the child has reached the pre-teen to teen years, many factors may come into play. Children in this age group are very self-conscious and determined to fit in with their peer group. This age group also gossips relentlessly. Sometimes, discussions, which may start as a joke or an attempt to garner sympathy or attention, may get back to parents or school officials. The teenager, when confronted with the rumors, will rarely say that she was joking or lying. She is too afraid that her peers will make fun of her or ostracize her if they find out the truth. Sometimes, teenagers will make up stories about sexual abuse to deflect punishment or criticism or to rid themselves of an unwanted adult. Even if they later regret the action, the fear of public scorn prevents the teenager from revealing the truth.

These defense theories obviously contain gross generalizations but they are examples of real situations from real cases. They illustrate the need to pick apart the complaining witnesses original disclosure to look for possible motives to falsify the accusation. Sift through various facts and combinations of facts to determine the best fit. Try out different explanations for conduct and statements. Make charts of the different statements so you can clearly define the inconsistencies between the complainant's versions and between her versions and other evidence.

Listen to your clients carefully in making this decision. They know better than you the personalities and the relationships that have led to this accusation. Their instincts about what will motivate the various parties are often correct.

Test your hypotheses. Tell the story to your neighbors, family members, postman, anybody who will listen.

Change the order of the facts and emphasize different facts when you tell it. Listen to where you have trouble explaining the story because if you are having trouble telling it to your neighbor, you will have trouble telling it to the jury.

List all the pieces of evidence you need to prove your defense and what/who you need to prove. It is easy to forget that you need a witness to prove simple facts and not get out the necessary subpoenas. Most importantly, set aside time to think about the case long before the trial so that you can thoughtfully assess your best theories and the best method of proving them and persuading the jury that your client is not guilty. With the right effort and creativity, you can maximize the chance of achieving the result you and your client desire.■