



## *HOW TO DEFEND AGAINST FALSE*

### *ALLEGATIONS OF CHILD SEXUAL ABUSE*



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Authors note: This Article is targeted mainly toward non-lawyers. Those who suddenly find themselves or someone close to them accused of child sexual abuse. As the contents of this article are based almost entirely upon my personal experience and opinions developed from nearly 30 years of criminal trial experience as a prosecutor and defense attorney including at least two hundred criminal jury trials the use of legal and research citations will be omitted. My research is my personal professional experience. The purpose of this article is to provide individuals accused of child sexual abuse with basic practical legal information and a framework for things to consider as they begin the process of deciding how to defend themselves. However, such individuals should always keep in mind that every case has unique and challenging facts that may call for different considerations or actions from those discussed in this article. Anyone accused of a crime should follow the advise of an attorney experienced and knowledgeable in the defense of these cases and who is familiar with the specific facts of the individual's case.

#### **Introduction.**

#### **The Witch Hunt**



In recent years the criminal justice system and local and national media have paid more and more attention to child sexual abuse crimes. Sensational stories of child predators abducting children and stories about the sex offender registry laws enacted as a result of such tragic cases have led to a near witch hunt atmosphere where the public seems to believe that there is a child predator around every corner and on every door step.

Unfortunately this has also led in some cases to the use of sexual abuse allegations as a weapon against innocent individuals and authorities who automatically believe even the most suspect of allegations who bring charges against individuals that are sometimes innocent.

The great majority of child sexual abuse cases do not involve stranger abduction or even the convicted sex offender who lives down the street. The great majority of child sexual abuse allegations are made against a family member, friend, or relative, such as a father, stepfather, uncle, teacher, pastor, priest, counselor, or other person close to the child. Certainly, when the person accused is guilty, child sexual abuse is a crime of opportunity. However, sometimes innocent fathers, step fathers, family members, friends, professionals and even mothers are



sometimes accused. In other words, the offender's close relationship to the child can also provide a motive for a child or someone close to the child to make a false allegation, and in fact many false allegations are made. The public needs to realize that anyone can be accused and that false allegations are often made. However, the media tends to overlook the stories about false allegations. When was the last time you saw a story in the news where the media told you about a case where the allegations of a sexual crime against a child turned out to be false. Unless the story

happened to involve a celebrity you never see that story, but I know they exist because I have represented these individuals.

For example, I have represented clients in cases where a child made an allegation because she wanted go live with her biological parent, a case where the child's mother wanted to change shared custody with the father to sole custody by her which would have provided her a ten fold increase in child support, a case where a child wanted to go live with her mother rather than her father because the father was too strict, a case where a teenage boy wanted to be able to brag that he had sexual relations with his girlfriends mother. All of these cases are examples of cases that I have actually handled and in which we have obtained dismissals or not guilty verdicts.<sup>1</sup>

Allegations of child sexual abuse are the easiest crime to accuse and the hardest to defend against because authorities will charge and juries may convict on very little evidence. With alleged crimes such as a drug deal, or bank robbery, or any other type of crime the authorities and juries usually require some corroborative evidence before they will bring charges or find the accused guilty. In child sexual abuse cases however the authorities and juries are much more



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Disclaimer: Not all results are provided for all cases. The prospective client's individual facts and circumstances may differ from the matter in which the prior results have been provided and may affect the ability of the lawyer to achieve similar results for the prospective client.

likely to believe the uncorroborated and unsubstantiated allegation of the accuser. The mere allegation by one child or minor without any corroborating evidence can cause investigators to bring criminal charges and can cause juries to convict and an innocent person spending the rest of his life in prison.

There are several reasons for this response by the criminal justice system. First, many adults simply do not want to believe that a child has the ability to lie about sex. I believe this response is rooted in the fact that before wide use and access to the internet by children, a child simply would not know certain details about sexual activity unless they had been abused. However, as children have become more and more sexually active at younger and younger ages and especially as children are now often exposed to strong sexual content through the media and the internet at extremely young ages, often times a child now has the ability to describe specific sexual content when making an allegation that years ago the child would not possess. Many individuals and many authorities simply have not accepted that our children are now often sexualized to the extent that they do have the sexual knowledge to make a false allegation.



Secondly, police officers and social workers that work in this area of the criminal justice system usually enter into this type of work out of a strong desire to protect children. They view themselves - even if they will not admit it - as an advocate for children, not un-biased investigators. Therefore, when a child makes an allegation of sexual abuse, the investigators start by assuming the accused is guilty rather than acting as a neutral investigator searching for the truth.

Thirdly, the natural repulsion felt by any person against child sexual crimes fueled by the witch hunt atmosphere created by the media in recent years simply creates an up-hill battle for anyone accused of such a crime. While our constitution is supposed to require that anyone accused of any crime is presumed innocent until proven guilty, from a practical standpoint with child sexual abuse allegations the reverse is in fact true. Anyone accused of child sexual abuse needs to understand that they need to be prepared to do their very best to convince the authorities or the jury that they did not commit the crime.

For these reasons and more - of all criminal investigations - sex offense cases are the most likely to result in the arrest and conviction of an innocent person because the system does a very poor job of conducting impartial objective investigations of these allegations. Any person accused especially the innocent must be prepared to defend himself. No one will do it for you. The system in these cases presumes that you are guilty as soon as the allegation is made.

From my experience as both a prosecuting attorney who has prosecuted many child sex offense cases and now as a criminal defense attorney who has defended many individuals charged with this type of crime I have developed a list of what I have found to be the most important things that any person accused of such a crime needs to consider when preparing his or her defense.

### **Tips on Defending Against a False Child Sexual Abuse Allegation**

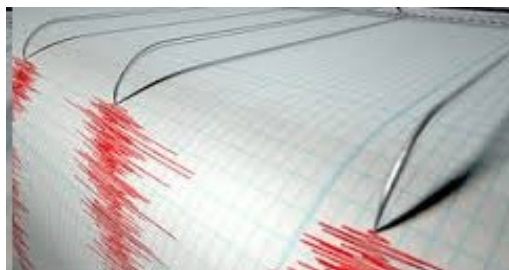
#### **1. Get a defense attorney involved immediately upon the allegation and have him investigate.**

It is much easier to fend off the filing of charges than it is to obtain a dismissal of the charges once the a person has been indicted or arrested. As stated above I believe that most investigators and social workers have a natural bias in favor of the child when investigating these cases. However, I have also found that once they are confronted with evidence in favor of the accused they can often be convinced to look at the case objectively. Their bias is not from ill will. They are not out to bring charges against innocent individuals. Thus, while the initial bias may prevent them from looking for exculpatory information, if exculpatory evidence is brought to them before a charging decision is made criminal charges can sometimes be avoided. The criminal justice system (police and prosecutors) do not like to admit that it wrongly indicted or wrongly arrested a person and dismissing a case against someone already arrested is an admission that they screwed up - something that rarely happens. Therefore, once charges are actually filed a Defendant is usually forced to enter into a plea bargain or go to trial. The complete dismissal of the charges prior to trial once a person is charged is extremely rare.

Early investigation by a defense attorney and his team is important because it provides the best chance to find or develop favorable evidence and to present that evidence to the authorities before the person is arrested in an attempt to avoid charges in the first place. Also, once a child has made a statement to a school counselor, a police officer, a detective, a social worker, they have recounted the allegations three, four, and five or more times and have been locked in to their story. Getting the truth at that point becomes more and more difficult. Although we are not able to interview the accuser in all cases depending upon the cooperation of the custodial parent or guardian, in the cases that we can immediately interview the accuser we often find favorable information.

For example, in one case that we investigated our client's ten year old step daughter claimed that she saw the client having sexual contact with her sister. The alleged victim actually denied the claim but charges were imminent because the police believed the allegation despite the fact that the actual alleged victim denied any wrongdoing by the client (one example of the extreme bias in the system against someone accused of child sexual abuse.). We immediately interviewed the ten year old sister who claimed she observed the sexual contact between her step father and her sister. When asked what she saw, one of the things she alleged was that she saw the stepfather "french kissing" the sister. When asked to explain what French kissing was she

said that she did not know. After obtaining that interview and taking it to the prosecutor the point that we were able to make to the prosecutor considering criminal charges was: why would the girl use the term french kissing if she did not know what that term meant? Our theory was that the girl was being coached in what to say by the biological father because he wanted custody. The Prosecutor provided our interviews to the grand jury considering charges and the grand jury dismissed the case.



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There are other things that in certain cases the defense will want to do in order to fend off potential charges before they are brought. Although lie detector (polygraph) <sup>2</sup> results are not admissible in court in most jurisdictions, investigators often rely heavily on lie detectors in their investigation using them to determine whether or not to issue charges and using them to claim to the suspect he failed in order to induce him to confess. However, there is a reason the tests are not admissible in court and that reason is that a lie detector can be influenced by such things as nervousness and fear. Therefore, even innocent individuals may want to decline consenting to a lie detector test. Yet there are times to consider taking a lie detector test and strategies to employ. Even though the results are not admissible in court once a lie detector is taken and failed such a result will certainly confirm for the investigator his bias and it will be even more difficult to avoid formal charges. However, refusing the test will also do the same thing. Thus, the accused is often caught in a catch-22 situation. Therefore, in certain cases I will have a client take a practice polygraph with a polygraph expert hired by the defense. If the accused is able to handle the stress of the exam and pass the exam, I will in some cases recommend that he agree to a test by the authorities. Taking and passing a lie detector test may be the quickest way to refocus law enforcement away from the bias against the accused and to get them to begin to consider that the allegation may be false. It does not work every time but it does work a lot of the time.

There are also psychological exams called psychosexual exams. Although no psychological test can say for sure whether a particular person did or did not commit a particular crime the theory is that a psychosexual exam will identify certain psychological traits that fit the profile of the type of a person that is more likely to sexually abuse a child. If a person does not possess those particular personality or psychological traits, we can use that to attempt to convince the authorities that the allegations are false. Therefore, on some occasions I will have my client take the exams and then submit the results to the authorities. Although not as powerful as passing a lie detector a favorable exam result can also sometimes refocus the investigators and to convince them to be more objective in their investigation. If we are able to provide both a favorable lie detector result and a favorable psychosexual exam result we are often well on our

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<sup>2</sup> Voice stress test analysis has become a popular substitute for polygraph examinations but it operates on the same principals as the polygraph (physiological responses to making a verbal statement that can be caused by many factors) and are also not admissible in court.

way to convincing the authorities not to file formal charges.

## **2. Determination of and presentation of the child's motive to make a false allegation of sexual abuse are essential.**

It is absolutely essential during the defense investigation that a motive for a false allegation be discovered and that the child's motive be presented to the investigating authorities or to the jury. As discussed above no one likes to believe that a child would lie about sexual abuse. To overcome the inclination of most individuals to immediately believe the child you need to provide a reason the child would lie. As discussed above, motives for such allegations can include the child's desire to live with the other parent, an attempt to avoid discipline, the bragging rights of a teenage boy, or a child's desire to please the other parent by complying with instructions of the other parent to make the allegation. These are just some examples of what I have encountered. There are many others and discovering which particular motive is in play in a particular case will require a very thorough review of the facts. Even in a case where the motive is not obvious or readily apparent one should develop at least a working theory of the possible motive constructed from all circumstantial evidence. Even if the motive cannot be readily determined keep looking for it. In one very difficult case we just could not figure out what the motive was until the middle of the trial during cross examination of the teen accuser when she finally admitted that she desired the attention of her absentee biological father. This admission combined with other facts in the case allowed us to put together the defense that the allegation against her step father was a ploy for attention from a biological father that prior to the allegation against the step father had abandoned the girl - and the verdict was not guilty.



In some cases and especially in cases involving very young children the motive might be the motive of another adult in the child's life such as a vindictive or mentally ill ex spouse or girlfriend and the child is simply repeating what he or she has been coached to say. Children can be coached and the younger the child the less likely the child will be able to distinguish reality from fantasy. In other words, a very young child can be coached to make statements that the child actually comes to believe to be true. This is called false

memory and presents very difficult issues because the child actually believes what he / she is saying and therefore can appear to be very credible.

A final note about motive: Sometimes there will be no intentional motive by the child or anyone else. I believe that sometimes parent hysteria can cause an unintentional false allegation or an exaggerated allegation. If a parent is obsessive about protecting the child from abuse and routinely "interrogating" the child about if he / she has been abused a very young child may actually develop a false memory or belief of being touched, or may develop an overly sensitive

response to legitimate touches in response to constant questioning. For example, in one case my office reviewed the child's mother was extremely controlling and obsessive about abuse issues and routinely interrogated the child if she had been abused. The child was left with the father's mother one weekend while the parents went out of town. Upon return the child when again asked by the mother if the child had been touched stated that her grandmother had touched her. The mother became hysterical and called social services and the police. What had happened was the grandmother had bathed the child and in drying the child with the towel she did touch some private parts with the towel. This case was resolved rather easily, but we believe it was only because the allegation was against the grandmother and the system bias we have spoken about earlier did not exist because of the gender of the grandmother. Had the grandfather given the child the bath I believe we would have had to fight much harder to avoid formal charges. Therefore, if you have been accused and another adult in the child's life has been obsessive with the child about abuse this is something that needs to be explored in preparing your defense.

### **3. Demonstrating the basis of the child's knowledge of sexual terms, situations, and acts is very important.**

As discussed above many individuals will credit a child's statement of sexual abuse simply because the allegation involves detailed sexual information that is not age appropriate. In such cases, it is important to be able to demonstrate that the basis for the child's knowledge came from a source other than the alleged abuse.

In order to demonstrate the child's knowledge regarding sexual matters, an investigation needs to be conducted into the child's access to television, movies, cable, internet, the child's other relationships, dating behaviors, pornographic material in the home, the child's sexual education curriculum, and last but not least information being provided by the child's peers. A child can learn quite a bit from a sexually active friend who has confided in the child.

### **4. Use of divorce / custody and dependant / neglect proceedings to gain information and to assess the State's case.**

When the accused is a parent, step parent, or someone who is a custodial care taker of the child chances are that in addition to possible criminal charges the State will file a civil proceeding to obtain court orders for the accused to stay away from the accuser. The first inclination of the accused may be to forgo any rights to have a hearing in the civil court because the accused does not wish to be around the child due to concerns of additional allegations. Giving up the right to challenge the custodial legal proceedings can be a serious mistake. An accused should use these proceedings to build the defense to the criminal case.

In many States the rights of the accused in a criminal proceeding limit the ability of a defendant to gain access to witness statements, or to take depositions. Therefore, unless the custodian of the child allows your attorney to talk to the child you can find yourself in a criminal trial charged with a heinous sexual offense against a child and facing years in prison - all without

knowing exactly what the accuser is claiming you did. You should therefore use the civil proceedings as an opportunity to prepare for your criminal case. In many states civil discovery is much broader than criminal discovery. Use the civil discovery rules to take depositions of the child and any other witnesses that you can. Use the custody or dependant / neglect hearing to obtain a sworn statement from those individuals. In this way you not only know exactly what to prepare for but you may very well be able to develop statements that are inconsistent. If the child or other witness gives sworn testimony in the divorce / custody, dependant / neglect case that is different from what they give in their testimony during the criminal case, you can argue that the witnesses in not credible.

## 5. Words Matter

A jury has a very minimal amount of time to make assessments and determinations about you and the accuser. Therefore, I believe even terminology can be the difference between a not guilty or a guilty verdict.

Lawyers and judges who work in the system every day have a habit, simply as a sort of verbal short hand of referring to individuals not by name but as the "victim" or the "defendant" - even before a person's guilt or innocence has been established. Your attorney should humanize you as an individual. Never let your attorney refer to you as his client, or the defendant. He should refer to you by name. The jury needs to understand that if they find you guilty, they are affecting the life of a real person with a real identity beyond someone who is simply the "defendant" or "the client". Alternatively, do not recognize the child as a "victim". Do not - I repeat do not - call the child the victim or even the "alleged victim". I believe this sends a powerful message to the jury. If they hear the term victim repeated enough they will eventually come to view the child as "the victim". I would not even refer to the child as "the child". The attorney should refer to the child as the accuser whenever possible as opposed to using the child's name. If you are testifying, it would seem unnatural and seem coached for you to say accuser, so you should use the child's name.



One favorite question of prosecutors when conducting a cross examination of the accused is to ask whether the child is lying. They especially like to ask this question when the accused has a close relationship with the accuser, for example - when the accused is the parent. Although this question is highly objectionable, it is often made before the defense attorney has a chance to object. Once the question is out an objection may be even more damaging than allowing an answer. If you are ready for it the answer is easy. Unless the child is very young and it can be argued that he or she

may have a false memory, the accused needs to be very willing to say the child is lying. I have seen many individuals who were accused reluctant to call the child a liar because they are the child's parent or because they just felt it was not nice to call a child a liar. However, as I stated,



words matter. You are on trial for your life. If the child is not lying than she is telling the truth. If she is lying you better be willing to say so. Hesitating could cost you your freedom.

#### **6. Have a strategy for what to do with the forensic interview.**

A "forensic interview" is simply an interview performed by a person, usually a social worker, who is supposed to be trained in how to interview children in a manner that will make sure the interview provides reliable information. As the person interviewing a young child can easily influence what the child says forensic interviewers are supposed to be trained in how not to ask leading questions and how not to influence the child's answer. The problem is that due to their bias in favor of children and against anyone even simply accused of sexual abuse many so-called forensic interviewers nevertheless conduct very leading interviews of the child. The "forensic interview" is typically videotaped. Most jurisdictions will allow the attorney for the accused to view the videotape of the interview. Some jurisdictions will also provide a copy of the tape. Other jurisdictions will not allow the attorney to have a copy and the attorney must go to the prosecutor's office, or detectives office, or social services to view the tape.

What you should be looking for on the tape is whether the interviewer uses leading questions and other manipulative interviewing acts such as refusing to accept a negative response by the child. I have actually seen forensic interviews where the child in response to a specific question regarding sexual abuse stated that nothing happened and that their was no abuse. Instead of ending the interview the interviewer continued asking what was done to the child and used leading questions until the child made an allegation.



Whether the forensic interview is admissible as evidence during a trial depends upon the law in each jurisdiction and can depend on what the defense does in challenging the credibility of the child and the credibility of the forensic interview. After reviewing the interview decisions should be made about several things. First, should an expert psychologist or forensic interviewer be hired to review the interview to determine whether given the child's age and the conduct of the interview the interviewer influenced the child and aided or coached the child into an allegation. The interview should also be reviewed to determine whether there were inconsistent statements made by the accuser that suggest the story is not true. Second, if it is determined that the forensic interview was done improperly or that there were material inconsistent statements made during the interview it needs to be decided whether or not to make an issue at trial of how the interview was conducted or about the inconsistent statements. At first glance one would certainly think that this information should be presented to the jury. However, in a jurisdiction where the forensic interview is not automatically allowed to be produced as evidence and is only admissible to rebut defense challenges to the child's credibility there can be very serious negative consequences to

making an issue of how the forensic interview was conducted.

If the forensic interview is challenged in front of the jury as being conducted inappropriately, or if it is alleged there were material inconsistent statements made during the interview versus the child's trial testimony it is likely the prosecution will be able to play the entire interview for the jury in an attempt to rebut such attacks. In such an event the jury in addition to having heard the accuser testify on the witness stand will hear the testimony a second time as the forensic interview is played for them. Even worse, if the forensic interview tape is made an exhibit the forensic interview will go back to the jury room where it is played and played and played and all of the testimony you presented during trial refuting the allegation gets lost because the only thing and the last thing the jury hears during deliberation is the video taped accusation against you.

Therefore, I am usually only in favor of making an issue about how the forensic interview was conducted when the jury can readily see that the child was manipulated and the interview was obviously biased. If there are concerns about how the interview was conducted but they are subtle and not obvious to the layperson an expert may be needed to explain why the interview was not conducted in a proper manner. In these circumstances I would file a motion to be heard by the judge (and not the jury) to prohibit the use of the child's testimony during trial based upon the grounds that the testimony is so tainted by prosecutorial misconduct from the inappropriate forensic interview that the child's testimony can not be reliable and would be more prejudicial than probative and therefore should not be allowed.

Likewise I am generally not in favor of playing the forensic interview for the jury to show prior inconsistent statements to the jury unless the statements are so inconsistent and so incredible that having the jury hear that information clearly outweighs having them view the taped forensic interview where a child accuses my client of sexual misconduct and which may be replayed multiple times in the jury room during deliberations. In short, do not make an issue about minor inconsistencies.



#### **7. Your attorney should pay close attention to several special evidence rules.**

There are rules that govern the type of evidence that is admissible in a criminal trial and under what circumstances certain evidence can be admitted. In most jurisdictions, those rules include a prohibition against allowing an accused to present evidence regarding an accuser's past sexual history. This rule is often referred to as the rape shield law and typically numbered as Evidence Rule 412. There are also rules that prevent the accused from presenting specific instances of the accuser's character. For example, usually any

evidence regarding a lie the accuser told about another person not involved in the case would not be allowed. This rule is typically numbered as Evidence Rule 608. However, most jurisdictions also have special exceptions to these rules which under certain circumstances do allow the defense to show to the jury evidence regarding the accuser's sexual history and specific instances of the accuser's character. Because it is unusual for a court to allow an attorney to use these exceptions many defense attorneys are not as familiar with the exceptions to the rules as they should be or need to be. Cases involving allegations of child sexual abuse often involve facts and circumstances that are more likely than other types of cases to allow the attorney defending the case to effectively argue that the accusers past sexual history or specific examples or instances of the accusers character is relevant and admissible.

Therefore you need to make sure that your attorney has recently familiarized himself with these rules and their exceptions and any court cases that discuss those rules and exceptions. For example, if a young accuser has knowledge of sexual terms and acts which are not age appropriate, the exceptions to the rape shield law under Rule 412 should allow the accused to present evidence that the accuser has been sexually active with another person in order to explain the reason the accuser would have knowledge about sexual terms or acts. An example of an exception to the prohibition against presenting evidence of specific instances of poor character of an accuser is if an accuser has made a prior false allegation of sexual abuse against another individual. This specific instance of bad character should be allowed under Rule 608.

There are also special evidence rules about when and how the forensic interview is admissible. Lawyers who do not routinely handle these types of cases are often unfamiliar with these rules and the law surrounding these rules. As stated above it is often not helpful for the interview to be played for the jury and your attorney should be aware of the rules about how to exclude that interview if possible.

## **8. Selecting the Jury.**

In a criminal case involving child sexual abuse allegations the accused will have the right to a jury trial. Most state courts during jury selection will allow the lawyers to ask potential jurors questions.<sup>3</sup>



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<sup>3</sup> In most Federal Courts the attorneys are not allowed to ask the questions and are only allowed to present limited written questions to the judge which he must approve and he will ask the

The lawyer will then have a certain number of jurors they can disqualify. I have said that while it is still possible to lose a case after doing a good job selecting the jury by making an error later in the trial a lawyer can never recover and win the case after doing a poor job selecting the jury. Put another way - choose the wrong jury and you've already lost. Due to the extreme repulsion by citizens against sexual crimes against a child and that as a practical matter a person accused of such a crime will not enjoy the presumption of innocence from most jurors, the importance of selecting the jury in a child sexual abuse case cannot be over stated.

Any trial attorney who has tried very many cases understands that it is important to ask open questions in order to learn as much about the juror as possible. In other words the attorney should ask questions of the jurors that require some sort of explanation rather than a simple yes or no.

There are several subjects that need to be addressed in the child abuse sexual allegation case during jury selection. I will address two of them. The first subject that needs to be addressed with a potential jury in the sexual abuse allegation case is the child as super witness. I call child accusers in sexual abuse allegation cases super witnesses because I believe jurors automatically give a certain amount of credibility to them as witnesses simply because they are children and simply because of the nature of the allegation. As stated at the beginning of this article people do not want to believe that children will lie about sexual abuse. This fact along with the jurors' inherent desire to protect a child will cause the juror to want to believe the child from the beginning -rather than listen to the testimony with an open mind. Thus unlike most witnesses - the child witness alleging sexual abuse begin their testimony with the assumption that they are telling the truth - which is why I call them super witnesses. Therefore, questions to potential jurors need to address this problem and jurors need to be asked about their ability to treat the child like any other witness.

For example, ask questions such as:

Q:"Mr. Jones, how do you feel about whether children tell the truth more than adults just because they are children?"

Q: "Mr. Jones, tell me some reasons that you can think of why a child might make a false allegation of sexual abuse?"

While this will not totally avoid the problem of the child as a super witness it at least gets the jury thinking in the right direction and once in a while a juror will respond with an answer that helps make your point to the rest of the jury. Of course sometimes a juror will give an answer in an attempt to sabotage you because they think everyone accused is

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questions to the jury - and will usually do a lousy job.

guilty or they are trying to get out of jury service. I once actually had a potential juror say during jury selection that no child would ever lie about such a thing. I used his negative answer as a spring board to go down the list of all possible reasons a child might lie about abuse. Obviously he did not agree with me but it gave me a chance to get all of the other jurors to start thinking about those reasons and to start to consider that false accusations can and do occur.

Another issue to address in these types of cases is the crying witness. The crying child accuser turns the child witness from super witness to super and nearly "bullet proof." The crying just exacerbates the jury's instinctive desire to protect the child. Using open-ended questions like the ones above make sure the jury understand that stress, fear, and frustration can cause a child witness to cry and that many children know how to manipulate others by crying just as many adults know how to manipulate others by crying. Simply because the child witness is crying does not mean the child was in fact abused.

### **9. Fully and properly prepare the accused to testify**

In many cases of this type there will be little to no evidence to corroborate the accuser's allegations, and little to no evidence to corroborate the denial by the accused. In other words most cases will come down to what is called a "He said - She said" case. Given the inclination of the jury to treat the child accuser in a sexual abuse allegation case as a super witness the ability of the accused to effectively testify is essential.



In other types of cases the jury may be more forgiving if the accused appears especially nervous or rambles or gets confused or gets angry. The jury will be nearly as understanding with anyone accused of child sex abuse. While only the truth must be presented the manner in which the accused presents the truth is extremely important. The accused should have a good understanding of what will be asked by his attorney and what will likely be asked by the prosecutor on his cross examination. All questions the attorney for the accused will ask and all questions it is believed the prosecutor will ask should be reviewed with the accused in practice sessions. There can be a fine line however between adequately preparing the accused and over preparation that will cause his testimony to appear coached. Practice sessions should be stopped once the accused appears to have a good grasp of what questions will be asked and the fundamentals of how he needs to present himself. In other words, the accused needs to know

what questions to expect in order to avoid surprises and he needs to practice overall presentation such as body language, but his testimony should not be scripted word for word.

In extreme cases where the client is a very poor speaker or has very poor interpersonal skills a professional communications coach may need to be hired in order to make him or her more presentable to a jury. I believe that unless there is over whelming evidence of guilt once the accused testifies that 90% of the juries decision is simply based on whether they like or dislike the Defendant. The more they like the Defendant the more likely he will be found not guilty. The more they dislike him - even if for reasons having nothing to do with the actual evidence - the more likely they will convict him. Therefore the impression the defendant makes while testifying is critical.

### **10. Use of experts**

In a criminal trial typically the only witness allowed to give an opinion is one who the court finds to be an expert. Typically all other witnesses may only testify to facts: what they saw, heard, or did. An expert however may testify to what he believes a particular fact means, for example, whether in his opinion a particular injury is consistent with sexual abuse.

Certainly, if there is forensic evidence in the case such as hair, fiber, blood, or semen that implicates the accused but the accused maintains his innocence, defense experts will be needed to review the tests, findings, and conclusions of the State's experts. There are typically two situations in which to consider using an expert witness in a child sexual abuse allegation case: 1) to review and possibly testify regarding whether any findings of tearing or scarring of the vaginal wall or hymen or anus are consistent or inconsistent with sexual abuse; and 2) to review and possibly testify regarding whether or not the forensic interview was conducted in a leading or suggestive manner causing the accuser's testimony to be unreliable.

Generally, I do not favor use of an expert witness to testify to the obvious. For example, if the forensic interviewer's questions and manner is so obviously leading and suggestive that any one can see how it would improperly influence a witness -then an expert is not needed to point out the obvious. In fact I believe the jury may resent the use of an expert in such a situation wondering why the defense believes it necessary to have an expert testify to the obvious. However, more subtle forms of leading and suggestive questioning especially of very young children may require expert testimony. Furthermore, expert testimony may be needed to explain to the jury how, because of a faulty interview, a young child over time may actually believe as true the false information they provided.

As discussed above in tip number six, before presenting expert testimony regarding the forensic interview be sure that the expert's opinion is strong enough and powerful enough to justify the result that the introduction of that expert's opinion will cause the State to be able to introduce the actual interview and in effect allow the accuser to testify a second time thru the interview.

In cases where there is evidence of tearing or scarring the state will typically present an expert to testify and give an opinion that the tearing or scarring is consistent with sexual abuse. In such situations the defense will want an expert to review the evidence to determine the possibility that the injury could have been caused by consensual sexual activity with someone other than the accused, or by accidental means, such as a fall involving a straddling injury received in an activity such as biking, horse back riding, or gymnastics. Straddling injuries, although rare, can occur.

There is often a temptation to forgo consulting with a defense expert when the State's expert is expected to testify to facts that are obvious or not in dispute, or the State's expert gives a pre-trial statement that the defense believes is helpful to the defense. Why hire your own expert when the State's own expert gives a helpful opinion? Be extremely cautious in giving in to this temptation because the State's expert may change that opinion. Once in trial and actually testifying State experts have a habit of exaggerating or changing their opinions to better fit the State's theory especially if the prosecution's case is not going well. When this happens confronting the expert simply on the basis of their prior statements is not likely to be effective as they will try to explain away the inconsistency with technical jargon and language and the only thing the jury remembers is the expert's ultimate opinion.

For example, I once had a case where in a pre-trial interview the State's expert, a forensic nurse, stated that the scarring observed in the hymen was just as consistent with the teen accuser having engaged in consensual activity with a boy as it was with the teen having been sexually abused by the accused. However, when she testified at trial she stated that although possible it was highly unlikely that the scarring occurred from consensual sexual activity - a complete contradiction to what she told me. Therefore, to avoid this problem hire an expert for everything when financially able. You may ultimately not actually use the expert but it is far better to have one ready and not need him than to need one and not have him. Given the stakes involved in the sexual abuse case the cost is well worth it.



A note about DNA, blood and semen. If there is DNA or blood or semen evidence in a case where the accused is a family member experts should be consulted and on stand by to testify if necessary to the science about DNA and bodily fluid transfer. DNA and blood and semen can transfer from towels and clothing on to other clothing or bed sheets. Transfer can even occur during the laundry.

#### **11. The Attorney must be passionate about defending his client**

I fully believe that a defense attorney in defending against the child sex abuse allegation can do everything technically correct by presenting all the right evidence,

making all the right arguments, conducting a great cross examination, and making all the right objections, but nevertheless lose the case because he did not display true passion in the belief of the innocence of his client. I believe true passion is often the difference between a guilty verdict and a not guilty verdict. These cases are very emotional from the state's side and the defense lawyer should respond with its own emotion. Chances are the accuser will cry and chances are the prosecutor will shout his or her disgust about how the accused stole the child's innocence. The attorney for the accused who believes in his client needs to respond. The attorney for the accused must be willing to make an EMOTIONAL PLEA about the injustice that has been wrought upon the accused. The defense attorney must respond with indignation at the unfairness of the accusations. If the attorney does not convince the jury that he is absolutely convinced of the innocence of the accused, the jury is not going to be convinced to vote not guilty.

### **Conclusion** **The Bad News and the Good News**

The bad news. The criminal justice system in the beginning of these cases is very unfair and the odds are stacked against the person who has been accused because of the bias of investigators. You have felt it and you know it. Your life has just been turned upside down. Your reputation and very freedom are at stake and you do not know if you will ever recover. You are afraid no one will ever believe you over an innocent child. The stakes are extremely high. With very lengthy prison terms and mandated sex offender registry requirements it is not an exaggeration to say that your life as you know it is at stake.

The good news. It often takes months of hard work and a lawyer who will stand with you like a rock but we have helped many people get their lives back. By employing each of the strategies I have discussed above we have won many of these cases. Anyone accused of such an offense needs to take the situation very seriously and employ a lawyer who knows the special problems these types of cases present and who has experience fighting these cases. Your FREEDOM is worth the fight.

Horst Law  
My Client - My Fight

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