

**Representing the Accused in Sexual
Assaults of Children: What your clients
are getting into and trying to get them out**

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- I. Early Stages.
 - A. Client Interview. Your client is your best source of information. Be sure your interview is thorough. This should include (a non-exhaustive list):
 1. Social History
 2. Releases for confidential records
 3. Client's version of the case
 4. Everything the client knows about the child
 5. Everything client knows about the origin of the allegation and the circumstances under which it was made.
 6. All client contact with police, social services, teachers or other professionals involved in the case.
 7. Who client thinks should be interviewed about the child.
 8. All reasons why client thinks child is not truthful.
 9. Any alibi or fact witnesses.
 10. Discussion of how client can help you learn more about child through electronic information such as My Space, Facebook, Blink, AOL, IM's, Email, etc.

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11. Be sure to advise client about mandatory reporters which include physicians, social workers, teachers, police officers and therapists.

B. Learn about children. Children do not think and behave like little adults. Children's memories are very malleable and they can easily come to believe a false accusation. Learn about the stages of child development, information about false memories and children, brain development, etc. Some resources for learning about kids:

1. 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.

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

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

4. 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>

C. Preliminary Hearing. This may be your only opportunity to see and question the witness before trial. Don't give it up unless necessary. Protect your record for a later *Crawford* objection if the state attempts to use it at trial. Do not be afraid to cross examine parent about the circumstances of the initial disclosure to tease out the issues even when you don't know the answers.

D. Law Enforcement. Informal discussions can be very enlightening about attitudes and the direction of an investigation. Call early and keep the dialogue going in the hall as the case progresses.

E. Social Workers. Social workers are aware of the dangers of suggestive interviewing and generally are trained to avoid suggestiveness. However, the social worker is rarely the first person to interview the child.

1. Call the Social Worker for a Chat.

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.

2. Subpoena/Locate Training Materials.

- a. Subpoena the social worker with training materials. Consider sending articles to the social worker/expert for review. For example, The Child Protection Center in Milwaukee has guidelines for the Stepwise Interview that discuss the need to develop multiple hypotheses so that the investigator doesn't get locked into one theory and spend their time trying to prove the theory is true rather than discover the truth.
- b. 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.

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

- a. In most cases, the child has been interviewed repeatedly before even meeting the social worker. The child usually discloses the abuse first to a parent and then is interviewed at least once by police officers.
- b. Social workers will generally acknowledge that there is always a danger that a child will give the answer he/she thinks will please an adult who is questioning him/her.
- c. It is no great leap to get an admission that this danger is particularly acute when the questioner is a parent who is upset and whose emotions may influence a child.
- d. Knowing the training materials allows us to use the social worker to illustrate that all the safeguards built into his/her interview are absent from other earlier (and later) interviews by Mom, police, teachers, etc. As well as the social worker may have done his/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.

II. Discovery & Investigation

- A. What the prosecutor will give you: police reports, photographs, victim's medical records, recorded interviews of victim by police/social workers, 911 calls, dispatch calls, recorded interrogations.
- B. 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. *State v. Denis L.R.* 2005 WI 110.
- C. Prosecutor must disclose 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.
- D. Open Records requests: previous complaints, prior police contact with client's and/or victim's address, contacts with specific individuals.
- E. Obtain from client/friendly adult: school records, psychotherapy records, diaries & journals, computer use records of websites, IM's, My Space or Facebook, school curriculum on health, sexuality child or sex abuse, yearbooks, non-police scene photos, family photos, cards, letters, etc.
- F. Subpoenas. Can use then to require victim or family to bring items from home that are relevant, e.g. family photos.
- G. Motions to enter land. Can be used to inspect or photograph/videotape scene.
- H. Defendant is entitled to a pretrial psychological examination of the victim when state gives notice that it intends to introduce evidence generated by expert hired specifically for purpose of examining victim and supplying testimony at trial. *State v. Maday*, 179 Wis.2d 346 (Ct. App. 1993).

III. Discovery of Confidential Records – Pretrial Motions

- A. Basic rule: 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), *PA v. Ritchie*, 480 U.S. 39(1987)

If complaining witness (or other record custodian) refuse to release records for *in camera* review, the court may suppress witness' testimony. *State v. Behnke*, 203 Wis.2d 43 (Ct. App. 1996).

B. Examples of Successful Motions

1. *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 freaked out due to mental health problems as a alternative explanation for her bizarre behavior. *Id.* at 368.
2. *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.
3. *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.
4. *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.
5. *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.

C. Examples of Unsuccessful Motions

1. *State v. Munoz*, 200 Wis.2d 391(Ct. App.1996). Information that victim received counseling for prior assaults insufficient.
2. *State v. Behnke, Id.* Information that victim had history of self-injury insufficient to demonstrate need for records to support claim that victim hit herself in the eyes and bruised her body.
3. *State v. Green*, 2002 WI 68. Defendant's assertion that the victim's statements to her counselor after assault could be inconsistent with her reports to police and social worker was insufficient to compel an *in-camera* review.

IV. Experts and Pretrial Motions Concerning Expert Testimony.

A. Experts on Memory and Suggestibility of Child Witness.

1. Expert testimony admissible on how suggestive interview techniques used with young child can shape a child's answers, that is, to discuss procedures and techniques used in pretrial interviews with child witness and to explain how these procedures and techniques may have affected the reliability of the child's recollections. *State v. Kirschbaum*, 195 Wis.2d 11 (Ct. App 1995). (note: this case cites a number of court decisions from other states in support of this proposition).
2. But, court upheld exclusion of this 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; Dr.'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.

- B. 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). Witness may not testify that another witness is telling the truth. *State v. Haseltine*, 120 Wis.2d 92 (Ct. App. 1984). This bars testimony that the expert believed the witness or was certain that witness was a sexual assault victim. *State v. Romero*, 147 Wis.2d 264 (1988).

Practice Tip: 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.

- C. Consider 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.

- D. Move to have an expert conduct a pretrial examination of the complainant if state has retained 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.
1. When state's expert has not interviewed complainant, defense not entitled *Maday* psychological examination. *State v. Anderson*, 2005 WI App 238 (*reversed on other grds*).
 2. An expert's status as the complainant's treating therapist does not preclude that expert from being "retained" by the State for *Maday* purposes. *State v. Rizzo*, 2002 WI 20.
 3. When state's expert who was also complainant's treating therapist limited testimony to information about delayed reporting and expert stated he could assess that aspect with a personal examination of complainant, *Maday* examination is unnecessary and properly denied. *State v. Rizzo II*, 2003 WI App 236.
- E. Considering retaining an expert to testify that your client lacks the psychological characteristics of a sex offender. 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.
1. Be aware that if expert relies on and/or testifies to defendant's version of events as part of expert opinion, state can be entitled to have own expert examine client. *State v. Davis, Id.*
 2. Practice Tip: Make sure that the examiner just uses standardized tests and doesn't do an interview regarding the alleged offense to prevent state from being able to have expert examine your client under *Davis*.
 3. 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.*
 4. Admissibility of this evidence held to be discretionary determination by trial court per *State v. Walters*, 2004 WI 18. But when state argued that 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 fundamental elements of a defense. *State v. St. George*, 2002 WI 50.

V. Other crimes evidence

- A. In general, the rules of evidence prohibit other acts evidence to prove propensity to commit a crime, subject to a lengthy list of admissible reasons for other acts evidence in Wis. Stats. Sec. 904.04(2).
- B. But propensity evidence is permitted in first degree sexual assaults of children and adults: prosecutions under Secs. 940.225(1) and 948.02(1) Wis. Stats. See newly created sec. 904.04(2)(b) which states::

“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 to show that the person acted in conformity therewith.”

- 1. Practice Tip: Note the limitations of the statute. It is restricted to prior convictions for these two offenses. If the state seeks to admit this, argue that it is limited to admitting evidence of the conviction, not the underlying fact.
- 2. Attacking the statute
 - a. What is the meaning of similar? Does one look to the elements of the offense or the underlying facts?
 - b. Attack the rule as an unconstitutional infringement by the legislature upon the separation of powers (an unwarranted interference with the Supreme Court’s power to determine the rules of evidence that govern trials).

C. Realistically, most other crimes evidence in child sexual assault cases will continue to be admitted under *State v. Sullivan*, 216 Wis.2d 768, which sets forth a three-step analytical framework for the admission of other acts evidence.

- 1. Is the other acts evidence offered for an acceptable purpose under Wis. Stats. 904.04(2)?
- 2. Is the other acts evidence relevant, i.e. does it relate to a fact or proposition that is of consequence to the determination of the action and does it have probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable that it would be without the evidence.

3. Is the probative value of the other acts evidence substantially outweighed by the danger or unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time or needless presentation of cumulative evidence.
- D. The Sullivan test is also subject to the “greater latitude standard” in child (and adult) sexual abuse cases. *State v. Hunt*, 2003 WI 81, *State v. Veach*, 2002 WI 110.
 - E. Courts have permitted acts remote in time in child sex abuse cases. See for example *State v. Opalewski*, 2002 WI App.145 in which acts that occurred 15-25 years earlier were not considered remote.
 - F. Look for and argue factual dissimilarities. *State v. Meehan*, 2001 WI App 119. In this case victims were of different ages (14 and 23), factually dissimilar (one act in a bedroom after an illegal entry in middle of night while victim was sleeping; other act in a public place during day when victim was awake. *State v. McGowan*, 2006 WI App 80, which disallowed evidence from defendant’s prior sexual acts as a 10 year old juvenile in defendant’s adult case of sexual assault of child.
- VI. Other Acts: the Rape Shield Law - Sec. 972.11 Wis. Stats. Evidence concerning the complaining witness’ prior sexual conduct or opinions of the witness’ prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence.
- A. Statutory Exceptions- Admissibility must be litigated in pretrial motion
 1. Evidence of the complaining witness’ past conduct with the defendant.
 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.
 - B. Constitutional right to present evidence and of confrontation under Sixth Amendment may require expansion of rape shield law under some circumstances. There is a five part test per *State v. Pulizzano*, 155 Wis.2d 633 (1990).
 1. The prior acts must have clearly occurred;
 2. The prior acts must closely resemble those of the present case;

3. The prior acts must be clearly relevant to a material issue;
4. The evidence must be necessary to the defendant's case; and
5. The probative value of the evidence must outweigh its prejudicial effect.

If the five prongs are met, the court must determine whether the defendant's right to present the proffered evidence is nonetheless outweighed by the state's compelling interest to exclude the evidence.

- C. Defendant fulfilled *Pulizaano* test and permitted to introduce evidence of prior sexual assault of child victim to show alternative source of sexual knowledge and injury. *State v. Dodson*, 219 Wis.2d 65 (1998).
 - D. Admission of expert testimony (Jensen evidence) by the state to explain complainant's reporting behavior does not "open the door" to allow testimony barred by rape shield law. *State v. Dunlap*, 2002 WI 19.
 - E. Rape Shield law bars testimony that regarding complainant's absence of sexual activity. *State v. Penegar*, 139 Wis.2d 569(1987); *State v. Mitchell*, 144 Wis. 2d 596 (1988).
- VII. Other Acts: Not Barred by the Rape Shield Law
- A. Written expressions of sexual desires are not conduct or behavior and may be admissible. *State v. Vonesh*, 135 Wis.2d 477 (Ct. App. 1986).
 - B. Prior demonstrably false claim of sexual assault is not barred by the rape-shield law. *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001).
- VIII. Other pretrial motions
- A. Suppression Motions. 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.
 - B. Juvenile Cases: Bring challenges to prosecutions based on age of victim alone. Consider equal protection challenge when prosecution is based upon consensual act between children and only one is prosecuted. Consider equal protection challenge to attack felony prosecution based

upon sexual contact between persons ages 13 – 16 when similar conduct by adults would be misdemeanor offense for 4th degree sexual assault.

IX. Some Thoughts on Developing a Theory of Defense

- A. Develop a number of hypotheses. 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, manipulating 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.

“if the investigator entertains only a single hypothesis, there exists a chance that the investigation might turn into an effort to ‘prove’ that hypothesis rather than an effort to find the hypothesis that best fits the facts of the case” The Step-Wise Interview–Guidelines for Interviewing Children, John C. Yuille.

- B. Sift through the facts and combinations to determine the best fit. 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.
- C. Test your hypotheses. Tell the story to your neighbors, family members, postman, anybody who will listen. Change 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.
- D. 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. The more organized you are the more relaxed you will be.