DEFENDING CRIMINAL SEXUAL CONDUCT CASES

October 19, 2018

Wayne County Criminal Advocacy Program

Shannon Smith
Smith Blythe, PC
1668 South Telegraph Rd.
Suite 140
Bloomfield Hills, MI 48302
www.smithblythe.com
cell: (734) 218-1998

CSC CASES

Cases involving allegations of criminal sexual conduct, particularly by children, are some of the hardest cases to defend. The United States is in a divided and strange spot between the #metoo movement, the Kavanaugh confirmation hearing, the epidemic issue of sexual assault, and the risk/ease for false convictions. July selection will be more important than ever. Our jurors will have strong opinions, as you have probably seen from the Facebook wars, and many have read articles on both sides of the spectrum.

When it comes to women there are many who believe that sexual assault occurs to 1 in 4 women, that most sexual assault is not reported, and that it's important to believe all victims to encourage others to come forward. They also may have seen statistics that only 2% of reports are false reports which has been posted over and over in recent times. It will be critical to see if jurors think along these lines….and to distinguish the burden of proof at a confirmation hearing or job interview to the high standard of proving something beyond a reasonable doubt.

When it comes to children, many believe that they have no reason to know about sexual activity, have no motive to outright lie and the complainants have every quality of a "good" prosecution witness: sweet, innocent, sympathetic and young. Often, there is a delay in reporting the claims, resulting in an absence of biologic evidence. Rarely are there eyewitnesses to the alleged events. Since time is not of the essence where reporting is delayed, forensic interviewers allow children to give vague information about when they say the allegation happened. That in turn makes it impossible to pin down the timing, which in turn makes it difficult to identify and locate potential impeachment witnesses who could address specific accusations. Permissively vague reporting also deprives the accused of alibis who could verify what the accused was really doing at the time of the alleged assault.

Common in my cases are people who are just as quick to impute a pedophilic intent to everything the accused has ever done (albeit never before the accusation): *Why would he attend cheerleading events for his niece except because he was fantasizing about her? Why would he need a password on his laptop if he didn't have something to hide? His eight-year-old daughter sits on his lap – that has to mean he's grooming her to molest her!* Accusers, upon their disclosure, are

automatically considered a "victim" (even via many states' statutes), are taught that they are actually "survivors" (implying that there was abuse for them to survive), are thrust into therapy that presumes the accusations to be true and receive the secondary gain of unwavering support from everyone around them.

The only thing worse than committing sex crimes is being falsely accused of doing so. Desperate for hope and a defense strategy, combined with overwhelming anxiety and fear, the accused needs a lawyer who is willing to discover the true story and present it affirmatively as the true narrative of the trial. These are not cases where counsel can wait, react and deflect; the lawyer must turn the tables and prosecute their client's story of how the false allegation was born, what factors brought it to life, and how it snowballed into a destructively life-changing case.

A THREE-PRONG STRATEGY

In every case, there are three aspects to investigate and consider: **plausibility, credibility,** and **reliability**:

(I) Plausibility

Attacking the plausibility of the accusation is usually the angle where the clients themselves can contribute useful evidence. This is typically the part of the case the lawyer simply cannot do for the client. Make a list of each detail the accuser includes in each of his or her accusations, and work through that list with the client and his or her supporters. What facts, independently verifiable, make the accusations impossible or implausible, or simply defy common sense?

- Reconstruct a detailed timeline of events. If the accusation is narrowed down to a time frame, obtain credit card statements, bank statements, phone records, sports schedules, school calendars, e-mails, trip confirmations and other materials to determine every single thing that was going on in that time period. Identify vacations, visitors who came from out of town, games, events, even the county fair the family attended. Have the client reenact the typical routine schedule at home including when people leave for work or school, when people get home, when the cleaning lady or babysitter was present in the house. This exercise can remind protagonists of information they simply have not thought about and help them show the timing of the claims is

impossible, that they would be unlikely, or the client would have to be crazy to think they could get away with it.

- Obtain information about the child and his or her family:

  * Family law records from divorce files;
  * Petitions for restraining orders;
  * Records of custody disputes;
  * Evaluations by *guardian ad litems*;
  * Motions filed by one parent, claiming the child had behavioral issues caused by the stress of the divorce;
  * Motions filed by one parent, seeking orders for the other parent to pay for counseling;
  * Testimony or reports of therapists which do <u>not</u> include any reports of molestation accusations.

  The goal is to obtain as much information as possible, so even reading that a child is working with a therapist is significant information and will be discussed further below.

- Get a floor plan of the alleged scene and visit the location to see it for yourself. Ask the client to draw a diagram and provide photographs. Is there a large picture window with a clear view to the couch where the child alleges your client had sexual intercourse with her? Would five other family members be walking right past that window to get into the house at any moment in the course of the fifteen minutes when the child alleges this happened? Does the house have an open floor plan with little to no privacy where your client's four kids would be able to walk around a corner and see something at any second? While a floor plan may not make an allegation impossible, sometimes it shows that the accusation is implausible because of the likelihood of detection.

- Collect photographs and videos of the alleged victim. Children grow and change quickly. By the time a case gets to trial, a child who brought her accusations as a flat-chested 9-year-old is now a fully-developed sixteen-year-old who is trying to look like a sexualized adult. Jurors need to have an accurate image of what the accuser claims, to decide whether *this* defendant is the type of deviant who preys on a child who is, at the time of the alleged assault, unsexualized.

There are some plausibility arguments to avoid. Unless there is a very unique set of facts that support these strategies, avoid defenses that include erectile dysfunction issues and penis size impossibilities. While many clients think it is persuasive to present testimony of their inability to achieve an erection with their spouse or other adults, jurors may conclude this is the case because they are only sexually attracted to and stimulated by children. Further, because a majority of sexually abused children do not present with physical findings, even in cases where they have been penetrated, the "it's too big to fit" defense is generally not helpful. There is no research or evidence-based medicine to show that an adult penis cannot fit into a juvenile vagina or rectum. That defense could open the door to showing just how possible, and thus how horrific, adult-on-juvenile penetration really is.

(II) Credibility

There is no doubt that trial lawyers salivate over cases with seasoned liars who have reputations for untruthfulness; but jurors can believe that an accuser is a liar by nature yet also presume that even a liar would not make up a claim of sexual abuse. It is for this reason that discovering the story about the motives to lie is more critical. The stronger the motive, the more likely it would be possible.

- Reverse roles with the accuser to understand why they may be saying what they are saying. Ask others to reverse roles as well to see if they discover new insights for what is driving the accuser to present this story.

- Spend time speaking to anyone who will talk to you about the accuser or the circumstances surrounding them when they disclosed, including family members, friends, churchgoers, neighbors, and teachers. By understanding the child's personality, it helps understand the motives that may appeal to the particular child in question. *What was life like at the time the child disclosed? Were they feeling ignored by parents who were distracted and fighting with one another? Were they caught stealing at school, and pressed to explain why they were acting out?* Never underestimate the

power of the secondary gain that comes with getting attention and sympathy as adults believe an accuser has been victimized.

- Ask about other instances where the child has lied or been dishonest. Remember that for a prior episode of dishonesty to be useful, the lie has to be substantial and serious – not minor matters such as turning in homework.

- Find out whether the child has been in counseling before the accusation, and whether the child's parents ever had to work with the school regarding behavioral issues. If possible, obtain the school and/or counseling records. Parents with legal custody should have a right to obtain these records or the defense will need to file appropriate motions with the court seeking supplemental discovery of the same. In Michigan, for example, lawyers can file motions requesting copies of privileged records as long as the defense articulates a reasonable belief the records will be material to the defense. If the lawyer cannot directly get the records, at least ask the court to conduct an *in camera* review of the records to see if there is information pertinent to the case.

- If there are therapy or medical records available, find the initial intake appointment where the complainant would have likely been asked about a past history of physical and sexual abuse. If the allegation pre-dates the intake, the *denial* of any abuse would be important. Remember that therapists, physicians and mental health professionals are mandatory reporters – meaning they are required by law to report abuse when they suspect or have information that an adult perpetrated abuse on a child. The lack of an investigation, combined with a denial by the child, will be helpful information (more on this below).

- Social media investigation is critical. Review Twitter, Facebook and whatever "App" is the hottest for the accuser's age group. Do they post about their accusations? Do they appear to be seeking attention in other ways? Do they exaggerate? Do they lie in their posts? Figure out who their closest friends are and look through the friends' profiles as well to find comments and posts from the

accuser. Even if the postings are not admissible at trial, they nonetheless provide valuable insight for your role reversal with the accuser and his or her supporters (including any outcry witnesses, *i.e.*, the person to whom the accuser allegedly first reported his or her allegations).

- Obviously, obtain as much information and discovery to dissect every statement the child has made about the allegation. Highlight the inconsistencies, but do not believe that the presence of inconsistent statements will carry the day. Jurors will always excuse minor inconsistencies depending on the child's age. It is up to you to present inconsistencies as a story in themselves – otherwise, jurors only see an adult lawyer nitpicking at a child.

- Do not panic if the child is not a liar and you are having trouble developing credibility issues. Remember that children are subject to the influence of the adults in their lives. This is where the motives and bias of *others* come into play, which can be very useful in a child sex case.

- If your client has been accused before, explore whether the prior allegations simply make the client an easier target. Explore whether the prior allegations are just a catalyst to further the claim that your client must be a bad person.

(III) Reliability

The reliability angle on child sex cases tends to be the most difficult for lawyers to grasp. *Reliability* and *credibility* are not synonymous. While credibility refers to the believability of the witness, reliability refers to the accuracy of the report.[1] If a child genuinely believes that his grandfather inappropriately touched him in the bathtub, he is not lying when he reports it. If his perception of that event is altered by a hypervigilant parent who is convinced something happened to him and integrates comments from that parent, his disclosure about being touched may

[1] Bruck, M., Ceci, S., & Hembrooke, K. (1998). Reliability and Credibility of Young Children's Reports. *American Psychologist, 53*(2), 136-151.

not be reliable. It is possible the child believes he is telling the truth, but is simply unreliable.

What can we do to explore reliability issues – and to understand how otherwise truthful children may make false accusations?

- Consult with an expert in forensic psychology with expertise in memory, suggestibility and forensic interviewing techniques.

- Read two books that summarize the widely accepted consensus of important research regarding memory and suggestibility.
    - Ceci, S. J., & Bruck, M. (1995). *Jeopardy in the courtroom: A scientific analysis of children's testimony*, Washington, DC: American Psychological Association.
    - Poole, D. A., & Lamb, M. (1998). *Investigative interviews of children: A guide for helping professionals*, Washington, DC: American Psychological Association.

  These books are a great place for lawyers to start, instead of reading numerous individual studies which would be too complex and time consuming. The authors explain the mechanics of juvenile and adolescent memory, and reference many of the well-known studies that confirm how various factors can influence the reliability of information a child reports. The books also address adult memory, which is also not reliable at times as well.

- Learn how memory works. Memory is a constructive process. Many factors affect a person's initial perception, storage, and recall. Recall of memories is not as simple as watching a tape of an event. It involves a reconstruction process in which content of previously presented material is unconsciously and unintentionally woven into a coherent whole story, with the aid of preexisting knowledge. Details may be distorted as the person forms a coherent story in his or her mind. For example, details that are consistent with the story may be added and details that are inconsistent may be dropped.

- Understand that once memories have been altered, there is no way for experts or any others to determine the *accuracy* of reported events. Once a person or child has come to believe something has happened, memory is irreversibly and permanently changed. This is

supported by a wide body of scientific research, which has been conducted in the fields of child development, psychology and sociology. The research on suggestibility of children and factors influencing the accuracy of reports is included in numerous peer-reviewed articles and books in the field – too many for any one lawyer to read. The two books listed above give excellent summaries of the overall consensus of the research, making it easier to digest and use in defending child sex cases.

- Remember that based on research, once an idea or memory has been implanted, regardless of how the memory was acquired, the memory itself becomes the only reality. Consequently, children may be genuinely convinced of the veracity of their memory and subsequent retelling of an event. Further, although it is not within general knowledge, it is recognized scientifically that the degree of conviction a child may have can be inversely related to the probability of its accuracy.[2]

- Trying to lead a child to admit they have lied is poor strategy. It would be better to advance the theory explaining why the child made the accusation. For example, confirm that the mother asked the child about the alleged abuse repeatedly every time the child returned home from parenting time weekends with dad over a six-month period. Show how a therapist helped a child "put together the pieces" of a story when the child expressed confusion about how her uncle was tickling under her arms and near her chest. For a very young accuser, allow him or her to speak freely to show his or her perception of reality and of truthfulness – to show that the judge's preliminary question of "do you know the difference between the truth and a lie?" really does not fully address how such a young mind understands truthfulness.

- It is also important to understand *source monitoring error*. Source monitoring error occurs when the brain incorrectly attributes the source of a memory to the memory itself. This is why, for example, children may believe they experienced abuse and not understand that

[2] Brainerd, C. & Reyna, F. (2012) Reliability of Children's Testimony in the Era of Developmental Reversals. *Developmental review : DR* 32.3 (2012): 224–267.

the source of the memory was actually from their mother constantly suggesting that "daddy must have touched your privates." What one believes or reports as the "truth" may be partial or total fantasy, or the result of familiarity with ideas gleaned from a variety of external sources other than direct personal experience, such as being questioned, being coached, being exposed to sexual material, or overhearing conversations. Although children have a generally good ability to distinguish between concrete fantasy and reality figures, there is some evidence that they have difficulty distinguishing between what they experienced through perception, and what they only imagined or were told they experienced.[3] Research by Pezdek and Roe demonstrates that children can be convinced of experiencing a different physical touch than that which actually happened.[4]

- Obtain a copy of the forensic interviewing protocol or the guidelines used to interview the child.[5] The goal of a forensic interview is to obtain a statement from a child, in a developmentally-sensitive, unbiased, and truth-seeking manner. Protocols have been developed because the research shows how easy it is to intentionally and even unintentionally influence what a child reports. Per those protocols, forensic interviews should be conducted using a structured framework where interviewers are trained to remain neutral, objective and unemotional. In order to avoid diminishing the reliability of statements made, the interviewer is expected to remain dispassionate, detached and even skeptical as to the issues being evaluated. Questions are asked to the child in an open-ended, non-suggestive format, which has been shown to elicit the most reliable responses from children. The interviewer should also explore possible alternative hypotheses for why an accusation may have been made. For example, the interviewer may ask questions to explore whether an adult gave the child any guidance in advance of the interview, whether the child was confused about the way someone

[3] Johnson, M. K. (1997). Source monitoring and memory distortion. *Philosophical Transactions of the Royal Society B: Biological Sciences*, *352*(1362), 1733–1745.

[4] Pezdek, K. & Roe, C. (1997). The suggestibility of children's memory for being touched: Planting, erasing and changing memories." *Law and Human Behavior*, *21*(1), 95-106.

[5] See, e.g., https://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf

touched them and came to believe it was a "bad" touch, or whether they are making it up to avoid going back to their dad's home for the weekend.

- Find out how much training the person tasked with interviewing the child has had. While some law enforcement agencies have Child Advocacy Centers where interviewers with substantial training conduct the interviews, many times police officers, child protective services workers, social workers and other professionals with minimal training conduct the interviews. Sometimes this information can be obtained through subpoenas, Freedom of Information requests, and motions for supplemental discovery seeking training records and materials.

- Do not be discouraged if the interview seems "clean." Some interviews are conducted by highly qualified professionals who follow the protocols very well, avoiding leading questions, not reacting to the child's statements, and properly seeking clarification of information. Even when there is no evidence of taint or suggestion from the interview itself, keep in mind that the child may have already had their memory irreversibly altered *before* the forensic interview – which makes the reported information at the interview still unreliable. A universal truth in the many cases I have defended is that the child is never the one to pick up the phone and call the police. There is always someone else who is an intermediary who talks to the child first. It may be a school counselor who hears the allegation and alerts law enforcement, a parent who asks questions and tries to determine what happened, or a friend whom the child has decided to tell. Many times, several people discuss the issue with the child before a properly trained interviewer sits down with them. Each of these people inevitably influences the child's memory, and each successive conversation about the abuse implicitly encourages the child to commit to his or her original report. The effect is akin to adding fingerprints to a knife at the scene of a crime.[6]

[6] Klika, J. B. & Conte J. R. (2016) The ASPAC Handbook on Child Maltreatment Fourth Edition. Los Angeles, CA: Sage Publications, Inc.

- Reverse roles with the disclosure witness, *i.e.*, the person to whom the child initially disclosed. Most times, the person who hears the initial disclosure is someone the child trusts and someone who cares about the child – a counselor, a friend, a family member, and frequently a parent. The reaction of these people, as you can imagine, is typically exactly the opposite of what the protocols call for – emotional, upset, protective, anxious and biased. Many times they ask questions without thinking, trying to get information from the child without considering the importance of asking non-suggestive and non-leading questions.

- By simply putting yourself in the role of a second-grade teacher who just heard a child say that someone has touched them inappropriately, you can imagine your motivation in the moment, and all of the questions you would want to rapidly fire to get more information. Even if you do not know the exact tone of the conversation or specific things that were said, this kind of exercise gives us the chance to step into the scene and test out different reactions and play the conversations out in different ways.

- If the child was in therapy, keep in mind how therapy is different than the preferred way of eliciting information from children through forensic interviews. While forensic interview protocols are designed to limit the potential suggestion, influence and taint that is scientifically known to yield unreliable reports, the cognitive set and evaluative attitude between forensic interviewers and therapists are entirely different. Therapists are trained to be supportive, accepting and empathetic. Therapists proceed using the information that is provided to them by the person being treated, which may be incomplete, grossly biased or honestly misperceived. Their purpose is to further treatment, not to pursue validating the truth of the information provided to them. A therapist does not conduct a factual investigation into circumstances surrounding patient claims. They do not seek information that both supports and refutes the patient's assertions. They do not have to examine potential reasons that the allegations could be made aside from what the patient relays. The patient is able to work collaboratively with the therapist to define the goals of the therapeutic interaction, free from a rigid structure. The

veracity of claims is irrelevant to the therapist, and, therefore, the accuracy of the information itself, as revealed in therapy, cannot dependably be considered reliable.

- That said, if a child has been in therapy, find out the techniques used by the therapist in treating patients. Some techniques have been widely criticized to yield, or encourage commitment to, unreliable information. Research supports, for example, that "play therapy" where small children are encouraged to use imagination can induce false autobiographical memories.[7] Additionally, therapeutic intervention that provides continuing support to the complainant can cause the alleged victim to become more attached to and convinced of the veracity of their memory. Therapists who encourage patients to concentrate on a topic, a reported memory for example, have the potential for generating supplemental but not historically reliable details. This is why in many cases, after periods of time have elapsed when abuse has been discussed in therapy, suddenly many complainants come to expand their allegations that they will claim they did not initially remember.

- Design your cross-examination with these thoughts in mind and remain flexible with the story. It is easy, sometimes even lazy, to paint the divorcing mother as a manipulative liar who wants custody of the children. Sometimes the facts do not support that narrative. Maybe the mother misunderstood a bizarre statement her four-year-old daughter made, and sincerely believes something sinister may have happened. When children say things like, "Grandpa made me eat his red snake and I hated it," adults can easily interpret that information in several directions. At the end of the day, it may just be that Grandpa gave the child Twizzlers. Remember that through questioning and information gathering, it is entirely possible someone unintentionally influenced the child without realizing it and it will be difficult to paint them as someone who coached the child with evil intentions. Since the defense has no burden to prove what

[7] Mazzoni, G. and Memon, A. (2003). Imagination can create false autobiographical memories. *Psychological Science,* (2), 186-188; Mazzoni, G., Loftus, E. and Kirsch, I. (2001). Changing beliefs about implausible autobiographical events – a little plausibility goes a long way. *Journal of Experimental Psychology: Applied,* (1), 51-59.

did happen, the jury can be left with options that may appeal to some and not others. Either (a) the ex-wife is a manipulative and horrible person who set her son up to make claims (and that does happen, but you should be ready to support that story with evidence, not just argument) or (b) the ex-wife genuinely misinterpreted something the child said and through suggestive questioning, unintentionally elicited an even less reliable statement. Either way, the jurors will approve the story that makes sense to them based on their assessment of the witnesses.

- Sometimes taking the less aggressive route is easier. Every mother will admit they love their child more than anything in the world. Every mother will admit they wanted to know what was wrong when their child was upset about something or they felt the child was hiding something from them. They will admit they would have done whatever it took to get to the bottom of it. Every child will admit that their mom loves them and that when they reported alarming information, they could tell their mother cared. Since good mothers talk to their children, every child will admit their mom talked to them a lot and showed them how much she cared. The child will usually also confirm that seeing their mom get upset made them more upset…and now the jury can see how the snowball started rolling down the hill.

The summation on *reliability* is you do not have to prove evil in order to save your client, at least not on the part of the child or witness to whom the disclosure was made.

EXPERT CONCERNS

In this section, I include information about expert testimony because it's probably the most frequently asked question I get from other lawyers. Credit, however, is due to **Marty Tieber** and **Kris Tieber**, who did an excellent job of briefing "syndrome" issues in the Tomasik case.

While courts should be particularly insistent in protecting innocent defendants in child sexual abuse cases, prosecutors frequently attempt to use experts to bolster the story of the alleged victim and use tactics to eviscerate the presumption of innocence. Some examples of improper testimony may include the following:

- Testimony about how the complainant's actions comported with those of a victim of sexual abuse and they have Child Sexual Abuse Accommodation Syndrome (CSAAS) symptoms;
- Testimony that overtly states or implies that the fact that there was a delay in the disclosure makes the accusation more credible;
- Testimony that the pattern of disclosing in "bits and pieces over time" is a common way children disclose abuse; and,
- Testimony that it is common for sexually abused children to recant their allegations.

All of the above-mentioned testimony, including CSAAS, is absolutely not accepted by or supported by research; however, this type of testimony can have a devastating effect by influencing jurors. In most cases, unless the prosecution expert witness appears to be so absolutely incredible that they cannot be believed, it is much better to file motions to exclude this testimony. File motions in limine seeking the exclusion of the evidence, or at the very least to limit the proposed testimony. And, if it does come in, be prepared to combat it and minimize the effect on the jury.

Generally, before these "experts" are allowed to testify the prosecutors must demonstrate (1) that the jurors truly need assistance on the matter, (2) that the witness is qualified to assist them, and (3) that the theories and methodologies employed by the witness are **valid and reliable**. Even if all of these criteria are met, the evidence must still be more probative than prejudicial to be admitted. Without these protections, the danger is great that the expert testimony will not provide relevant information for the jury, but instead improperly vouch for the credibility the complainant. Where the "assistance" from the expert amounts to little more than telling the jurors which witness to believe, the expert intrudes into the very area where the jury makes the ultimate decisions – assessing credibility and deciding who to believe.

Expert witness testimony holds great potential to sway factfinders, especially in a case which is reduced to a credibility contest between the complainant and the defendant. "To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective

source, offering it a much sought-after hook on which to hang its hat."[8] The concern of unfair prejudice to defendants in cases where an expert presents CSAAS testimony is further compounded because studies have shown that cross-examination, one of the only methods to discredit unreliable scientific evidence, is not a particularly effective means of discrediting expert testimony once jurors have heard the testimony and made their decision on its validity.[9] Attempts to minimize the effect of an expert's testimony on CSAAS by calling a defense expert may be futile to offset any aura of expertise the prosecution creates.[10] In general, calling a defense expert may not be sufficient to educate jurors on the factors that indicate scientific reliability. This makes the gatekeeping role of the trial court even more imperative. Courts have warned that the "admission of CSAAS evidence, without limitation, would run too high a risk of misleading the jury and therefore be more prejudicial than probative."[11]

When filing motions in limine or motions to exclude portions of the proposed testimony, start by outlining the standards regarding expert testimony in your jurisdiction. Courts are required to act as gatekeepers and have a fundamental duty to determine if the proffered expert testimony is relevant and reliable.[12]

Typically, the laws in every state requires the following:

(1) That scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,

[8] *People v Beckley*, 434 Mich 691 (1990).

[9] Brown, D., *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal L Rev 1585, 1602 (2005); See also K M. B. Kovera et al., *Juror Evaluations of Expert Evidence Validity* (August 1997) (unpublished paper presented at the 105th Annual Convention of the American Psychological Association).

[10] Kathy L. Hensley*, The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts*, 17 Pac. L.J. 1361, 1376 (1986).

[11] *Frenzel v State*, 849 P2d 741, 749 (Wyo 1993).

[12] See *Daubert v Merrell*, 509 US 579, 594–595 (1993); *Kumho Tire Co. v Carmichael*, 526 US 137, 149–151, (1993).

(2) The witness must be qualified as an expert by knowledge, skill, experience, training, or education and may testify thereto in the form of an opinion or otherwise

(3) The testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case; and,

(4) The testimony's probative value outweighs its prejudicial effect.

While these considerations are separate and distinct, **each** must be satisfied independently. Therefore, here are some ideas to incorporate in a motion in limine or a motion to limit such evidence.

1. Argue the expert testimony does NOTHING to assist the trier of fact to understand the evidence or to determine a fact at issue.

The threshold inquiry into whether expert testimony is proper is whether the proposed testimony will *assist the trier of fact to understand the evidence or to determine a fact in issue*. Often, testimony from "syndrome experts" is used to discuss "common symptoms of sexual abuse victims" such as having poor self-esteem, family problems, association with an older peer group, depression, drug abuse, withdrawal, leaving home without permission, and problems with school behavior.[13] It is insulting to juries to assume that jurors would need expert testimony to understand that sexual abuse victims sometimes exhibit emotional problems and destructive behavior. This type of testimony is **not necessary** to understand any fact at issue in most sexual abuse cases. It is within the common understanding of lay people and should be excluded as this type of testimony does not require expert analysis to be understood by the average juror.

[13] See, e.g., *Steward v State*, 652 NE2d 490, 492 (Ind 1995); *Commonwealth v Dunkle*, 602 A2d 830, 833 (Pa 1992).

2. Object that the expert is not qualified, particularly if they rely on "observation" as their experience.

One of the main issues with CSAAS expert testimony is that often the underlying support for the expert's experience is derived simply from their observation in clinical practice of treating perpetrators and/or victims of sexual abuse. There arises a serious question as to whether this behavioral evidence can meet the standard of reliable science required to be admitted under the rules of evidence. Nonetheless, this evidence continues to be admitted routinely at trials, often with little critical analysis by the trial courts.

Therefore, an expert's anecdotal testimony about children he or she has observed cannot be considered to be based in science. The testimony cannot be tested or peer-reviewed. There is no way to determine the error rate based on observations, or how many of the sexual assault victims the expert has treated were actually abused. Typically, when an expert relies on their "experience" or "observations," no data can be presented to either support or supplement the expert's theories. Instead, the testimony is rooted solely in the expert's opinions based on what they claim they witnessed working with patients. Expert testimony based upon observation alone should absolutely be subject to judicial scrutiny.

> "There is no logical reason why conclusions based on personal observations or clinical experience should not be subject to [reliability] analysis. **That a person qualifies as an expert does not endow his testimony with magic qualities**. Observation informed by experience is but one scientific technique that is no less susceptible to [reliability] analysis than other types of scientific methodology. The gatekeeping function . . . is the same regardless of the nature of the methodology used: to determine whether the process or theory underlying a

> scientific expert's opinion lacks reliability [such] that [the] opinion should not reach the trier of fact."[14]

3. Argue that the theories and methodologies employed by the expert were neither valid nor reliable.

The belief that children and adolescents disclose sexual abuse incrementally in "bits and pieces over time" is a misconception that is routinely used in sex cases by the prosecution and has been largely debunked. The idea stems from the clinical theory that Roland Summit developed in the 1980s, CSAAS. Despite its initial popularity, CSAAS lacks any scientific validity and is contrary to what recent empirical studies have shown. Further, there is absolutely no evidence, based on research, that when a disclosure is made it is likely to be recanted or revealed in any fashion other than fully. The initial disclosure is usually a complete disclosure, especially when the alleged victim was subjected to a forensic interview.[15] Consequently, disclosures that become expanded, or are significantly inconsistent, are more suspect as less reliable. While adolescents or children may delay making an initial disclosure of abuse, once asked about abuse by a neutral party, an extremely high percentage make a full and complete report.[16] This is particularly critical information when children have denied abuse in the past and make allegations that would pre-date the denials.

---

[14] *Canavan's Case*, 733 NE2d 1042, 1050 (Mass 2000) quoting *Boston Gas Co v Assessors of Boston*, 137 N.E.2d 462 (Mass 1956)(emphasis added).

[15] London, K., Bruck, M., Wright, D., & Ceci, S. (2008). Review of the contemporary literature on how children report sexual abuse to others: Findings, methodological issues, and implications for forensic interviewing. *Memory*, *16*(1), 29-47.

[16] Bruck, M. & Ceci, S. (1994). Forensic developmental psychology: Unveiling four common misconceptions. *Current Directions in Psychological Science, 13,* 229-23*;* London, K., Bruck, M., Ceci, S. & Shuman. (2005). Disclosure of child sexual abuse: What does the research tell us about the ways that children tell? *Psychology, Public Policy and the Law*, *11*(1), 194-226.

When an expert presents anecdotal information that may seem to conform to common sense, make sure that information is supported by valid data. Prosecution experts will testify that delays in reporting abuse are common because of the fear of not being believed or the embarrassment with coming forward: while this sounds logical, a meta-analysis of the literature that analyzed twenty-one studies supports the conclusion that most adolescents disclose fully when asked. The meta-analysis revealed that "[w]ith the exception of one study, the rate of disclosure for substantiated cases ranged from 76% to 96%."[17] The research further concluded that, despite widespread beliefs among clinicians and researchers, there was little to no strong evidence to support the belief that in valid cases of abuse, denial of abuse is common. Therefore, "even when adults in these studies provided CSAAS-consistent explanations of delay or of non-disclosure of abuse (e.g. fear, shame, embarrassment, guilt, fear of not being believed), when independently tested, these factors tend[ed] not to significantly predict who discloses and who delays."[18] Additionally, common sense supports that delays in disclosure are common, if not predictable in child sex cases. The fact of a delay does not, by itself, make an accusation more likely to be true.

Depending on the proffered testimony, some things to keep in mind in making an attack on the testimony of a defense expert are whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error. Evidence of syndromes in court proceedings is frequently a major source of confusion for courts, especially in sexual assault cases and with CSAAS testimony. CSAAS, like all psychodynamic theories, "is essentially irrefutable" because it is impossible to prove that a child is not suffering from CSAAS.[19] The fact that CSAAS is basically unfalsifiable should weigh heavily in any analysis of its lack of reliability.

[17] London, *supra*.

[18] *Id.* at 33.

[19] *State v Foret*, 628 So 2d 1116, 1125 (La 1993).

The idea that there is a list of behaviors that can be used to diagnose child sexual abuse has been shown to have no scientific underpinning. In fact, the lists of "symptoms" experts have associated with sexual abuse include an array of behaviors displayed by both maladjusted and adjusted children alike. Relying on numerous treatises on the subject of child sexual abuse, the Pennsylvania Supreme Court reasoned that the behavior patterns frequently associated with CSAAS are not necessarily unique to sexually abused children, but are also common to children who have experienced other trauma.[20] The court noted that "abused children react in a myriad of ways that may not only be dissimilar from other sexually abused children, but may be the very same behaviors as children exhibit who are **not abused**."[21] Thus, the court held that "[p]ermitting an expert to testify about an unsupportable behavioral profile and then introducing testimony to show that the witness acted in conformance with such a profile is an erroneous method of obtaining a conviction."[22]

If the testimony is deemed admissible, focus on the fact that behavior issues and problems a complainant may have may be attributed to other factors and not indicative of sexual abuse. For example, take whatever symptom the prosecution is trying to inflate, whether that be anxiety, suicidal thoughts, fears, bad dreams, etc., and cross examine the expert about studies that have been done on children who are not sexually abused. Cross examine the expert about studies that show what percentage of children, for example, experience "bad dreams." Cross examine that children who are *not* sexually abused also have bad dreams, and that there are not studies to support that "bad dreams" is a pathognomonic symptom of sexually abused children. Showing the jury that the expert is exaggerating the prevalence of symptoms also typically experienced by non-sexually abused children alike, will diminish the "expert's" credibility and testimony. Many of the "symptoms" that CSAAS experts will claim are true of sexually abused children

[20] *Commonwealth v Dunkle*, 602 A2d 830, 832 (Pa 1992).

[21] *Id.*

[22] *Id.* at 830.

are very common of children at various ages and they can certainly be associated with other childhood stressors and behavioral disorders.

4. Argue that the evidence is too prejudicial and the probative value is outweighed by the prejudicial effect.

Even if expert testimony regarding CSAAS meets the strict requirements for reliability and relevancy, a trial judge must further consider how the testimony will not be considered too prejudicial. If its probative value is substantially outweighed by the danger of unfair prejudice, it must be excluded. Evidence is unfairly prejudicial when "there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[23] Relying on the previously cited research showing the persuasiveness of experts in trial may help show the court that the proffered testimony is too prejudicial.

The United States Supreme Court has warned that "expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 … exercises more control over experts than over lay witnesses."[24] The concern of unfair prejudice to defendants is particularly critical in child sexual abuse cases, because CSAAS evidence "can be highly prejudicial if not properly handled by the trial court … [since] the particular aspects of CSAAS are as consistent with false testimony as with true testimony."[25] It is very critical to avoid this type of prosecution "expert" testimony, if at all possible.

[23] *People v Crawford*, 458 Mich 376, 398 (1998).

[24] *Daubert*, *supra* at 595.

[25] *People v Patino*, 32 Cal Rptr 2d 345, 349 (Cal Ct App 1994).

SORA CHEAT SHEET

I also frequently am asked questions about SORA rules and laws. Therefore, I'm including the information I keep handy on a cheat sheet that I frequently use. **Cheryl Carpenter** deserves much of the credit for my cheat sheet – she authored an article in 2011 and a follow-up in 2014 that was instrumental to helping me keep track of the SORA laws. Some of what you see was cut and pasted from her articles.

In 1995, Michigan enacted the Sex Offender Registration Act (SORA). MCL 28.722 *et al*.

WHO HAS TO REGISTER

MCL 28.722(b) lists who must register. It includes:

1. Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal cases, including (an adult) conviction subsequently set-aside for a listed offense.

2. Either of the following:
   a. Being assigned to youthful trainee status (HYTA) *before* 10/1/2004. This does not apply if a petition is granted at any time allowing individual to discontinue registration, including reduced registration periods that extend to or past July 1, 2011.
   b. Being assigned to youthful trainee status (HYTA) before 10/1/2004 if the individual is convicted of any other felony on or after July 1, 2011.

3. Having a juvenile adjudication if **BOTH** of the following apply (this applies to both in-state and out-of-state adjudications):
   a. The individual was 14 or older at the time of the offense.
   b. The offense would classify the individual as a Tier III offender.

TIER BASED REGISTRY

Michigan's SORA is strictly offense based. Courts have **no discretion** to change the tier placement of an individual even if they show successful completion of sex offender therapy or a long history of law abiding behavior. An individual is stuck with the length of registration based on their conviction offense.

TIER I INFO:

-Register for 15 years with petitioning opportunities for removal after 10 years. MCL 28.725(10).
-Must verify their domicile or residence one time a year during the month of the registrants' birthday (new law 4/1/14) MCL 28.725a(a)
-Includes attempts or conspiracy for any of the below
-Most offenses are non-public, however, the listing will be public if either of the following apply:

1. the offense involves a minor complainant, MCL 28.728(4)(c); or
2. the person has two tier I offense convictions (two offenses charged in one case; subsequent tier I offense puts individual in tier II)

-Catch-all registrants are non-public
-Tier I offenses with complainants 18 and order are non-public

Tier I Offenses

750.145c(4)	A person who knowingly possesses any child sexually abusive material.
750.335a(2)(B)	Indecent exposure with fondling of self, if the victim is a minor
750.349b	Unlawful imprisonment/restraint if the victim is a minor
750.520e	4th Degree CSC if the victim is 18 or older
750.520g(2)	Assault w/ Attempt to commit (touch) if the victim is 18 or older

750.539j	Surveillance of or distribution, dissemination, or transmission of recording, photograph, or visual image of individual having reasonable expectation of privacy, if the victim is a minor.
750.10A	Anyone who was at the time of the offense is a sexually delinquent person
28.722(s)(vi)	Catch-All Provision (non sexual offense conviction "that by its nature constitutes a sexual offense against an individual who is less than 18 years of age.")

TIER II INFO:

-Register for 25 years. MCL 28.725(11)
-Public list available on the internet.
-Includes tier I offender subsequently convicted of another tier I offense
-includes attempts or conspiracies of any of the below

-Must verify their domicile or residence two times a year

Tier II Offenses

750.145a	A person who accosts, entices, or solicits a child less than 16 years of age… with the intent to induce or force that child or individual to commit an immoral act.
750.145b	A person who accosts, entices, or solicits a child less than 16 years of age… with the intent to induce or force that child or individual to commit an immoral act… with a prior conviction.
750.145c(2)	A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material.

750.145c(3) A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material.

750.145d(1)(A) Use of the internet to solicit or commit an immoral act except for a violation arising out of a violation of 750.157c (coercing a minor to commit a felony)

750.158 Sodomy against a minor; unless either of the following applies: (A) victim consented, was 13 up to the age of 16 and no more than 4 years age difference OR (B) victim consented, was 17 or older and was not under custodial authority of the individual.

750.338, 750.338a or 750.338b Gross indecency, victim 13 up to the age of 18, unless either of the following applies: (A) victim consented, victim 13 up to the age of 16, not more than 4 years age difference, OR (B) victim consent, victim 16 or 17 and victim was not under custodial authority of the individual.

750.448 Solicit to commit prostitution if the victim is a minor

750.455 Pandering - enticing female to become a prostitute.

750.520c 2nd Degree CSC if the victim is 18 or older

750.520c 2nd Degree CSC if victim is 13 up to the age of 18.

750.520e 4th Degree CSC if victim is 13 up to the age of 18.

750.520g(2) Assault w/Attempt to Commit (touch) if victim is13 up to the age of 18.

TIER III INFO:

-Register for lifetime. MCL 28.725(12).
-Public list available on the internet.

-Includes tier I offender subsequently convicted of another tier I offense
-includes attempts or conspiracies of any of the below

-Must verify their domicile or residence four times a year. MCL 28.725a(c)

Tier III Offenses

750.338	Gross indecency between males, victim under 13
750.338a	Gross indecency between females, victim under 13
750.338b	Gross indecency between male and female, victim under 13
750.349	Kidnapping committed against a minor
750.350	Kidnapping victim under 14
750.520b	1st Degree CSC, does not apply when a court determines victim consented, victim 13 up to the age of 16, less than 4 yr. age difference.
750.520c	2nd Degree CSC, victim under the age of 13
750.520d	3rd Degree CSC, does not apply when a court determines victim consented, victim 13 up to the age of 16, less than 4 yr. age difference.
750.520e	4th Degree CSC committed by individual 17 or older against victim less than 13.
750.520g(1)	Assault w/Attempt to commit penetration, does not apply when a court determines victim consented, victim 13 up to the age of 16, less than 4 yr. age difference.
750.520g(2)	Assault w/Attempt to Commit touch, victim under the age of 13

JUVENILES

UNDER 14 – NEVER PLACED ON REGISTRY

Juveniles under age of 14 (at the time of the OFFENSE) are excluded from definition of "convicted" for SORA purposes thus they are not required to register. MCL 28.722(b)(iii). The juvenile's case cannot have been a designated case (juvenile waived to adult circuit court).

AGE 14-16 WITH TIER I AND II OFFENSES – NO REGISTRY

Juveniles in the 14 to 16 year old age group do not have to register as sex offenders if their offense does not fall into a tier III category. MCL 28.722(b)(iii).

JUVENILES 14-16 WITH TIER III OFFENSE – LIFETIME NONPUBLIC REGISTRY:

Juvenile offenders remain on a non-public registry for their lifetime as long as their case was not designated to be tried in the same manner as an adult. MCL 28.728(4)(a).

****An important and comprehensive report about the harm juveniles suffer because of sex offender registry was completed by the Human Rights Watch, in May, 2013, entitled, "Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US." Report can be found at www.hrw.org. This report is very helpful in educating judges and prosecutors about why juveniles should be kept off the registry.

EXPUNGEMENTS

Adult Expungements remain convictions for SORA

Convictions that are set aside, known also as expunged, remain a conviction for SORA purposes. MCL 28.722(b)(1). Thus, those individuals who had adult convictions set aside will remain on SOR.

Juvenile Expungements are not convictions for SORA

This is not a change in the law, however, many registrants and defense attorneys do not realize that an individual who had their juvenile adjudication set aside does not have to register as a sex offender. A juvenile set aside is not a conviction for SORA. It is a matter of exclusion because the law states, "convicted . . . include[s] a conviction subsequently set aside under 1965 PA 213, MCL 780.621 to 780.624." MCL 28.722(b)(i). There is no reference to juvenile set aside law, thus, juveniles who get their adjudications set aside do not have to register.

WAYS TO AVOID REGISTRY

- HYTA (after 2004) – See HYTA Cheat Sheet to follow
- Plead to Seduction (non-registerable)
- If Catch-All is an issue, do an Order for Non-Registration
- Consent Calendar – but not available for CSC offenses any more

Romeo and Juliet cases:

MCL 28.728c(14) states: The court shall grant a petition by an individual if the court determines the listed offense was the result of a **consensual** sexual act and ANY of the following apply:

(A) ALL of the following:
(i) The victim was 13 or older but less than 16 years old at the time of the offense.
(ii) The petitioner is not more than 4 years older than the victim.

(B) ALL of the following:
(i) Petitioner was convicted of
-Crime against nature or sodomy against victim under 18 (MCL 750.158) or

-Gross Indecency victim 13-17 years old (MCL 750.338, 750.338a, or 338b)

(ii) Victim was 13 or older but less than 16 years old at the time of offense.

(iii) Petitioner is not more than 4 years older than the victim.

(C) ALL of the following:

(i) Petitioner was convicted of

-Crime against nature or sodomy against victim under 18 (MCL 750.158) or

-Gross Indecency victim 13-17 years old (MCL 750.338, 750.338a, or 338b)

-CSC 2nd and "that other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections." (MCL 750.520c(1)(i

(ii) Victim was 16 years or older at the time of the offense.

(ii) Victim was not under the custodial authority of the petitioner at the time of the offense.

REDUCTION AVAILABLE FOR TIER I and TIER III JUVENILES:

Tier I offenders can petition after 10 years for removal from the registry. MCL 28.728c(1). Tier III offenders who were juveniles at the time of their offense can petition after 25 years for removal. Adult defendants have no relief. MCL 28.728c(2).

RECAPTURE

If your client had a prior sexual offense and did not have to register, they will be "recaptured" and registered if they are convicted of ANY FELONY (does NOT have to be sexual).

The subsequent felony does not have to be a listed sexual offense. Felony is defined as a conviction that carries imprisonment of 1 year or more. MCL 28.722(f).

HYTA FOR CSC CASES

For the purposes of SORA – HTYA makes it not a "conviction." MCL 28.722(a)(ii)(B)

The HYTA Statute is MCL 762.11.

You CANNOT get HYTA for a life offense, or a CSC EXCEPT

- CSC 3 – sec 1a only 520d(1)(a)
- CSC 4 – sec 1a only 520e(1)(a)
- Assault with intent to commit CSC 3
- Assault with intent to commit CSC 4

If you are able to get HYTA for a client – do it with the offenses above, or a sex offense that is not a life offense, or seduction. Seduction never requires registration, so it's a great 5-year felony (and if the client loses HYTA status, they do not have to register).

See MCL 762.15 – allows HYTA for individuals who are 15 and 16 that have been waived up to adult court