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Preparing a Client for a Psychosexual Evaluation

The Benefits of a Psychosexual Evaluation

Representing a person accused of sexual misconduct can be among the most challenging and complicated cases that a criminal defense attorney faces. An important tool in the resolution of many of these cases is the psychosexual evaluation (PSE), often referred to as a sexual deviancy evaluation, though it is more than just that. A PSE is an empirically informed assessment of a client's sexual development, sexual history, paraphilic or deviant interests, and risk of reoffense. The evaluation should identify any treatment needs and propose a treatment plan as appropriate. These specialized evaluations are used at various stages in both criminal courts and family courts to make judgments about a client's risk to the community and amenability to treatment that can have profound implications for a client's future.

In the criminal courts, a PSE conducted prior to the resolution of the case can affect plea negotiations and trial strategy, provide significant mitigation (or aggravation) at sentencing, affect release decisions and re-entry planning, impact a client's level of supervision in the community, and affect sex offender registration and community notification risk level classifications. Even after clients have been sentenced, they will often be required to participate in a PSE and make those findings available to the court and prosecution. In the family

courts, these evaluations are used to make judgments about child custody, visitation, and services required by the court. PSEs are also increasingly used in cases involving allegations of pornography or sexual addiction or other so-called "hands off" sexual misbehavior, both prior to and after resolution of the case. A favorable PSE can make a huge difference to a client, while an unfavorable PSE can have a very negative effect on the client's criminal case, lead to disastrous consequences in the family court, and haunt the client for years to come.

A client who has been properly prepared for the PSE, and who has been advised of the risks and the rights that may be impacted by the PSE, can benefit greatly from this evaluation process. This is the client's chance to provide evidence regarding risk or lack of risk to the community, treatment needs, and amenability to sex offender specific treatment. The PSE provides the prosecutor, judge, and corrections officials with a rationale for treating the client more appropriately based on facts, rather than conjecture or fear. The risks and benefits of the PSE in criminal court and family court cases, and how to properly prepare clients for such an evaluation while preserving their rights and their liberty, are the topics discussed in this article.

When Should a PSE Be Used?

A PSE is a valuable tool an attorney can use to the client's advantage in the negotiation and resolution of many criminal cases involving sexual offenses. Clients sentenced for sexual offenses will also typically have a PSE included as a condition of sentencing. During an evaluation conducted prior to the resolution of a case, an attorney will be able to control that process and use the results only if the evalua-

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tion is favorable. Postconviction the evaluation is required by the court, and may even be conducted by governmental actors such as corrections or probation employees. In both cases, it is important for the attorney to carefully consider and understand the potential consequences to the client, the important rights the client has even postconviction, and how to best protect the client's interests and avoid a disastrous outcome.

Preconviction Psychosexual Evaluations

A PSE can be a valuable tool to many clients prior to the resolution of the case, and is particularly useful when the client intends to resolve the case with a plea deal. A great number of sexual offense clients have already confessed to authorities or to someone before they ever enter defense counsel's office. Other clients confess to their attorney, and after a fair assessment of the government's evidence defense counsel concludes that a trial is a very bad strategy. Though these are challenging circumstances for a defense attorney, a favorable PSE can make a huge difference to a prosecutor in negotiating a case, and can set the stage for the client's success on probation and in treatment. In these cases, clients who are carefully vetted and prepared for the PSE can help themselves considerably by fully and honestly participating in this process. Evidence that a client does not pose a significant risk to the community, does not have a long history of sexual offenses, and is amenable to community-based treatment can lead to a dramatically better resolution than would be available without this evidence that favors the client.

The PSE is less useful, but may still be helpful, when a client adamantly denies any wrongdoing. Many evaluators will simply conclude that if the client says he or she did not do anything wrong, then there is either nothing to evaluate or they will deem the client in denial and thus a danger to the community. Other evaluators will complete a PSE with a client who denies the instant offense. In those cases, the purpose is not to evaluate the client's denial of the offense. The purpose is to rule out deviance and sexual maladjustment in the rest of the client's life without making any findings regarding the instant offense. The Association for the Treatment of Sexual Abusers (ATSA) specifically prohibits the use of a PSE for "substantiating or refuting allegations that are the focus of criminal, civil, child custody, or other investigations."¹ Despite that prohibition, some evaluators

are willing to look at the rest of the client's life to make an assessment of past behavior and future risk, while taking no position on the instant offense. It is essential to talk to the evaluator before making a referral to determine the evaluator's willingness to perform an evaluation on a client who denies the alleged offense.

Postconviction Psychosexual Evaluations

Courts often require a PSE as a condition of sentence in sexual offense cases. Other times corrections officials mandate PSEs in secure settings. The court and the law mandate these evaluations and they cannot be avoided. This does not mean, however, that the client does not have significant rights to enforce and protect during this process, including the right to remain silent and refuse to answer potentially incriminating questions. In these cases, it is critical that attorneys identify any potential issues that might negatively affect the client before the evaluation, and advise the client regarding the process of invoking and enforcing important constitutional rights.

Another common postconviction use of the PSE involves cases in which the client is asking probation, the courts or other authorities for relief from the duty to register as a sex offender, or for reduced community notification risk level classifications, or for modifications or termination of probation. When the client is seeking affirmative relief, a favorable PSE is often essential to giving the relevant authorities the necessary rationale to grant the relief that is sought.

The Risks of a Psychosexual Evaluation

Whenever a client submits to a PSE, very real risks exist that must be considered and understood in order to truly protect the client's interests and liberty. A PSE will necessarily include the evaluator obtaining a full sexual history from the client, with a focus on deviant and illegal behaviors. The client will also be required to take a polygraph examination to corroborate the client's self-report of his or her own history, and full disclosure of all past misdeeds is expected from the client.

The biggest risk to clients is that during the evaluation they may incriminate themselves in regards to the current allegations or past unreported events, making matters worse for them rather than better. The risk is that clients may incriminate themselves by disclosing other uncharged and unknown victims to an evaluator who is also a mandatory

reporter.² A mandatory reporter is required by law to report to authorities any previously unknown victims.

The other major risk is that clients may also approach the evaluation with the wrong attitude and end up with a result that is prejudicial and negatively affects them in their legal cases. A client who understands the purposes and perspective of a PSE, and who has been advised by defense counsel prior to that evaluation, is much more likely to avoid these pitfalls than the client who is simply told where to report for the interview.

New Charges: The Risks of Telling All to a Mandatory Reporter

Attorneys should carefully interview their clients before engaging in a PSE to explore the possibility of additional, uncharged victims. During a PSE, the client will be asked very directly about other potential victims and past sexual misconduct. When an incriminating disclosure is made by a client, this information not only ends up in the PSE, but also will often generate a new report to law enforcement authorities and potentially will lead to new investigations and charges against the client. These disclosures may have a negative effect on representation in the instant offense, and make resolution of that case even more difficult and harmful to the client. This is a critical issue that an attorney must address in order to protect clients.

Mandatory reporting laws for disclosures of abuse or neglect of a child are present in all 50 states and U.S. territories.³ These statutes vary in some details, but all specify the persons and professions that are required to report suspected child maltreatment to the authorities.⁴ Those reports may be made to child protective services, a law enforcement agency, or a state's toll-free child abuse reporting hotline.⁵ In every jurisdiction, mental health care providers are among those who are required to report, and in 17 states probation and parole officers are specifically listed as mandatory reporters.⁶

The standard for when a report needs to be made differs somewhat from jurisdiction to jurisdiction, but the typical law requires a report be made when the professional suspects or has reason to believe that a child has been abused or neglected.⁷ Another standard sometimes applied requires the professional to report any situation in which the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably harm the child.⁸

A mandatory reporter who willfully fails to report suspected abuse or neglect

of a child is subject to some penalty in 47 states.⁹ The failure to report is classified as a misdemeanor in 38 states, and in four states can be a felony for more serious cases.¹⁰

The Wrong Attitude Can Hurt the Client

Clients who need to undergo a psychosexual evaluation do not always have the right attitude or perspective to do well in those evaluations. In those cases, it is the lawyer's duty to confront and counsel their clients to try to gain some insight into the distortions in their thinking and improve the outcome of the PSE. If the attorney does not confront that attitude, clients may suffer serious consequences in resolving their criminal or family law cases.

Sex offenders indulge in many thinking errors, or "cognitive distortions," to explain and justify their behaviors. These cognitive distortions are specific or general beliefs and attitudes that violate commonly accepted norms of rationality that have been shown to be associated with the onset and maintenance of sexual offending.¹¹ In other words, these beliefs and attitudes are the little lies sex offenders tell themselves to justify their behavior. These include denial, minimization of the impact of their behaviors, rationalization for their behavior, victim blaming, a passive attitude about how the events occurred, denial of planning or grooming, lack of empathy, intimacy and social competency deficits, and alcohol and drug problems. Excuses come in many forms and may be persuasive to the client's friends and family, but none of them really help the client during a psychosexual evaluation.

There is some controversy in the literature regarding the usefulness of focusing on sex offenders' cognitive distortions in the treatment of sexual offenders.¹² Nonetheless, cognitive distortions are faithfully and negatively reported in PSEs, and they are considered much more valid as a tool in the assessment of sex offenders.¹³ These distorted attitudes remain a major stumbling block for clients whose thinking errors have not been challenged. A client who sticks to these thinking errors during an evaluation is likely to be deemed a risk to the community and not amenable to treatment. That is the reason the client's attorney must identify, discuss, and confront those attitudes so that the client begins to question his original justifications, which typically results in a far more favorable evaluation.

Getting the Information Needed to Protect the Client's Interests

Preparing to Have the Conversation

To obtain the information needed from clients in order to properly advise them of the risks and benefits of a PSE, defense counsel must ask a lot of very personal questions about sensitive and sometimes bizarre topics. Many attorneys find this questioning distasteful and prefer to simply send the client to the evaluator to ask these questions. In doing so, they fail to protect their client's interests and potentially set the client up for disastrous consequences. Competent representation of a person who is accused of a sex offense and whom defense counsel has referred, or who the court has ordered, to a PSE requires that counsel (1) know what the client will say and (2) advise the client of the consequences of what he has to say.

If the lawyer expects the client to answer these sensitive and potentially incriminating questions, counsel must approach the discussion in a neutral manner, and be matter-of-fact about these topics. If the lawyers is giggling, apologizing and seems embarrassed by the questions, then it is likely the client will not respond in the full and specific ways needed in order to protect his interests. Defense lawyers should be very direct in their questioning, but not judgmental. They should maintain their personal boundaries and resist the temptation to share any information about their own experiences. If a client reveals details that are shocking, lawyers must do their best not to react strongly to what the client says. It is important that lawyers maintain a professional demeanor at all times or clients will lose confidence in counsel's willingness to really help them.

How to Talk About Sensitive Topics

Persuading clients to talk accurately and openly about their sexual history is not easy. It is helpful to begin the discussion regarding sexual history by acknowledging that most human beings consider the details of their sexual experiences to be very private. It is important to put clients at ease, and to work up to the more difficult topics. It is a good idea to begin the discussion by asking open-ended questions about clients' personal history. These kinds of questions begin to give counsel insight into clients' stories and make clients comfortable talking about themselves. Counsel should start from the beginning and have them describe their childhood, family relationships, medical history, mental health history, and substance abuse history. It is

essential to gather as much detail as possible so that they are prepared to tell their stories in detail when they meet with the evaluator and so that counsel can identify any issues that counsel needs to discuss further with the client.

After learning the basic details of the client's life story and establishing a rapport, counsel is ready to begin to discuss more difficult topics. Ask the client about his or her first memory of sexual feeling, and the first sexual experience. The goal is to get the client to provide a detailed chronological history in a narrative form, not merely to get the information out of them. Counsel should ask the client to talk about all of his sexual experiences as a minor and as an adult, and encourage him not to leave anything out because he finds it embarrassing.

Finally, when the client is giving counsel this history in a free narrative, counsel should use a structured sexual history questionnaire to make sure all of the possible topics have been covered. While this interview can be completed by the client in written form, putting the answers on paper should not take the place of actually sitting down with the client and going over each of the questions verbally as well. There are a lot of bizarre or shameful experiences that clients will never share with counsel unless they are asked directly, in a nonjudgmental way, by someone they trust and have established a rapport with. If the attorney has not created that environment for the questioning, then the attorney is very likely to get only a partial history.

What to Talk About

A PSE covers a wide range of topics, including any previously unreported sexual crimes. ATSA Practice Guidelines for the Assessment, Treatment, and Management of Male Adult Sex Offenders lay out an extensive list of topics for evaluators to discuss with individuals they are evaluating. Defense attorneys can use these topics to guide their own discussions with clients. The topics include personal history questions and sexual history questions.

Personal History Questions

- ❖ Developmental history and family background — clients should be prepared to tell their family history, childhood traumas, etc.
- ❖ Education and employment histories — it is important for clients to be prepared to relate this information in a complete and accurate way

- ❖ Level of cognitive functioning and other responsivity factors
- ❖ Medical and mental health history
- ❖ Criminal and other antisocial behavior and values, including any history of aggression
- ❖ Relevant personality traits such as, but not limited to, suspiciousness, hostility, risk-taking, impulsivity, and psychopathy
- ❖ Substance use and abuse
- ❖ Availability of appropriate community supports

Sexual History Questions

- ❖ Sexual history, including sexual fantasies, urges, and behavior, early sexual experiences, number and duration of sexual relationships, gender identity and sexual orientation, masturbation and intercourse frequency, sexual functioning, and unusual sexual interests or behavior that are not sexually deviant (as defined in this document) or illegal, such as cross-gender dressing
- ❖ Access to potential victims
- ❖ Deviant sexual interests and arousal
- ❖ History of sexually abusive behavior, including details about victims, tactics used in the commission of the offense, and the circumstances in which the sexual abuse occurred
- ❖ Insight into offense precursors and risk
- ❖ Level of self-disclosure and accountability
- ❖ Official *and unreported* history of sexual and nonsexual crimes
- ❖ Peer and romantic relationship history
- ❖ Use of sexually arousing materials (e.g., magazines, computer pornography, books, videos, internet sites, telephone sex services)

Identifying a Client's Thinking Errors

As the defense attorney learns the client's history, she should inquire in greater detail about any behavior that

was criminal, deviant, or concerning. Most sex offenders had a story they were telling themselves in their head at the time of their offense about why it was okay to do what they were doing. The attorney's job is to figure out what that rationale was.

Defense counsel must make sure the client is prepared to tell the complete truth, no matter how embarrassing it is. What counsel cannot do is help the client come up with a better story. The client ultimately will need to take a polygraph examination to corroborate his or her self-reported sexual history, so lying is not an option. Defense counsel should convince clients to talk about what they did and why they did it. The goal is to help clients demonstrate some insight, empathy, and recognition of the lies they were telling themselves at the time of their offending. Defense counsel should ask them open-ended questions and then ask them to amplify. "You said X. Tell me about that." As they talk, note the cognitive distortions, but let them get it all out and feel heard. Do not challenge these statements too aggressively or too soon. At this stage counsel should simply listen, but do not interject or confront them yet.

Polygraph Examinations

Clients should be fully aware that they will have to take a polygraph examination, as this is a strong motivation for them to be honest and open with their attorney. Polygraph examinations may not be scientifically reliable enough to be admitted as evidence in a trial, but they are used and relied upon regularly in psychosexual evaluations. Their principle purpose is to corroborate the client's self-report of his own sexual history, not to test the accuracy of the specific allegations of the instant offense. ATSA sanctions the use of polygraph examinations in corroborating client self-reports and in monitoring treatment compliance and progress. But polygraph examinations have their limits. ATSA members are advised not to use the results of psychophysiological assessments such as polygraph examination as the sole criterion for estimating client risk of engaging in sexually abusive behavior. Evaluators and the attorneys who make referrals to those evaluators should obtain assurances that examiners are appropriately trained in the use of their psychophysiological assessments and adhere to the applicable standards or guidelines of their profession.

Polygraph testing involves a structured interview during which trained examiners record several of an exami-

nee's physiological processes. Following this interview, examiners review the charted record and form opinions about whether the examinee was nondeceptive or attempting deception when answering each of the relevant questions.

Four types¹⁴ of polygraph examinations¹⁵ are typically performed with sex offenders:

- ❖ *Sexual history disclosure tests* examine whether the person has fully disclosed his or her sexual history to the treatment providers and the polygraph examiner who takes a separate history from the client.
- ❖ *Maintenance tests* examine the degree to which the person has been complying with treatment and community supervision requirements.
- ❖ *Monitoring tests* examine whether the person has been free of new sex offenses during community supervision and treatment.
- ❖ *Specific issue/instant offense tests* examine issues of specific fact, and can be used to clarify discrepancies between the offender's and the victim's descriptions of the offense, or to rule out specific suspected behaviors.

For a PSE, the sexual history disclosure test is typically the only examination employed, though sometimes a specific issue/instant offense examination will be conducted as part of an evaluation of a client who denies committing the alleged offense.

Preparing the Client for the Sexual History Polygraph Examination

Polygraph examinations are widely used in PSEs to include at minimum a sexual history polygraph, and some evaluators also ask for a specific issue polygraph in regard to discrepant details. The most important thing to impress upon a client who will be taking a polygraph examination of any kind is that only the truth will work if the client wants to pass the examination. Defense counsel's attitude toward this requirement can do much to shape the client's concerns and stress level. It is helpful to instill some degree of confidence in the polygraph process, and to overcome their suspicions about the polygraph.

Defense counsel should explain to the client that anxiety is a baseline and that everyone who takes one of these examinations is nervous. That is not

what the polygraph measures. Choose a polygraph examiner who takes the time to explain the process to the client, and who does not view her role as an interrogator. The client may be taking polygraph examinations for many years to come, so the client's first experience should be as positive as possible.

The client must be prepared to give a full and accurate sexual history. This is one of the reasons it is important and useful to go over the sexual history with the client before the polygraph. If the client's memory has not been refreshed and he is remembering new things in the middle of the test, the client will likely fail. Ambiguity about past events can lead to inconclusive results and the necessity and expense of taking another polygraph examination. A client with a clear and refreshed memory of his own sexual history is much more likely to pass that examination.

New Victims Disclosed During a Defense Polygraph May Not Be Subject to Mandatory Reporting

Sometimes clients will not disclose past sexual misconduct until they are actually faced with the polygraph examination. The polygraph examiner hired for the client's sexual history examination should be hired by the defense or family law attorney so that he or she is part of the defense team and covered by the attorney-client privilege. If the defense attorney is concerned about the accuracy of the client's self-report, or if the goal is to motivate the client to make disclosures he has only hinted at, sending the client to a private sexual history polygraph examination *prior* to the PSE can sometimes be useful.

One of law enforcement's primary uses of the polygraph is interrogation. A person who is taking a polygraph examination is more likely to tell the truth, and more likely to confess, than a person who is simply being questioned. Many polygraph examiners received their training while working for a law enforcement agency. Polygraph examiners have two basic skills: They are polygraph examiners and they are professional interviewers and interrogators. Despite an attorney's best efforts to prevent these disclosures by interviewing the client in advance, examiners will often obtain disclosures that the attorney cannot get. This is the reason polygraph examiners should be informed in advance that they are being hired as part of the defense team, and that they owe the client a duty of confidentiality as a member of that team. Polygraph examiners are not mandatory reporters, and thus disclo-

tures made to them should not make their way into the official record if everyone concerned has been properly advised.

Now That You Know What They Have to Say

Overcoming a Bad Attitude: Confronting the Cognitive Distortions

After defense counsel has had the difficult discussions with the client, it is time to analyze the information discussed and determine how best to proceed. If the client continues to make excuses and fails to take responsibility for her behaviors, then defense counsel can confront those cognitive distortions (thinking errors) and try to move the client to a new understanding of the excuses she has made for her behavior. Having identified the rationales and specific cognitive distortions the client is employing, defense counsel will be in a better position to confront those excuses and distortions and persuade the client to think about them differently. Counsel should go back to the client's words and begin to use those words to identify and discuss the thinking errors. This should be done gently so as to maintain counsel's relationship with the client. It is best to be direct and nonjudgmental, and for counsel to remind the client that counsel is on her side. However, counsel should not shy away from questioning the client's thinking.

A nonconfrontational way the attorney can do that is to begin by restating what the client told counsel, using the client's words, and then ask the client in a neutral tone of voice if she really believes that. Defense counsel should force the client to say why the client's thinking is skewed — if the client can. If counsel has established a rapport and some trust with the client, counsel can begin to be more direct.

As clients begin to explain themselves and hear their own explanations, one can often see the first "dawning realizations" begin to come over them. They hear the lies and excuses in their own words as they try to explain the things they were thinking at the time of their offense.

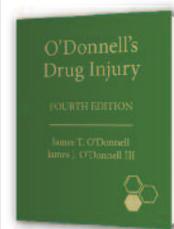
The process of identifying and confronting cognitive distortions can take longer with some clients than with others. It is best to have these discussions during at least two meetings so that clients can have time to think about these issues in between meetings. In the end, all defense counsel can do is warm them up and crack their shell of excuses and thinking errors in advance of their interview with

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the evaluator. The goal is to have clients recognize the duality between their distorted thoughts at the time of the offense and the way they look at it now. If counsel can achieve some level of dawning realizations about their offense, and get them to begin to develop a sense of empathy and remorse, the chances of a favorable evaluation improve dramatically.

New Disclosures: The Duty to Advise the Client

If counsel's conversations with the client have led to disclosures of either victims who were previously unknown or facts about the instant offense that are not helpful, the attorney must advise the client of the right to remain silent wholly or in part during the PSE. Not advising the client of the privilege against self-incrimination may give rise to a claim of ineffective assistance of counsel.¹⁶ Courts have found counsel was objectively deficient for failing to advise a client that he had a Fifth Amendment privilege against self-incrimination and could refuse to participate in the evaluation.¹⁷

Sending a client to a PSE with a mandatory reporter without trying to find out what past sexual misconduct the client might disclose is akin to sending a client accused of murder to spend

time with a detective to see if the detective can pin any other murders on him. Most attorneys would agree that they would never send the murder client to see the detective, yet clients are sent to PSE evaluators all the time without this careful vetting. Finding out the details of a client's sexual history is unpleasant but critical to effective representation. If an attorney is unwilling to do this work, then the attorney should consider refusing these cases.

Can Counsel Rely on the Evaluator to Advise the Client?

Some attorneys will rely upon the evaluator to warn clients regarding confidentiality and the right to remain silent. This is inadequate to ensure that clients' interests are protected. In theory, a PSE evaluator should warn the client of the risks of reporting previously unreported victims during the evaluation process. In practice, however, clients should not learn about these risks as they sit down with the evaluator. The defense attorney has a duty to protect the client's interests and advise the client of these very real risks.

A mental health professional performing a psychosexual evaluation should notify the client of the mandatory reporting rules prior to conducting the evaluation. The ATSA Code of Ethics¹⁸ lays out this duty:

- (a) Members are responsible for ensuring that clients, consultations parties, family members, research participant, organization/agencies, and all other work-related clients fully understand issues related to confidentiality. This includes, but is not limited to:
 - (i) informing clients of the limits of confidentiality;
 - (ii) informing clients of any circumstances that may cause an exception to the agreed upon confidentiality; and
 - (iii) specifically informing clients about mandatory reporting requirements.

The risks of finding out about previously unreported victims are greatest when juveniles are being evaluated. The mental health provider conducting the evaluation has a particular duty to explain the mandatory reporting laws to the juvenile being evaluated in a way the juvenile can understand. The ATSA Professional Code of Ethics specifies:

“Members shall clarify issues of confidentiality in cases involving minors in a manner that the minor client is capable of understanding. ...”¹⁹ While that all sounds good, only the attorney can adequately and carefully evaluate what the client has to say and help the client make choices about which questions, if any, to refuse.

The Right to Remain Silent During a PSE

An attorney representing clients who are participating in PSEs must understand how the Fifth Amendment works in the realm of these evaluations. The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.”²⁰ The availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure that it invites.²¹

Furthermore, this prohibition against self-incrimination permits a person to refuse to testify against himself at a criminal trial, but also “privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”²² In all such proceedings, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. ... Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.²³

Generally, the Fifth Amendment analysis requires the court to consider (1) “whether the defendant’s statements exposed him to a ‘realistic threat of self-incrimination’ in a subsequent proceeding” and (2) whether the State “has sought to impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.”²⁴

The attorney’s duty to advise the client is critical. Courts across the country have consistently held that *Miranda* warnings are not necessary for many scenarios in which the Fifth Amendment right to remain silent is still possessed by the defendant.²⁵ A client who is participating in a PSE still has a right to remain

silent, but will not have *Miranda* warnings read to him or her.²⁶

Clients must understand how to invoke their right to silence if the right is to have any meaning. To obtain this Fifth Amendment protection, an individual must invoke this privilege, such as refusing to answer the question(s), or it is generally waived.²⁷ However, failure to invoke this privilege is not deemed a waiver of that right unless a state agent interrogates a person in custody or assertion of the privilege is penalized.²⁸ A client may be properly penalized, for example, for refusing to participate in a PSE at all, which might violate the client’s sentencing conditions. But the State may not induce a witness to forgo the Fifth Amendment privilege by threatening to impose sanctions capable of forcing the self-incrimination that the amendment forbids.²⁹ A client who invokes the right to remain silent and refuses a specific question during the PSE may not be punished for that refusal.

Should the Client Refuse Evaluation Completely?

Preconviction Considerations

There are times even when there are going to be newly disclosed victims that it still makes sense to complete the PSE preconviction. Oftentimes a client will disclose to defense counsel additional victims who are of a similar age and circumstance as the charged offense. This is particularly true of juvenile clients. Other times the newly disclosed additional victims will have experienced significantly less trauma, or will be related to an incident from many years prior rather than related to the instant offense. In those cases, the impact of these new disclosures on the outcome of the evaluation is not necessarily going to be so negative as to warrant forgoing the evaluation.

A new disclosure of additional victims is not always a deal killer for a case that the defense attorney is attempting to negotiate, particularly for juveniles where the focus should be on rehabilitation. In those cases, the defense attorney must weigh the relative effects of any new disclosures and decide whether to proceed with the evaluation regardless of the new disclosures. Sometimes counsel can make this decision and the outcome for the client will not be significantly worse. Counsel can emphasize the client’s honesty and willingness to be up front about his history, which bodes well for treatment success. Sometimes this

strategy works. Sometimes it does not. It is never an easy call.

The consequences of forgoing a PSE prior to the resolution of the case for fear of new charges or disclosures mean that the client will not benefit from the significant mitigation these evaluations can provide. But weighed against a significant chance of new charges, refusal of the evaluation at the preresolution stage may be the best alternative.

Postconviction Considerations

Postconviction the client may not have any choice but to participate in the evaluation. In those cases, particularly, it is critically important for all attorneys to advise their clients of the Fifth Amendment privilege against self-incrimination, which still attaches even after pleading guilty.

Clients who participate in postconviction evaluations, even if the PSE is court-ordered, are not entitled to *Miranda* warnings for the purposes of the Fifth Amendment.³⁰ Evaluators will likely give some warnings about the limited confidentiality and duty as a mandatory reporter to clients prior to interviews, pursuant to their ethical obligations, but attorneys should not count on that warning to protect their clients. The person who is best positioned to give clients this advice is their defense attorney.

One option is to refuse to participate in the evaluation completely. This can lead to negative consequences in sentencing and probation, and a sanction for refusal to cooperate in a PSE is possible, as it is not a penalty under the Fifth Amendment.³¹ For example, a PSE is not considered a penalty if the defendant faces a reduced chance at early parole by not cooperating during the evaluation.³² Similarly, a defendant being confronted at a probation meeting about voluntary confessions revealed during treatment was also not considered to be in custody or the results being a penalty for the purposes of the Fifth Amendment.³³

Courts can use a defendant's lack of cooperation during a PSE as a factor for sentencing.³⁴ However, courts cannot draw an adverse inference from a defendant's silence in determining facts relating to the circumstances and details of a crime.³⁵

Invoke the Right to Silence Partially: Refuse Some Questions Only

To avoid the possible negative consequences at sentencing or while on probation, a client may elect to participate in a PSE and only refuse to answer cer-

tain questions. This is usually the best course because the client cannot be accused by the government of refusing to cooperate while still avoiding the risk of potential new charges. Courts consider the Fifth Amendment to be properly invoked in the face of a realistic threat of self-incrimination.³⁶ The threats cannot be too unlikely or speculative.³⁷ To avoid the issue of having a client penalized, the government can offer immunity.³⁸ Immunity may also be provided by statute.³⁹ Immunity is rarely, if ever, offered in these situations.

Sanitize the Disclosure by Withholding Identifying Information

An option in cases in which a client has undisclosed past sexual offenses is to "sanitize" the client's disclosures by having the client withhold identifying information for any new victims. Where there are no formal or informal immunity agreements with the prosecutor's office, many evaluators will manage the disclosure of new victims by having them withhold names or other identifying information while disclosing past victims.⁴⁰ Evaluators are only required to report, and the police can only investigate, disclosures that include the identity of the victim. In some jurisdictions, the evaluators take the position that allowing clients to disclose past victims without identifying information is the only way to ensure the client will provide the information.⁴¹ Other professionals take the position that allowing the disclosure of victims without obtaining identifying information is unacceptable for a variety of reasons.⁴² Even when identifying information is omitted, many times the victim is a family member or otherwise known to the client, and the authorities may not have to make much of an effort to determine the identify of that person.

Counsel occasionally can advise clients who are seeking preresolution evaluations in some cases to "sanitize" their disclosure by not identifying the victim, their relationship to the victim, or where the offenses occurred. In those cases, counsel should talk with the evaluator in advance about this issue and make sure the evaluator is willing to go forward in those circumstances. Then counsel can carefully advise clients regarding the extent of their disclosures. If they are not prepared to make at least a disclosure of the events, and instead choose to lie about or omit those facts, they will

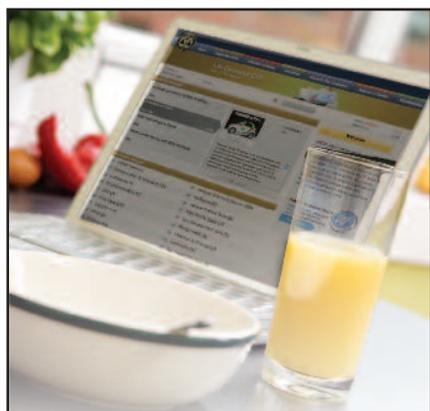
have serious problems passing the polygraph. In those cases, the PSE may be a waste of time and money. By knowing what the client will say, and taking these steps to omit identifying information about undisclosed victims, counsel can minimize the risk of new criminal charges while still advancing the client's case.

Juvenile Cases

Juvenile offender cases also give rise to situations in which the Fifth Amendment may be used.⁴³ Even if the jurisdiction allows for immunity for disclosures of other crimes, a court predisposition/adjudication cannot compel a juvenile in participating in a PSE.⁴⁴ In *Diaz-Cardona*, the trial court was reversed because the court could not require a juvenile to participate in a special sex offender dispositional alternative evaluation before sentencing, even with a protective order in place, because it would violate the juvenile's Fifth Amendment privilege against self-incrimination.⁴⁵ However, a juvenile offender who is postdisposition/adjudication may be ordered to participate in a PSE with either a protective order or laws prohibiting further criminal liability with disclosures.⁴⁶ In these cases, there remains a critical need to carefully and clearly communicate to the juvenile client that he or she has the right to refuse to answer certain questions, and to make sure the evaluator understands the important rights that will be invoked during that examination.

Conclusion

A psychosexual evaluation can be very helpful to clients in criminal and family court proceedings, but can also pose serious risks of new criminal charges and negatively affect the outcome of their cases. Advising a client who is participating in a psychosexual evaluation requires an understanding of the components of the evaluation and a willingness to ask direct questions about difficult and sensitive topics. By building a rapport with the client, and being prepared to ask the tough questions, an attorney can help ensure that this experience helps the client's case rather than hurts him. Knowing what the client will disclose enables the attorney to advise the client whether to go forward with the evaluation, refuse the evaluation, refuse to answer certain questions, or sanitize the answers to some questions by refusing to divulge identifying information for newly disclosed victims. The conversations necessary to prepare a client for a



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PSE are not easy or quick or pleasant, but they are essential to effective representation.

Notes

1. ATSA Code of Ethics, Section 3.02.
2. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFORMATION GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2016), available at <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda>.
3. *Id.*
4. *Id.*
5. *Id.* at 3-4.
6. *Id.* at 2.
7. *Id.* at 3.
8. *Id.*
9. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFORMATION GATEWAY, PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 2 (2012), available at <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/report>.
10. *Id.*
11. Caoilte Ciardha & Tony Ward, *Theories of Cognitive Distortions in Sexual Offending: What Current Research Tells Us*, 14 TRAUMA, VIOLENCE AND ABUSE 5-21 (2013).
12. Timothy Auburn, *Cognitive*

Distortions as Social Practices: An Examination of Cognitive Distortions in Sex Offender Treatment From a Discursive Psychology Perspective, 16 PSYCHOL. CRIME & L. 103 (2010).

13. Anthony R. Beech et al., *Assessment and Treatment of Distorted Schemas in Sexual Offenders*, 14 TRAUMA VIOLENCE & ABUSE 54-66 (2013).

14. Dan Sosnowski, *Types of Polygraph Used in Sex Offender Testing*, Public Agency Training Council, available at <http://patc.com/weeklyarticles/so-polygraph-testing.shtml> (last visited Jan. 14, 2017).

15. Kim English et al., *The Value of Polygraph Testing in Sex Offender Management*, National Institute of Justice 14-15 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/199673.pdf>.

16. *Krispen Estrada v. Idaho*, 30821 (Idaho Ct. App. 2005).

17. *Murray v. State*, 156 Idaho 159, 168, 321 P.2d 709 (2014).

18. Association for the Treatment of Sexual Abusers, *Ethical Principles*, at 10, available at <http://www.atsa.com/pdfs/COE.pdf>.

19. *Id.* at 10.

20. U.S. CONST. amend. V

21. *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting *In re Gault*, 387 U.S. 1, 49, (1967)); *In re Gault*, 387 U.S. 1, 49 (1967).

22. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 322, 38 L.Ed.2d 274 (1973).

23. *Id.* at 78, 94 S. Ct. at 322.

24. *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

25. *Krispen Estrada v. Idaho*, 30821 (Idaho Ct. App. 2005); *Dzul v. State*, 118 Nev. 681, 56 P.3d 875 (Nev. 2002).

26. *Dzul v. State*, 118 Nev. 681, 56 P.3d 875 (Nev. 2002).

27. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

28. *Id.* at 429.

29. *Id.*

30. *Minnesota v. Murphy*, 465 U.S. 420, 434, 426, 104 S. Ct. 1136, 79 L.Ed.2d 409 (1984); *State v. Jacobsen*, 95 Wash. App. 967, 974-75, 977 P.2d 1250 (1999).

31. *United States v. Kennedy*, 499 F.3d 547 (6th Cir. 2007); *State v. Hernandez*, 231 Ariz. 353 (Ariz. App. Div. 2 2013); *Dzul v. State*, 118 Nev. 681, 56 P.3d 875 (Nev. 2002).

32. *Dzul v. State*, 118 Nev. 681, 56 P.3d 875 (Nev. 2002).

33. *Minnesota v. Murphy*, 465 U.S. 420 (1984).

34. *United States v. Kennedy*, 499 F.3d 547, 552 (6th Cir. 2007).

35. *Mitchell v. United States*, 526 U.S. 314, 324, 119 S. Ct. 1307, 143 L.Ed.2d 424 (1999).

36. *United States v. Antelope*, 395 F.3d

1128, 1134 (9th Cir. 2005).

37. *Id.*

38. *Id.* at 1140; *State v. Powell*, No. 469570-II (Wash. Div. 2 2016).

39. *People v. C.Y.*, 2012 COA 30, 275 P.3d 762 (Colo. App. Div. 6 2012).

40. Kim English et al., *The Value of Polygraph Testing in Sex Offender Management*, National Institute of Justice 20-21 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/199673.pdf>.

41. *Id.*

42. *Id.*

43. *State v. Diaz-Cardona*, 123 Wash. App. 477, 98 P.3d 136 (2004).

44. *Id.*

45. *Id.*

46. *People v. C.Y.*, 2012 COA 30, 275 P.3d 762 (Colo. App. Div. 6 2012). ■

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