

I N S I D E   T H E   M I N D S

# Juvenile Criminal Defense Strategies

*Leading Lawyers on Examining  
Recent Trends in Juvenile Law and  
Building a Successful Defense*



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# Representing Juveniles Charged with Sex Offenses

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## **Introduction**

I am an attorney in private practice in Washington State, where my practice focuses on representing persons accused of sex offenses. While all sex offenses pose significant challenges to defense counsel, few are more complicated or challenging than the issues that surround the representation of juveniles accused of sexual offenses. The juvenile justice system has seen a movement toward harsher sanctions and lengthier periods of incarceration and restrictive treatment programs for juvenile sex offenders. Elizabeth J. Letourneau, et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 Criminal Justice Policy Review, 20, (Dec. 2008). Particularly when the client has already confessed to the offense, or where the evidence of guilt is very strong, the attorney must advocate strongly for the client to avoid these very dire consequences.

In those cases where the issue of guilt is not the emphasis of the defense, and where the attorney is focused on achieving the best result given the circumstances, the attorney must understand and communicate the reasons their client and all juveniles are different from adults, the reasons why the client does not put the community at risk, and the reasons the client should be allowed to be given a sanction focused on treatment rather than incarceration.

The challenges of investigating and trying these cases in juvenile court is a separate issue from this discussion of how to work with juveniles who have committed sex offenses and admit that fact.

The purpose of this chapter is to:

1. Acquaint criminal defense attorneys with the research that explains why juveniles who commit sex offenses are different from adult sex offenders
2. Explain how recidivism rates and risk prediction for juveniles operate and how to argue your client's future risk
3. Describe the ways that treatment for juvenile sex offenders work and their success
4. Offer some techniques and methods for working with juveniles on these difficult cases

## The Nature of Juveniles Who Commit Sex Offenses

### *Juvenile Sex Offense Rates Are Generally Stable*

While there is a widespread belief among the public that juvenile sex offending is at an epidemic and all-time high, the fact is that rates of juvenile sex offending overall have been generally stable in recent years. *Id.* However, from the late 1980s through 1994, there was a sharp increase in juveniles committing violent offenses, including sexual violence. D. Finkelhor, Guest Speaker at the 17<sup>th</sup> Annual San Diego Conference on Child and Family Maltreatment: *Sham or Champagne: The controversial decline in sexual abuse cases.*, February 3 – 7, 2—3.; J.C. Howell, *Preventing and reducing juvenile delinquency: A comprehensive framework*, Thousand Oaks, CA: Sage.) In response to this period of time, the sanctions for juveniles who commit sex crimes were intensified, including longer sentences, sex offender registration, and community notification statutes. At the time those policies were adopted, policy makers were making assumptions about high recidivism rates and poor treatment results that have not been borne out by the research or experience, yet those harsh and often counterproductive sentencing schemes remain in place. The challenge for the defense attorney in this environment is to advocate for a result for their client based in research and the proven effectiveness of treatment, rather than the harsh sanctions and misguided assumptions of policy makers from a different era.

### *Juveniles Who Commit Sex Offenses Are Different Than Adult Sex Offenders*

Another widespread belief or assumption made by policy makers dealing with juveniles who commit sex offenses is the belief that juvenile sex offenders have more in common with adult sex offenders than with other juvenile delinquents. Elizabeth J. Letourneau & Michael H. Miner, *Juvenile Sex offenders: A Case Against the Legal and Clinical Status Quo*, 17 Sexual Abuse: J. Res. & Treatmt., 3 (July 2005). The research in this area, however, suggests that juvenile sex offenders are similar to other juvenile delinquents and are quite different from adult sex offenders. The key for defense counsel is to understand and communicate that difference in presenting their client to the government and the court.

## **The Adolescent Brain is Different from the Adult Brain**

Physiologically, there are big differences between juvenile brains and the fully developed adult brain. The frontal lobe is the last area of the brain to develop, and is not complete until people are in their mid-twenties. This is the part of the brain involved with executive functioning: planning, judgment, initiating and stopping actions, anticipating outcomes and consequences, and inhibiting and suppressing inappropriate social behavior. Likewise, the Limbic System has not reached full capacity in adolescence. This deals with processing and managing emotion and motivations. When fully developed, the Limbic System keeps people from “overheating” and helps maintain control over behavior.

The effects of this underdevelopment on juvenile behavior can be profound. As a result of these deficits, juveniles do not read emotions in others as well as adults. The juvenile’s brain uses more of the emotion areas and less of the frontal lobe for functioning. The adult brain uses more of the frontal lobe. The Limbic System “stands in” for the underdeveloped frontal lobe of a juvenile.

The effects of this underdevelopment are often the key to understanding why the behavior occurred in the first place. Importantly, juveniles perceive risks differently than adults, and are less able to foresee probable consequences of their behavior. Juveniles are more influenced by their peers than adults. Juveniles are more impulsive. Solo offenders are more impulsive than group offenders. (Bijleveld and Hendriks, 2003). There is a high incidence of ADHD among juvenile sex offenders (Kavoussi, Kaplan and Becker, 1988).

While the underdevelopment of the juvenile brain may lead to the problem of sexually acting out in the first place, there are also characteristics of this development process that suggest a juvenile is well equipped to address and avoid this behavior in the future. Due to incomplete formation of the adolescent brain, youth are more amenable to rehabilitation as their personality traits are in flux. As the brain continues to develop, most youth “age out” of delinquent behavior as they mature. Youth are more sensitive and responsive to rewards than punishments.

The juveniles' behavior may not predict future acts. They do not just act on their sexual preferences. Compared with adults, adolescents' sexual preferences show a lesser association with their offense histories than adults, and their offenses are less likely to reflect their sexual "preference" or "orientation." The distinction between rapists and child molesters that is applied to adult sex offenders is less appropriate with juveniles. (Jones, 2003). They are not yet set in their ways. In general, adolescents do not have established well-developed patterns of sexual interest and sexual arousal. L. Trivits & N. Reppucci, 57 *Application of Megan's Law to juveniles*, *American Psychologist*, 690-704.

### **Predicting Future Risk with Juveniles Who Commit Sex Offenses**

The research suggests that the standardized risk assessment tools for juvenile sex offenders do not do a good job of predicting recidivism. J. Viljoen, *Assessing risk of re-offending among adolescents who have sexually offended*. (April, 2008) (paper presented at the Fifth Annual Forensic Psychiatry Conference, Vancouver, British Columbia). However, the research does identify many factors relevant to juvenile sexual re-offense risk assessment. Some of these so-called risk factors enjoy strong empirical support as a predictor of future offense patterns, while other factors have only limited empirical support, and many factors you might think relevant in fact are unlikely predictors of future sexual offense, such as a history of being abused or denial of their offenses.

*The Six Factors with the Most Empirical Support* J.R. Worling & Langstrom, *Risk of sexual recidivism in adolescents who offend sexually; Correlates and assessment*. In H.E. Barbaree and W.L. Marshall (Eds.), *The Juvenile sex Offender*, (The Guildford Press, 2nd ed., 2006).

There are six factors cited in the literature regarding juvenile sex offender recidivism risk that enjoy a great deal of empirical support for the proposition that these factors increase the risk of sexual re-offense.

1. **Deviant Arousal System.** A demonstrated sexual arousal to children more than four years younger than the offender in the last six months. Sexual assaults in the last year against two or more children more than four years younger than the offender. A

demonstrated sexual arousal to sexual violence in the past six months. Sexual assaults in the last year against two or more individuals that involved excessive physical violence, threats of death or pain, or the use of weapons.

2. Has the juvenile ever sexually assaulted more than two victims?
3. Has the juvenile experienced prior adult sanctions for sexual misconduct against another person? At any time prior to the most recent offense, was the youth cautioned, warned, disciplined, criminally charged or otherwise sanctioned by an adult authority for a sexual assault?
4. Has the juvenile ever intentionally committed a sexual offense against a stranger? (A stranger is a person the youth knew for less than twenty-four hours prior to the sexual offense.)
5. The juvenile has a lack of intimate peer relationships or social isolation. At any time in the past six months, the youth's social relationships have been characterized by:
  - a. no emotionally intimate peer relationships (non-familial persons who are within three years of the age of the youth),
  - b. no close friends,
  - c. reliance on a single peer aged friend, or
  - d. social isolation from peers outside of the regular school day
6. The juvenile is incomplete (less than 75 percent finished) with sexual offense-specific treatment.

In addition to those factors above, which have strong empirical support, there are several factors to be considered with limited empirical support. *Id.* These include:

- Problematic parent-adolescent relationships
- Attitudes supportive of sexual offending
- High-stress family environment
- Impulsivity
- Antisocial interpersonal orientation

- Interpersonal aggression
- Negative peer associations
- Sexual preoccupation (Total sexual output > 14)
- Sexual offending against a male by a male
- Sexual offending against a child
- Threats, violence, or weapons in sexual offense
- Environment supporting re-offending

Finally, several factors are unlikely as predictors of future sexual offense. *Id.* These factors are often argued as relevant considerations by prosecutors and judges, so it is important for the defense attorney to be able to address those concerns directly. The “risk factors” unlikely to predict future sexual offending are, first, the adolescent’s own history of sexual victimization. It is commonly believed that children who have been molested will offend against others, and that children who molest must have been molested themselves. In fact, a history of being abused themselves does not predict future offenses, and defense counsel needs to be prepared to make that point when the government tries to argue that this does create a stronger future risk.

A history of nonsexual offending by the juvenile is unlikely to predict future sexual recidivism by that juvenile. Sexual offenses that involve penetration, as opposed to simply molestation or touching, do not predict future sexual recidivism. The fact that a juvenile denies some or all of their sexual offending is unlikely to predict future sexual recidivism. A juvenile who demonstrates low victim empathy is likewise not necessarily more likely to commit another sexual offense than other youth.

### **Using Social Science Research in Court**

Translating the concepts and research of social science into successful courtroom argument takes careful preparation and presentation. Many of the concepts and findings of the research I refer to will be new to a prosecutor or judge, and communicating this information must be done effectively if you are to persuade them to rely on this information. Even where the concepts are more familiar to the parties and the court, taking the

time to summarize those findings and explain how they apply to your client is critical.

Social science research and concepts typically arise either at trial or during a sentencing hearing, though they can arise in many other situations such as probation violation hearings, sentence modification requests, etc. During a trial, social science research and findings may be relevant for a variety of reasons, and are typically developed with the use of expert witnesses. If the government calls an expert witness who testifies to these concepts, then you have the choice of bringing in your own expert witness to counter those conclusions, and/or using the research itself to impeach the government's expert witness under the "learned treatises" exception to the hearsay rule. The use of your own expert during a trial is beyond the scope of this chapter, except to say that it is critical that you familiarize yourself with the relevant research in order to effectively use that witness at trial. Find out the specific research your expert is relying upon and then read that research yourself to insure you understand how those conclusions affect or help your client.

At trial I strongly encourage practitioners to consider using the research themselves to impeach the government's witnesses with the research under the "learned treatises" exception to the hearsay rule. I have had great success using this technique while cross-examining child forensic interviewers, detectives, sexual assault nurse examiners, social workers and other government witnesses. Any governmental witness who claims some expertise in this area, as even police officers are wont to do, is liable to find themselves answering the research at trial. I do this by first interviewing the witness prior to trial and learning about their training and experience and their familiarity with the relevant research. I listen to their testimony to learn what concepts they are relying upon and endorse. I then select whatever research I think I might use at trial and provide a copy to the prosecutor and the witness to review prior to trial, placing the prosecutor on notice that I intend to use these documents to impeach the witness under the "learned treatises" exception to the hearsay rule. I only use peer-reviewed journals or other authoritative research that is repeatedly cited by other authors to insure they qualify as learned treatises. At trial I use these documents to undercut the assumptions made by the various investigators and evaluators, and to introduce alternative causality and other explanations

for the events described. The phrasing of the questions also gives the attorney a great opportunity to explain the research as you are confronting the witness with those findings.

The most common use of social science research in my practice is during sentencing hearings. Whenever you cite social science research in your pleadings be careful to summarize the findings of the authors accurately in your pleadings, without overstating the conclusion. Explain in as much detail as possible how this applies to the client and how it should affect the court's decision in this case. Always attach a full copy of the articles cited, with the relevant passages either highlighted or tabbed in some way. You want to make it easy for the reader to understand the concepts, and at the same time make it possible for them to read the more detailed article itself if they choose.

Of course the best practice at a sentencing hearing, if you can afford it, is to have an expert testify to these concepts and their application to your client. Most certified sexual deviancy evaluators and treatment providers should be able to qualify as an expert on the issue of risk factors and the effects on predicted sexual recidivism. The best case is when you have an expert who has actually evaluated your client and reached their conclusions regarding the client's risk of re-offense, amenability to treatment, and prognosis for success in the community. Whenever you face opposition from the prosecuting authority, or are likely to face skepticism from the bench, I highly recommend having the evaluator appear in court and testify to their findings and the research that supports those findings.

### **Sex Offender Treatment: The Methods and Successes of Treating Juvenile Sex Offenders**

If you are advocating for a treatment based outcome for your client, then it is important to understand the effectiveness of treatment and the methods and topics covered in treatment in order to explain why treatment is the right solution for your client. The standard and consensus modality for treatment for juveniles who commit sex offenses is what is known as Cognitive Behavioral Therapy. J.R. Worling & T. Cruwen, *Adolescent sexual offender recidivism: Success of specialized treatment and implications for risk prediction*, 24(7) Child Abuse and Neglect, 965-982 (2000). The state of the art in

treatment for juveniles is a specialized program of weekly individual, group, and sometimes family therapy over the course of at least twelve months and more typically two years or longer. There are several basic components to this treatment approach, including:

- Relapse prevention
- Denial and accountability
- Sexual attitudes and cognitive distortions
- Deviant arousal control
- Victim empathy
- Social skills
- Self-esteem
- Anger expression
- Trust
- Intimacy

The good news is that juvenile sex offense recidivism rates are generally very low in the first place, and that this treatment approach is generally very successful at further reducing recidivism rates in the future. Michael F. Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 Int'l J. Offender Therapy & Comp. Crim., 2 (Apr. 2010). In a meta-analysis of sixty-three data sets and 11,219 juvenile sex offenders done by Michael Caldwell, the weighted mean sexual recidivism rate was 7.08 percent, while the weighted mean general recidivism rate for non-sex offenses was 43.4 percent. In other words, only 7.8 percent of all juvenile sex offenders studied committed another sexual offense within an almost six-year monitoring period of time. This is a very different picture than the widespread public belief that juveniles who commit sex offenses are highly likely to re-offend, and that you can't "cure" a sex offender.

Juveniles who complete a sex offense treatment program have even lower rates of recidivism, demonstrating that the cognitive behavioral approach currently in use can have a major effect on the juveniles who complete the program. In one study, researchers found a 7.37 percent rate of sexual re-offense for those completing treatment and an 18.93 percent rate of sexual re-offense for those not completing treatment. L.R. Reitzel & J.L. Carbonell, *The effectiveness of sexual offender treatment for*

*juveniles as measured by recidivism: A meta-analysis*, 18 Sexual Abuse: J. Res. & Treatmt., 401-422 (2006).

Another study found an equally impressive result, with a 14 percent rate of sexual re-offense for those completing treatment and a 27 percent rate of sexual re-offense for those not completing treatment (Gretton, et al., 2005). Clearly, and despite popular belief, juveniles who offend sexually are actually very unlikely to re-offend sexually overall regardless of whether they have treatment, and when given treatment they offend at even lower rates.

### **Working with Juveniles Who Commit Sex Offenses**

Effectively working with juveniles who are accused of sexual misconduct requires that you find a way to communicate with your client in an open, direct, and honest way. With a lot of kids that is not easy. The last thing they want to do is talk to a stranger about sex or their lives in any detail. They often do not understand the role of the attorney, and whether the attorney is appointed by the government or hired by their parents or a relative, they often view their attorney as part of the system. In response to that feeling they are likely to shut down, minimize or rationalize their behavior, or simply deny facts that are obviously true. Overcoming those difficulties in the representation of juveniles is critical if you are to effectively and successfully advocate for your client. Below are some suggestions for ways to approach this difficult problem.

#### *Take the Time to Get to Know Your Client*

In my first full meeting with a juvenile client, I do not talk about the case initially, and often it takes quite a while before we even get to the legal matters. It is critical at the outset that you invest the time necessary to build some rapport, trust, and understanding with your client. I always begin by telling them that the first thing I want to do is get to know them a little bit. I start out by asking about school or activities and find out what interests them. With some kids, it is music, or video games, or doing tricks on their bike. Whatever it is, learn about it and demonstrate some interest in the kid's life. It is important during this time that you are actively listening to

the client, making eye contact, nodding and commenting where appropriate, and otherwise engaging the client in conversation rather than monologue. When I can relate any personal experiences to their interests, I am quick to do so, but be careful not to come off as disingenuous or contrived in your efforts to establish some commonality. I often share my own interests and hobbies during this discussion as well in order to get them to see me as something more than an authority figure in a tie.

Your questioning of the juvenile should be done to the extent possible with open-ended questions and invitations to expand on statements they make. Make sure they are talking more than you are! If that means letting there be silence in the room after you ask a question, then let there be silence. Too many attorneys become impatient in those circumstances and start filling the silence with leading and directed questions. It is critical that you get your client comfortable talking to you, not listening to you. Equally important is making sure that you are nonjudgmental in your talks with your client, and that they are able to reveal often very difficult things about themselves to you without fear of ridicule.

### *Explain Your Role to Your Client Carefully*

After I have my client relaxed and starting to think that I really do care what happens to them, I explain my role to them. We talk about the fact that whatever they tell me is a secret, and that I don't work for their parents or the government—I work for them. My job is to do whatever is in their best interests, not to judge them. I explain my duty of confidentiality, my duty to communicate with them, and my duty to do whatever is in their best interests, not the best interests of society. I make them explain this back to me and then ask them questions about particular situations to be sure they understand the concepts we are discussing.

### *Know Your Client's History*

Before I even discuss the facts of the case with my client in any detail, I get them to tell me about their own history. I find out about their childhood, siblings, relationships with parents and authority figures, how they do in school, their friends, their hobbies and activities, and as much as I can

about how they perceive their lives. I also ask about potential childhood traumas, including abuse, accident, family problems, substance abuse, pornography use, etc.

There is a limit to how much information and conversation a juvenile can take in during a single meeting, and I am always careful to watch for signs that we have reached that point. Particularly with younger juveniles, the conversations about their interests and background, and my role, may be all they can handle in a single session. As I said, take the time to get to know your client and lay the foundation of a solid rapport at the beginning of the case and you will find things go much more smoothly at the end of the case. I call this “front-loading” your communications with your client in that you devote extra time at the outset so that when the difficult decisions need to be made later in the case there is a strong foundation for those discussions.

#### *Involve the Parents to the Extent Possible*

I also believe it is critical to involve the parents, to the extent possible, in getting background information about your client and in helping your client make key decisions in their case. I know that this is not the practice of many attorneys who prefer to avoid talking to the parents at all, particularly where the parents are potential witnesses at trial. In those cases, I am careful to limit the topics of conversation to avoid any appearance of impropriety. What I have found is that the parents are able to give me a great deal of information about my client, which makes it possible for me to establish a better rapport with the client and enables me to identify the areas where the client is dissembling or minimizing or flat out misrepresenting their history. I also believe that a juvenile deserves to have their parents informed regarding the basic decisions they need to make in the case, such as whether to plead guilty or go to trial, with a full understanding of the implications of those decisions. Too many parents hire me only because they were unable to even speak to the appointed attorney who represented their child. And when I talk to those parents and hear what they have to say it is often very helpful and has a great deal to do with how and why I am able to resolve the case. Particularly when there are issues around an appropriate housing

placement, or contact with siblings or other minors, or supervision plans for the juvenile in the community, it is the parents who are in the best position to give the attorney the information they need to do the best possible job for their client. Talk to them.

### *Review Your Client's Legal Situation with Them in Detail*

Before I will discuss the case itself in any detail, or the allegations against my client, I insist that they review all the available discovery carefully. With younger juveniles, this might mean actually sitting with them and reading the important parts to them and discussing it as we go. With older kids, I give them a copy of the reports to review and ask them to make notes on things they disagree with or want to discuss. If there are recorded or videotaped interviews the client reviews those before we discuss the case in detail. Once the client is fully reminded of what evidence the government has against them we are ready to talk about what did or didn't happen on these occasions.

Once they have a full understanding of the allegations and the evidence against them, I talk about their legal situation. We discuss what the government would have to prove in order to convict them of the charges, as well as any defenses they might have. I explain what a trial involves, and their rights at trial to cross-examine witnesses, call witnesses, and testify themselves if they choose. I explain the option available in my state for a sentencing alternative involving community based treatment rather than incarceration for juveniles who admit their offenses, are at low risk to the community, and are deemed amendable to treatment. Even in those cases where the client is denying the offense, I review this option in some detail so they understand it. I go over sentencing consequences, sex offender registration, community notification, and probation. I try not to scare the client too badly while impressing upon them the gravity of their situation. The potential consequences for a conviction for a sex offense can be profound and I discuss some of those impacts on future employment, housing, and social interactions with the client as well. My goal is not to scare the client—it is to make sure they understand their situation, that they take our conversations seriously, and that they are invested in working with me to try to resolve this problem.

While explaining these concepts and consequences it is critical that you engage your client in a conversation rather than talking at them. This should be a two-way communication, and not a lecture. Make them repeat what you have said back to you in their own words throughout the discussion. Do not take a nod and an “uh-huh” as proof that the client understands what you are saying. Try not to talk like an attorney. Use language that brings these concepts down to a level where they can understand and appreciate what you are saying. I also write down the key points and give them that piece of paper to take away with them when appropriate so they have that to refer to when talking to their parents and others about the case.

*Get your Client's Version of the Events That Lead to the Charges Against Them*

Only after I have laid the foundation of rapport and a full understanding of the evidence against them and their legal situation will I typically engage my juvenile client in a conversation about what did or didn't happen during the alleged incident(s). I ask them to give me as detailed a recitation of the events leading up to the incident(s), their knowledge and experiences with the complaining witness(es) and other key players in the case, and their explanation for why these events occurred. During the initial conversation, I ask a lot of questions but try not to inject judgmental or skeptical comments. I want to hear their explanations in full so that I can understand where they're coming from and how they perceive the case.

Many criminal defense attorneys feel it is not their job to get a confession out of their client, and will take their client's statements about the offense at face value. When representing a client on a robbery, a theft, a drug charge, or most other offenses there is little or nothing to be gained from an admission of guilt and no reason for the attorney to press their clients on this point. But sex offenses are different in that the juvenile who denies their offense and goes to trial when they are actually guilty faces far harsher treatment and sanctions than the juvenile who admits their offense and asks for treatment.

In Washington State where I practice, the law provides for a sentence of community based treatment rather than a sentence served in one of the institutions of our state Juvenile Rehabilitation Authority for offenders who admit their offenses, are found at low risk to re-offend, and who are found

to be amenable to treatment during a rigorous evaluation process. The sentences they face after a trial can be two years or more, and in some cases up to their twenty-first birthday. The juvenile who persists in denying their offense in the face of a compelling case by the government faces profound and life-changing consequences. If I can achieve a much better outcome for the client and their future by moving them to a place where they can admit their offense and take some responsibility then I can often avert the most stinging of the possible consequences of their actions—long-term incarceration and institutionalization. With community-based treatment, the client will avoid the effects of institutionalization and be put on a path that offers an opportunity to be relieved of sex offender registration and have their record sealed within just two to five years. I believe it is my duty to not just advocate for my client and whatever position they choose, but also to counsel my client, and in these cases, that means frankly and directly counseling them.

Some juveniles will deny they did anything wrong because the allegations of sexual misconduct against them are false accusations, or misperceptions, false memories as a result of suggestion by authority figures, repressed memories that are not based in reality, or because they are coached by parents or others. When your client tells you that they didn't do what they are accused of (and hopefully their story makes sense and the government's story doesn't) then you prepare for trial, fully investigating the allegations, interviewing the witnesses, and enlisting experts where appropriate. Defending juveniles against those allegations at trial encompasses a great deal of issues and material that is not the subject of this chapter. This is the same body of knowledge used in defending adults against allegations of sexual misconduct. This discussion is directed at the juvenile who has very poor prospects at trial, and for whom a resolution short of trial is indicated by the facts of the case.

Many juvenile clients will deny their offenses against sometimes overwhelming evidence, while others will admit their offenses right away. They have been taught throughout childhood that the way to handle accusations is to deny them as long as possible, and when that doesn't work to rationalize, minimize, and blame others for their behavior. While that is often the best strategy when dealing with their parents, those techniques will not solve their problems with the criminal justice system. Where a

client takes that tack I listen fully to their explanations, and then go back and begin to question them about what they are saying. If it seems clear to me that they are trying to sell a story that just doesn't make sense then I confront them with the evidence the government has against them, the apparent inconsistencies in their story, and get them to explain how we should deal with those. While I never call my client a liar or directly accuse them of lying, I am very direct in addressing the problems I would have as their attorney when representing them at trial with the theory they are offering. Always leave the door open to changing their story.

In order to give my client the best opportunity to absorb what I am saying and think about it before committing to a particular path I make it a practice to have the conversations I describe above in at least two sessions. At the first session, I like to hear what they have to say and then do an initial round of confronting them about the difficulties I will have as their attorney selling their story. I then give them homework that involves asking them to think about two or three key issues or problems with what they are saying and to be prepared to talk about them at the next session. Consistently I find that this homework assignment directs their thinking during the time between meetings and makes it easier to get to the heart of the issues at that second meeting. During the second meeting, I again attempt to listen more than I speak, and I take pains not to lecture or berate the client even as I confront them with the problems. This approach works a great deal of the time, but of course is not always successful.

Another option in these cases is to enlist a psychosexual evaluator to assist you in overcoming your client's unconvincing and self-destructive denial. In many of my cases I have used an evaluator to engage the client in a series of meetings to see if the client will admit any misbehavior, opening the door to treatment rather than juvenile prison. If you are considering using an evaluator for this purpose in a case, it is important to talk to them about your goals before you refer the client, as not all evaluators are willing to take this approach. In one case, three different girls whom my teen client had molested at a daycare accused him of sexual misconduct, and yet he absolutely denied doing anything wrong when we talked on multiple occasions. The government was prepared to convict him of multiple counts of Class A sexual offenses, with a consequence of years in a juvenile institution. I then got his parents to agree to send him to an evaluator who

agreed to see this young man, and after working with that evaluator, he admitted those offenses as well as offenses against several other children. During the process his entire attitude, and the attitude of his parents, completely changed and he ultimately received a recommendation from the evaluator for community based treatment rather than juvenile prison despite the extent of his admitted offending. It was the fact that he admitted his offenses and that he had an appropriate and protective support system in his parents that made the difference in this case. If I had given up and simply accepted his denial, his life would have been very different.

### **Preparing Your Client for a Psychosexual Evaluation**

Many juveniles will admit their offenses to their parents or others when they are first confronted, and I do not meet them until after their guilt is an established fact. Whether your client admits their offense at your first meeting, or at your third, representing juveniles who have admitted their sexual offense raises a whole new set of issues principally related to preparing the client for a psychosexual evaluation. Your role in preparing your client for a psychosexual evaluation is primarily:

1. To obtain a complete sexual history from your client prior to the evaluation
2. To identify and confront any cognitive distortions or thinking errors evidenced by your client during your discussions
3. To describe the process and its components to your client so they are prepared for the actual evaluation process

#### *Obtain a Sexual History*

It is critical that you have an understanding of what your client will disclose if they are completely truthful when they meet with the evaluator. All evaluators are mandatory reporters, and anything your client reports to them in regard to additional victims, offenses, etc., must and will be reported to the authorities. While there are many good reasons for mandatory reporting laws and I have no quarrel with them, your role is to be your client's attorney and protect their interests. If your client has additional victims or offenses that are unknown to authorities then you need to know about those in order to effectively represent him. Often the

disclosure of additional victims will not necessarily significantly hurt your client in negotiations, and we elect to go forward with evaluations knowing those will be disclosed. What is most important is that you identify those potential problems and discuss the best way to address them with your client before you are doing damage control.

*Identify Cognitive Distortions and Address*

A psychosexual evaluation is a subjective evaluation of your client's subjective state of mind at a particular point in time. It is not an objective measure of a physical fact like a blood test, and as a result, your client's state of mind and willingness to engage during the evaluation are critical to their success. A client who is uncommunicative and evidences denial, minimization, rationalization, and victim blaming during the clinical interview and the psychological testing in the evaluation process will have a very unfavorable evaluation. But that same kid can get a favorable evaluation if you take the time to counsel them and prepare them to admit the truth and take some degree of responsibility for their actions during the evaluation interview.

I begin by listening to the client tell me their version of what happened, why it happened, what they were thinking at the time, why they thought it was okay then and why they think it was okay or not okay now, etc. I want to hear them talk about it and while I do I listen for the cognitive distortions or thinking errors that lead them to believe at the time it was okay to do what they were doing. Then I confront them about those thinking errors. I describe to them the effects that sexual abuse has on children and the damage they have done in child abuse cases. I ask them to justify each of their distortions and then give them my perspective on that issue. I am not afraid to be direct in confronting them, but again I avoid being judgmental or argumentative. My goal in this conversation is to crack the shell of their distorted thinking, and to get them to see things differently. They don't need a great deal of insight, but minimally they must see the duality between what they were thinking at the time they committed their offense and the possibility that that was messed up thinking. If you can achieve that, and get them to talk freely about what happened, then they are ready for the evaluation.

*Prepare Your Client for the Evaluation Process.*

There are three basic components to a psychosexual evaluation and I describe each to my client and attempt to prepare them for each stage of the process. The first component is the clinical interview, including the social and sexual history of the client, described above. In addition, there is psychological testing and physical testing.

Psychological Testing

Most evaluators use more than one standardized psychological test to measure personality traits, sexual attitudes, and deviant arousal systems, as well as basic intelligence and aptitude testing. What I stress to my adult and juvenile clients is to answer the questions honestly, and not try to make themselves look good. A person who answers the way they think the evaluator wants them to answer will inevitably be found to have manipulated the test due to the internal reliability and validity controls within the testing. Clients should be encouraged to read the questions carefully, and then answer without a lot of overthinking. It is okay if they aren't perfect.

Physical Testing

A standard tool used in virtually all forensic psychosexual evaluations is the polygraph examination. Some evaluators will employ a penile plethysmograph (PPG) as part of an initial evaluation, but those are used less commonly than the polygraph, particularly with juveniles. The PPG measures penile response to various sexual stimuli, including stimuli involving adults and children, persons of both sexes, and violent and deviant sexual acts.

The standard tool used almost universally in initial evaluations is the polygraph examination. The polygraph examination used in psychosexual evaluations is typically a “sexual history” polygraph that measures whether the client has fully disclosed their own sexual history during the clinical interview and during an interview with the polygrapher preceding the actual polygraph testing. Sometimes an evaluator will also request a “specific issue” polygraph regarding the specific facts of the case if there is some

dispute as to exactly what did or didn't happen, which should be administered on a separate occasion from the sexual history polygraph.

The key to preparing a client for the polygraph is to instill some confidence in them that they can pass the exam if they are telling the truth and to explain what will happen. I explain how it works, in general terms, and tell them that in my experience kids who tell the truth pass polygraphs. The work we have done up to that point to get them to talk about their sexual history and to be honest about past events is critical to preparing them for the actual polygraph examination, and if that work has gone well your client should be ready. I am particular about who I allow to polygraph a juvenile client for their first polygraph. I have seen too many clients traumatized by a bad experience with a gruff or hurried examiner during their first polygraph, and I have learned to head those problems off by choosing a gentle and friendly polygrapher for all juvenile clients who carefully explains every step of the process and puts the clients at ease. After they understand the process and have an experience of passing a polygraph, I become less particular about who conducts the polygraph.

The issues that can sometimes lead to “inconclusive” results or even failures are clients who are uncertain about the exact details of past events, and therefore worry that what they remember is not the actual truth, and those who remember new things during the examination. I explain to clients that the polygraph measures whether they are telling what they believe to be the truth, and remind them that the polygraph machine has no idea what really happened. The question is do they believe what they are saying is the truth? These issues are the reasons it is important to carefully go over the client's sexual history prior to the polygraph and clinical interview. I use an actual sexual history polygraph examination to make sure I am comprehensive in my questioning and to better prepare them to answer all of those questions in the interviews ahead.

## **Conclusion**

The assumptions behind many of the policies adopted in the 1990s that involve harsh penalties for juvenile sex offenders are being increasingly

called into question as the research on this population reveals a far different reality. We now know that juvenile sex offenders are very different from adult offenders due to the impact of juvenile brain development and impulsivity in sexual offending by juveniles. These behaviors resolve as juveniles mature, leading to very low re-offense rates for juvenile sex offenders. We also know now that treatment interventions are effective in further reducing juvenile sex offender recidivism rates. Policies that treat juveniles in the same way adult sex offenders are treated should be re-examined in light of these facts, and the policy of many states of marking juvenile sex offenders with lifetime consequences needs to be seriously reexamined.

One tool that should be employed by advocates for youth who offend sexually is the social science research which challenges these assumptions and helps convince the government and the court to treat your client appropriately. Practitioners need to take the steps necessary to make sure that the research regarding low recidivism rates, and the ways that juveniles are different from adults, are well known to the courts they practice in, and that sanctions imposed in those courts reflect those realities to the extent possible.

### **Key Takeaways**

- Stay updated on research comparing juvenile sex offenders to other juveniles, as well as to adult sex offenders, and be prepared to educate the court and other authorities on the evidence that juvenile sex offenders are similar to other juvenile delinquents and quite different from adult sex offenders.
- Use the research to make specific points relevant to your client. For example, point out that a history of being abused, or of denying their offenses, does not predict future offenses by the juvenile, when the government tries to argue that this does create a stronger future risk.
- Take the time to build rapport and understanding with your client by “front-loading” your communications.

- Be willing to confront and challenge your client's version of the events when it does not make sense and their denial is likely to send them to juvenile prison.
- Carefully prepare your client for a psychosexual evaluation if you expect a favorable outcome.

## Related Resources

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- D. Finkelhor, Guest Speaker at the 17<sup>th</sup> Annual San Diego Conference on Child and Family Maltreatment: *Sham or Champagne: The controversial decline in sexual abuse cases.*, February 3 – 7, 2—3.
- J.C. Howell, *Preventing and reducing juvenile delinquency: A comprehensive framework*, Thousand Oaks, CA: Sage.
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