

Raising their Voice

Avoiding Pitfalls in Prosecuting Child Sexual Abuse

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Objectives

Participants will...

- ▶ Learn the dynamics in child sexual abuse cases and the impact this can have on the investigation.
- ▶ Learn how to look for corroboration with these cases so the child's statement is not the only evidence.
- ▶ Understand how to utilize hearsay exceptions to admit corroborative evidence.
- ▶ How to handle common defense tactics and defense experts in court.

Children are Unique

- Often no conclusive medical evidence
- Abuse is typically in private, isolated setting
- Concurrent civil and criminal investigations; they often cross jurisdictional lines.
- The criminal justice system was not designed to handle the special needs of children.

Understanding the Dynamics

- ▶ Delayed Disclosure and Disclosure Process
- ▶ Grooming
- ▶ Multiple Victims
- ▶ Recantation
- ▶ Victim Credibility Issues
- ▶ Juror Expectations

Delayed Disclosure Research

- ▶ Overwhelming evidence that most child victims delay or never disclose child sexual abuse to friends, family or the authorities (Bottoms, et al.; London, et al., 2005: London et al, 2008)
- ▶ Even with corroborative evidence - medical exam (London, 2007) or confessions from the abuser/witness reports or videotape evidence (Sjoberg and Lindblad, 2002), up to 43% do not disclose

Why Children Don't Tell

- ▶ Threats to child
- ▶ Fear of perpetrator
- ▶ Lack of opportunity
- ▶ Lack of understanding of child sexual abuse
- ▶ Relationship with the perpetrator

Why Children Don't Tell

Children who are abused by a family member are less likely to disclose and more likely to delay disclosure

- ▶ Concern about consequences to others
- ▶ Shame and fear of causing trouble to family
- ▶ Fear parent's reaction
- ▶ Young children less likely to disclose

Children and Memory: Narratives

Children do not recall exactly the same information each time they describe an event (S.P. Brubacher et al 2019)

- ▶ Inconsistencies are NOT contradictions
- ▶ Recall failures and reminiscence (recall of previously unrecalled features) are typical
- ▶ Children who experienced repeated events appear less consistent but it is a function of events blurring together

Grooming/Manipulation

- ▶ All about relationship
- ▶ Groom child/family and community
- ▶ Continued access to child
- ▶ May be first person who has given child time/attention/affection

- ▶ Daubert Hearing not required for Grooming Expert
 - ▶ *St v Greer*, 312 Neb 351, Sept 2, 2022, disapproving *Edwards*

What does grooming look like?

- ▶ Special Treatment
- ▶ Gifts
- ▶ Secrets
- ▶ Being a “confidant” to the child—offering advice and understanding; attention
- ▶ **Watch for these signs in an interview, document them and seize evidence of them
 - ▶ i.e., get or at least photograph the gifts/letters/cards/etc.
- ▶ Interview others re: how D treated V vs. how he treated others

Multiple Victims

- ▶ NOT uncommon to find more than one victim
- ▶ Must consider that any child Defendant had access to could be a victim and interview them to ensure safety
- ▶ Don't assume boys are not victims
- ▶ Even if other kids aren't victims, they can provide lots of detail and corroboration

Victim Credibility Issues

- ▶ Our victims are not always little angels
- ▶ We take them as they come
- ▶ Their credibility issues make them more vulnerable to become victims
- ▶ If we see those issues, so do jurors...BUT SO DO DEFENDANTS!
- ▶ **Investigate:** Changes in victim over time and what Defendant KNEW about Victim

Credibility of Witnesses

- ▶ The **conduct and demeanor** of the witness while testifying;
- ▶ The **opportunity for seeing or knowing** the things about which the witness testified;
- ▶ The ability of the witness to **remember** and to **communicate** accurately;
- ▶ The **reasonableness or unreasonableness** of the testimony of the witness;
- ▶ The **interest or lack of interest** of the witness in the result of this case;
- ▶ The apparent **fairness or bias** of the witness;
- ▶ Any previous statement or conduct of the witness that is **consistent or inconsistent** with the testimony of the witness at this trial

Corroboration is key

Initial Reports are crucial in identifying things like the following:

- ▶ Victim's demeanor at outcry;
- ▶ How the report came about (i.e., who was told first);
- ▶ Observations of any injury if reported close in time to incident;
- ▶ Names of others present at disclosure; and
- ▶ Corroboration of *anything* that the victim describes
- ▶ Use Victim's words—shows reliability.

Forensic Interviews and Corroboration

Make a List Immediately following Forensic Interview:

- ▶ What can I corroborate?
- ▶ How am I going to find the corroboration?
- ▶ Minimum 5 Things

Corroboration continued

Follow Up Interviews:

- ▶ Others Present
- ▶ Siblings
- ▶ Parents
- ▶ Outcry Witnesses
- ▶ Before/After Witnesses
- ▶ Other Potential Victims
- ▶ **If you try to interview someone and they refuse, DO A SUPP to document that!
- ▶ LOCK IN THEIR STORY

Follow up On Forensic Interview

- ▶ If no medical exam, get one done
- ▶ 1 Party Consent Call/Communication
- ▶ Additional interviews to schedule?
- ▶ DNA to follow up on? Get buccal order, if necessary.
- ▶ Prepare Search Warrants: Residences, Electronics, etc.
- ▶ Document crime scene - photos helpful to jury and the victim
- ▶ Interview the suspect - does not matter what they say just make sure to lock in their version of events

Why a forensic interview for recantation cases?

- ▶ Document the circumstances of the recantation from the child's perspective
- ▶ Provide possible evidence of witness tampering
- ▶ Explore false allegations/alternative explanations for the original disclosure
- ▶ NOT to challenge the child's current or original statements

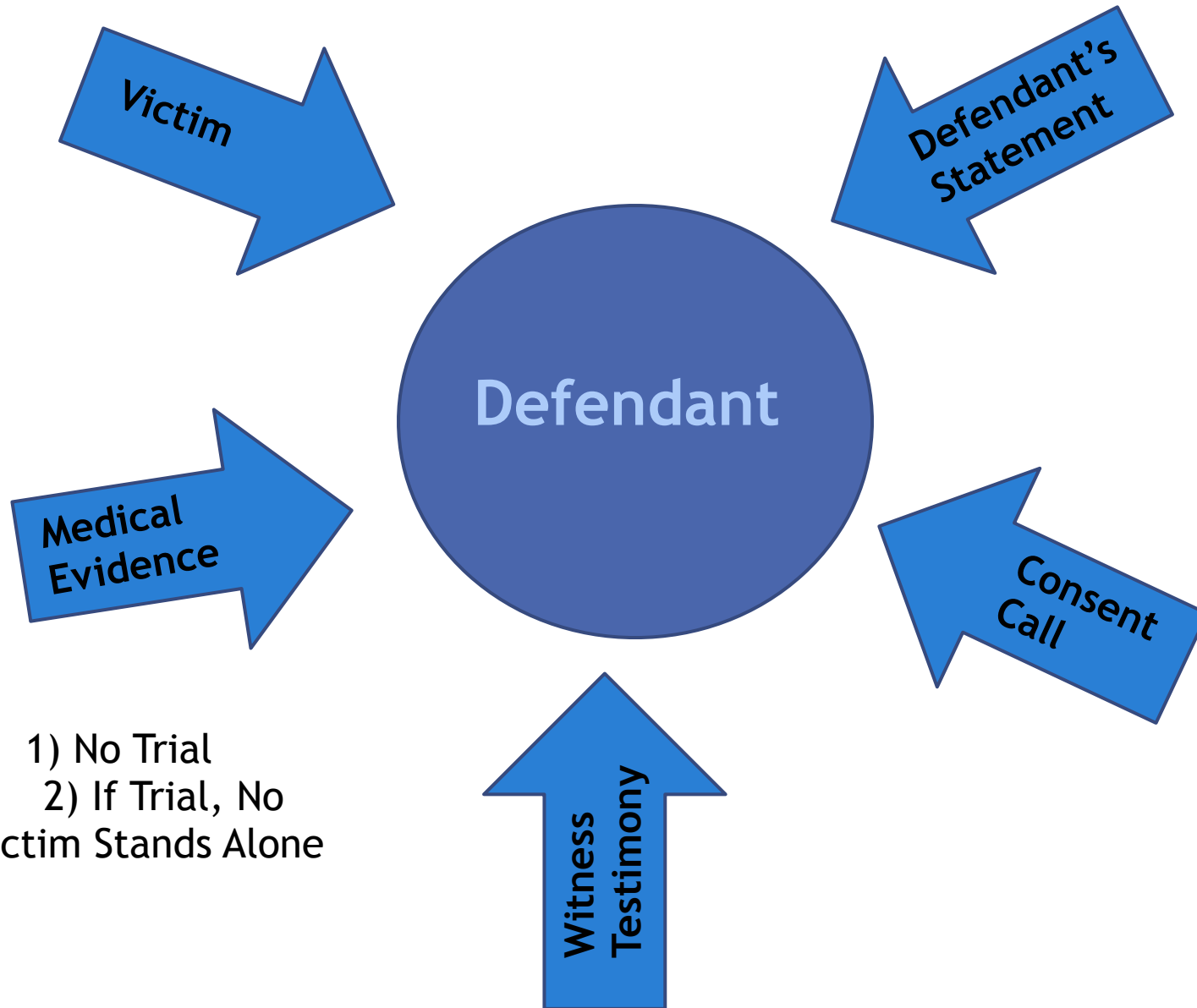
Shift the focus

- ▶ Investigate the cause of the recantation
- ▶ Identify circumstances of the recantation by interviewing to whom the child recanted
- ▶ Has contact occurred between child and alleged offender
- ▶ Determine if involved caregiver and family believe the child
- ▶ Determine if circumstances after the initial disclosure influenced recantation

Focus on the investigation (continued)

- ▶ Determine if the child was influenced by other people
- ▶ Explore witness/victim tampering by alleged offender
- ▶ Explore witness/witness tampering by others
- ▶ Explore whether the original statement was false

Putting It All Together



Goals: 1) No Trial
2) If Trial, No
Victim Stands Alone

Juror Expectations

- ▶ Prepare your jury in Voire Dire
 - ▶ “You will see me speak and behave in a far more casual manner with children who testify than with adult witnesses or professionals. Does anyone think that how I speak to children on the stand will impact how you evaluate a child’s credibility?”
 - ▶ “Will you be able to be a fair and impartial juror if I help a child witness feel more comfortable in court by changing how I interact with a child on the stand?”
- ▶ Jurors want DNA & Medical Evidence
 - ▶ Consider having an expert to testify why that evidence wasn’t collected, & why we would not expect to find DNA/bruises/hymen tearing

Visual exhibits are important

Proceeding with or without the victim

- ▶ Medical Evidence: Normal is normal, but history is important. (St. v. Floyd)
- ▶ Excited Utterances: Demeanor and Timing are the keys!
- ▶ Records
- ▶ Therapist information
- ▶ Digital evidence: Text messages, Facebook messages, Photos, etc.
- ▶ Prior (or subsequent) Victims (27-414)
- ▶ Defendant's Statement/1 Party Consent Call

Hearsay Exceptions

- ▶ In Nebraska: Medical exception
 - ▶ Forensic interview *may* be played in court under the - “Statements made for the purpose of medical diagnosis and treatment...”
 - ▶ Medical Exam REQUIRED
 - ▶ Includes mental & physical health
 - ▶ State of NE v. Vigil - January 2012 (Criminal)
 - ▶ State of NE v. Jedlicka - July 2017 (Criminal)
 - ▶ In RE Interest of Xandria P. - May 2022 (Juvy)
- ▶ Nationwide: 30 States Tender Years exception (...not Nebraska)
 - ▶ May include basis to find child victim “unavailable” so FI admitted as evidence without child testifying (eg: MO, SD, PA, MD)
 - ▶ Age based exception, requires hearing to determine reliability of statement

Trial Issues: Common Defenses

- ▶ Incomplete Investigation
- ▶ Motivation to Lie
- ▶ Put up to it by someone else (Custody/Divorce)
- ▶ Victim is a...
 - ▶ Liar / Mistaken / Has False Memories
- ▶ Victim was exposed to porn, etc. and that's how they know these things they're saying
- ▶ Defendant's a good person/could not do this

Incomplete or Poor Investigation

- ▶ No Medical Evidence or Exam
- ▶ No DNA
- ▶ Didn't even interview other people present or people V supposedly told
- ▶ Did a bad job at what was done—e.g., Interview
- ▶ Didn't try to get any digital evidence
- ▶ Made mind up too quickly w/o full investigation

Don't make cross easy for them

Full Investigation

- ▶ Forensic Interview
- ▶ One Party Consent Call
- ▶ Medical Exam
 - ▶ Attempted DNA Collection
- ▶ Interviews of Outcry Witnesses & Others Present
- ▶ Defendant Interview
- ▶ Interviews of Potential V's
- ▶ Scene Documentation
- ▶ Digital Evidence/Phones, etc.

Incomplete Investigation

- ▶ IV done by untrained person
- ▶ No Medical Exam done
- ▶ DNA not tested
- ▶ No interviews of anyone other than Victim
- ▶ Didn't try to talk to Defendant (or record it)
- ▶ Didn't go to the scene, get SW or photos
- ▶ Didn't try to get electronics and/or search them

Forensic Interviewer in Court

Expert testimony on the following issues:

- ▶ Delay of disclosure
- ▶ Disclosure process
- ▶ Children and Language
- ▶ Dynamics that facilitate/prohibit disclosure
- ▶ Memory
- ▶ Suggestibility
- ▶ Recantation

Defense Experts

- ▶ Will present outlier theories / research as commonly accepted
- ▶ Will use obscure articles
- ▶ Often very polished because they get lots of money to do this
- ▶ Good at avoiding answering the question
- ▶ **Our Expert** will often be asked to help explain to prosecutors what is wrong with the experts position

Forensic Interviewer Role with Defense Expert

- ▶ Should be able to speak to the research in general on the topic under attack
- ▶ Should be able to assist the attorney with how to approach the issues
- ▶ Does the attack apply in your case
 - ▶ If so how do you defend what happened
 - ▶ If not, how do you assist the prosecutor to keep the research out
 - ▶ Junk science

Do not be afraid...

- ▶ Discuss the research that you know best practices are based on
- ▶ Spend the time to familiarize yourself on research
- ▶ Talk about and stay aware of whacky 'research' being floated out there
 - ▶ Memory is hot topic right now
- ▶ Know the limitation of research
 - ▶ They are not having kids sexually abused and then researching

Questions

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