

# Child Molesting Cases for Family Lawyers

By: David Michael Bigeleisen, 2001



r. Wilson is on the phone", your receptionist says, "remember, the one who came in last week to ask about custody of his daughters. He seems a little bit upset and disoriented. He wants to know if he can see you right away."

"See if you can find out a little bit more about what he wants", you reply.

"Tried to", she says, "but he only wants to talk with you."

This is as typical an introduction to a client accused of child molesting as any. It is also typical of an introduction to lots of other cases that are not easy to understand. You will find this theme of dichotomy between ordinary and strange to run throughout almost every case of accusation of child molestation.

We'll call our model client Marco today. But any name will do. The mental illness which gives rise to child molesting knows no economic barriers, and very few ethnic ones. Those accused of lewd acts with children are most frequently male, but not necessarily. Also, those who most frequently come forward as victims are usually female, but once again, not necessarily. Our model for this essay will follow the most frequent pattern; you will have to adapt the model to your own special facts as they come to you.

## WORKING WITH THE CLIENT

Marco comes to you saying something like this: The social worker and the police came this morning and took my children. There is going to be a hearing in Juvenile Court tomorrow. Or, my wife and I are fighting over custody of our daughter, and she doesn't want to give me custody because she said I'm molesting the girl; or - Inspector Cohen of the police department called and wants me to come to the police station for an interview. I didn't do any of these things. What should I do?

These questions are good news. They are the first drops of rain before the thunderstorm arrives, and if you know your business and act quickly, you can begin to take protective measures.

Or, maybe the phone call comes in something like this: My brother (husband, son) is in jail, accused of child molesting. He's going to be arraigned tomorrow morning. This is bad news. It means the process is much further along the way and you are going to have to work harder and faster in order to catch up.

You may expect Marco to be fat, with dark rings under his eyes, sagging lips, and a stream of saliva drooling from his chin. You will be wrong. Accused child molesters look like everyone else. In most cases, Marco will carry ordinary social graces. He will appear pretty normal to you most of the time.

As in any other case, the first interview with the client is the most important. Once you have an idea what the accusation is, you may be tempted to ask Marco, "Did you do it?" I think this is almost always a mistake.

In cases like this, the first thing the client is looking for is someone to confide in. Confronting him with culpability will get in the way of this. He won't come back.

A better, and easier approach is simply to ask, "Tell me what happened." Don't cross-examine Marco very much at all in the first interview. Instead, give him advice on how the system is structured. Be supportive.

"I've handled many cases like this one. It's important, and I think it can be brought under control."

"And come in tomorrow morning with a retainer."

That's enough for the first meeting.

## PATHOLOGY ALL AROUND

I have never seen so many deeply troubled people together at one time, as I have in child molesting cases. Child molesting cases do not sprout up out of the ground. In every case which I have handled, the child's mother had serious psycho pathology. Usually this included a history of physical or sexual abuse, and very frequently drug addiction. Dig deeply enough and you may find that the child's mother has an evil motive of her own, or her past is so checkered that she won't be believed.

Similarly, many accused molesters were abused, physically, psychologically or sexually as children.

In some cases, the child will also have been wounded physically or emotionally before Marco appears on the scene. She will present herself to Marco as especially vulnerable. And, Marco may misinterpret this vulnerability.

All of these people find each other.

## BRIEF DIGRESSION

Some criminal defense lawyers refrain from asking their clients details about the offense. They do this in the belief that by remaining blind and dumb to the entirety of the facts, they avoid ethical transgressions when the client lies in court. I don't buy it. I think you're just leading him to the gallows. The more I know about the good and the bad of my client's case, the better. But the finding out of it calls for a little special treatment in molestation cases.

## COPING WITH DENIAL

Child molestation cases are frequently accompanied by a phenomenon called denial. This special kind of lack of self-knowledge or understanding will baffle you and frustrate you. Understanding and recognizing his bad act, and understanding and recognizing the trouble inside that led to it, is very painful to Marco. It is so painful that he has suppressed it and driven it from his consciousness. He will never admit to you that he did it.

Of course, this doesn't happen in every case. I've had lots of clients admit their mistakes to me, then begin to prepare a plan to deal with the problem.

It's also hard to distinguish denial from innocence. This is a big problem. A lot of people who come to you will be innocent. They will be falsely accused. If you confuse actual innocence with denial, you will do a lot of harm.

This means that Marco's view of things may not give you very much direction. You're going to need some extra help.

## GETTING HELP

I will often engage a psychologist with experience with these types of problems right away. I'm looking for a lot of things. The psychologist can give Marco a battery of standardized tests. Some of these will reflect whether Marco fits the psychological pattern of pedophiles. If Marco does, that doesn't mean he's guilty, but it will give you some further direction where to look next. If Marco doesn't appear to fit the pattern, that also doesn't mean he's innocent, but it helps a lot. Results of such a test can be admissible at trial to prove a lack of guilt, or, if guilt is established, at sentencing. They can also be useful in negotiations with the prosecution and social service agencies.

The psychologist will also inquire about Marco's background and his relationships with other people. He will learn a lot of things about Marco that will help you. He will also ask Marco questions in a different way than you will. This is because he's looking for something different from what you sought.

Sometimes this process will give you a peek into some weaknesses on the part of the witness who opposes you. It might give you further food for thought for further inquiry of the client, or for your investigation.

I have occasionally recommended that Marco see a doctor who specializes in the use of a plethysmograph. This is a messy business. The plethysmograph measures the degree of the client's apparent physical sexual arousal upon viewing pictures of clothed and unclothed people of different sexes and ages. The interpretation of the results won't give you a revelation. But it can provide some useful information.

I have also occasionally used the polygraph. In those cases I have another lawyer or an investigator interview the client in a foreign setting. This helps me to get a feel for how the client stands up.

## WORKING WITH THE POLICE

Very frequently, the only proof that the police have is the complainant's report, or the report of her mother. They know that this, alone, is often not strong enough to convict.

They will politely stop by to visit Marco at home, and ask him to come down to the station house to give his version.

Remember our discussion about denial. Marco doesn't want to

admit that he did anything wrong. So why not cooperate? This is going to be a disaster.

The police inspectors are very skilled at interview techniques, and they know Marco's soft spots. It's not unheard of for police to use misleading questioning techniques which you would never consider. Marco may recite a version of the events which is improbable or impossible. Worse yet, he may make a complete confession.

Of course, don't let Marco submit to a police polygraph unless he has passed your own polygraph every way, forward and backwards, and over and over again.

This doesn't mean you can't communicate with the investigator. Often he will freely tell you who the witnesses are, and what they have to say. If an arrest warrant is going to be issued, you can also arrange to have your client surrender and be brought to court right away. This beats having him rot in jail over a long weekend while he awaits arraignment.

## INTERFACE WITH JUVENILE COURT

Child molesting cases often first appear in juvenile court settings. The Department of Social Services will file a petition under Welfare and Institutions Code section 300. This is an opportunity. By all means, use the juvenile court proceeding to gather as much information as possible, and to test your case.

Most case law has denominated juvenile cases as quasi-criminal. This has meant that you are not entitled to the same full breadth of discovery tools that you would have on the civil side. I don't buy it. Perhaps the quasi-criminal rule should apply in juvenile delinquency cases, but I don't see why it should apply in dependency cases. You may want to consider testing this in the proper case.

In theory, all juvenile court proceedings are confidential. My experience is that the practicality is sometimes different. Often the District Attorney's office is the prosecuting agency of both the juvenile case and the criminal case. This may be grounds for recusal. Testimony in juvenile court is admissible in the criminal matter for impeachment. Thus, it's wise to think twice before having the accused testify in the juvenile matter.

All matters in juvenile court are supposed to be directed toward the best interests of the child. Don't let this distract you. You have a client who risks losing his freedom for a long time. Do what you must.

## INTERFACE WITH FAMILY COURT

The child molesting case can also arise in the domestic relations context. Of course, you have a full battery of discovery available in such civil matters. Visit your expert to get direction, and then get to work with depositions, medical examinations and psychological examinations.

## WORKING WITH THE WIFE

Sometimes a close examination of the wife and her motives yields useful information. Very often the wife will use a charge of child molesting as a brutal weapon to gain custody. Sometimes she will simply want to use the process to get rid of your client so she can take up with a lover. In one case, my office hired a detective to canvass the neighborhood where the accused and his wife lived. We learned that the neighborhood busybody lived across the street. Every morning while she drank coffee, she looked out the kitchen window. My client would leave the house at 6:30. The wife's boyfriend would ring the doorbell promptly at 7:15. The wife then proceeded to entertain the boyfriend in the living room window in a way that did not befit a married woman.

The wife may have been a victim of child molesting herself. This may color and distort the way that she interprets and understands her children's behavior.

Finally, the wife's own pathology may lead her to intentionally or unintentionally put words into the children's mouths. In one case, two boys both told the social worker that the father had molested them. Fortunately, the judge who handled the case had substantial experience in this area. He gently questioned the boys in chambers, at which time the boys quickly recanted and proclaimed that their mother had told them to tell the story, even though it wasn't true. In the case of a younger or more impressionable child, you might not be so lucky.

## WORKING WITH THE CHILD

Use the same rule you would with any adverse witness--never interview the child by yourself. At best, you would be left without rebuttal if the child's testimony at trial should differ from what she told you. At worst, you would have a difficult, unreliable, slippery witness say that you tried to influence her testimony. You would be off the case, and you would perhaps have legal troubles of your own.

You must decide whether you want the child to be competent or not. Of course, if the prosecution categorically cannot prove its case without the child's testimony, your first path is clear. It isn't always an easy one. The prosecution examination will be something like this:

*Shows the child a green disc.*

Q: If I told you this circle was red, would that be the truth or a lie.

A: It would be a lie.

*Male prosecutor:*

Q: If I said I was a lady, would that be the truth or a lie.

A: You're silly.

Often this passes as sufficient foundation for competence. I think it's silly and simplistic. If you have to, don't be afraid to be much more sophisticated and fact specific.

Question gently, but thoroughly. As in any case, see if the child will tell an improbable or impossible tale. Follow your intuition to see if the child will exaggerate wildly, or get her to minimize so that her testimony doesn't harm your client too much. And be patient.

## COPING WITH DSS AND CASARC

The child will very often be interviewed by social workers or nurses at the Child and Adolescent Sexual Abuse Resource Center ("CASARC"). The interviewing staff are often specially trained to elicit testimony from young children. These skills can easily be misapplied without any intention to mislead. Young children will very often state answers that the children think the questioner wants to hear. This is especially true if the questioner asks the same question in many different ways, or if several people repeat the same questions. By the time your turn comes, the truth (if it was ever available) may be lost forever.

You will need expert help to evaluate and test these interviews.

A pediatrician will examine the child. He will probably take photographs with a special camera. Many times the physical findings are subject to interpretation. Consult your own expert before cross-examining the CASARC pediatrician.

## CONCLUSION

Working on child molesting cases reminds me of my boyhood days spent fishing. Sometimes, instead of catching a snapper, I would get an eel. An eel is slippery, and it twists and turns all around. It's really hard to grab him and hold him. The facts in child molesting cases are like this.

The bottom line is that you may never know what really happened. Remember that you are an advocate, and do your best.

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