



By Daniel Pollack

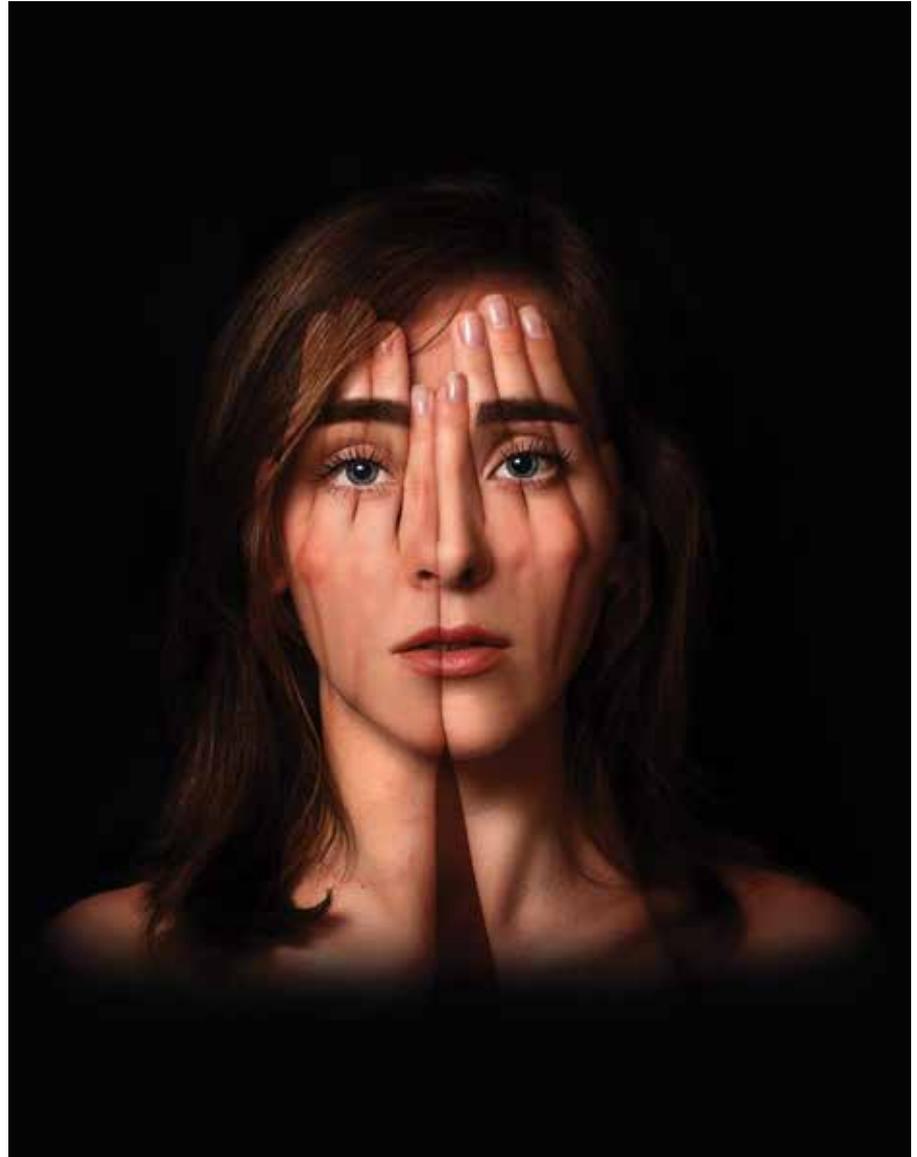
## Distant Memories, Fresh Wounds: Litigation Strategies for Sexual Abuse Lawsuits

In most claims for personal injury there are time limits by which the claim must be brought. There are various exceptions, including sexual abuse that took place many years ago when the claimant was a minor. In all lawsuits, the credibility of facts and witnesses is crucial. Abuse allegations, by their nature, are infrequently able to be independently, conclusively verified. Further, litigation is inherently an endeavor in which witnesses may have a stake in a particular explanation of past events.

Assuming there is no statute of limitations concern, what are some of the unique challenges and “tricks of the trade” of filing or defending against this type of civil lawsuit? We asked a number of experienced attorneys to share their insights about handling a sexual abuse case when the alleged abuse happened many years ago. The following are their observations.

### 1. Cameron R. Getto, Michigan

It is important to remain objective and avoid over-identifying with the client. Most injury lawsuits are significantly simpler to litigate than sexual abuse cases. This is because even if a physical injury is fully healed, there is almost always an abundance of physical evidence from which the attorneys can independently evaluate the magnitude of the harm as well as the possible or likely cause(s). Discrepancies among witness accounts of what may have happened almost always take a back seat to the objective, verifiable evidence, because juries tend to understand that witness accounts involve a certain amount of subjectivity.



In contrast, sexual abuse cases, particularly those remote in time, frequently involve circumstances in which no objective evidence of wrongdoing exists. Often, there are only two witnesses, both of whom present versions of the facts that contain key, dispositive

differences. Additionally, we all know that truthful, honest people sometimes tell lies, and that liars sometimes tell the truth. In remote cases, the passage of time raises questions of motive that ordinarily are not at play when a recent physical or visible injury is evident.

Because these dynamics shift the focus away from verifiable facts and instead place enormous importance on who to believe, an effective advocate must endeavor to remain objective. He or she must remain relentlessly focused on supporting the credibility of the client, even if the attorney believes every claim or account of events the client advances.

## 2. Katie Shipp, Pennsylvania

When the statute of limitations is not an issue, cases involving sexual abuse that happened long ago can still raise significant barriers for victims. Locating evidence is often challenging. Witnesses, or people the victim told about the abuse, can be difficult to track down and often their memories may be unclear, especially about critical dates and times. Further, documentary evidence may have been destroyed or buried in a long-forgotten archive. In cases of abuse within an institution, it may be necessary to rely on the institution, which is at risk of being sued, to gather and share evidence. This can be a battle since the institution will unlikely willfully share incriminating information without civil discovery or a court-ordered subpoena. Without this evidence or a clear understanding of exactly what kind of evidence might still be locatable, an attorney may be unwilling to pursue the case on contingency alone and the client may not be

able to advance the significant litigation expenses. These issues make the possibility of successfully litigating a case less likely. Although settlement is always a possibility, clients may face a moral dilemma when asked to settle a case that frequently includes a requirement of absolute confidentiality. It is often difficult for victims to balance their idea of “justice” with the value of the case from a legal perspective and what the offender or institution is willing to pay.

Just because a statute of limitations is extended or eliminated does not mean a plaintiff wins. Statutes of limitation only prevent access to the courthouse door. Once inside, a plaintiff must still present, prove, and actually win the case. “Access” does not always mean “justice” and careful client counseling is necessary to give victims perspective on exactly what the court process can and cannot provide. Fortunately, most victims gain strength and vindication from the process itself. Win or lose, having their day in court is truly cathartic for many victims. Holding individuals and institutions accountable is perhaps the best definition of justice attorneys and advocates can provide for their clients.

## 3. Karen Steinhauser, Colorado

Sexual abuse of children cases, whether they are brought days, weeks, months, years, or decades after the

abuse occurred, continue to be the most difficult cases to prove either in a criminal court or civil lawsuit. Even if no statute of limitations issue exists, the same type of investigation should be done no matter how recent the abuse occurred or how distant. The most common defense in these cases is one of motive. Arguments are made that the child was angry at the perpetrator, or the child’s family was angry at the perpetrator and this was a way to get even. Arguments are made that the family or child is after money. It is important to look for all evidence that can dispel the motive argument. Most of the time corroboration is not physical evidence, but can start with whom, if anyone, the child told about the abuse, even another childhood friend. Even if a child didn’t tell anyone, there may have been behavioral signs that often family, friends, teachers, and counselors have noticed—for example, a change in grades, reverting back to bedwetting or other “potty” accidents in young children who were toilet trained. There may have been other signs such as anger and not wanting to be social, or not wanting to spend time anymore for no apparent reason at the time, with the person who was the perpetrator. Just as important, trying to establish lack of motive to make a false accusation is critical. When jurors are asked to try to imagine why a person

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would go through the process of our justice system, and all that it entails for victims (medical exams, talking about very private things to strangers, cross examination, a questioning of their own actions) if the accusation weren't true, it increases the chances of a positive outcome for victims.

Finally, it is important to recognize that victims of abuse have to be treated as individuals. In other words, no one should tell victims what they should or should not do, or whether they should go to trial or settle a case, or testify, or not testify. Victims of abuse have been stripped of their power to choose by the perpetrators. The system must give back the power to the victims to make their own choices.

#### 4. Steven V. Rizzo and Mary Skjelset, Oregon

In our experience, children of sentient mind retain vivid recollections of abuse perpetrated by trusted adults, even if the acts themselves occurred many years prior to official disclosure. The emotionally charged nature of such traumatic violations ensures that the brain store the memory with excruciating detail. The challenge with litigating these cases arises not in a client telling the story, but in the audience believing it. People naturally prefer to think that respected citizens—church leaders, foster parents, medical professionals, teachers—would never hurt a child in such a vile and life-altering way. Therefore, collateral sources of information prove critical in underpinning victim testimony, demonstrating notice, and conveying damages.

■ **Victim information:** Children often attempted unsuccessfully to disclose the abuse when it happened. Records (school, medical, counseling) and witness statements (family, friends, professionals) hold indicia of trauma previously ignored or overlooked (anxiety, avoidance, behavioral shifts, eating difficulties, social/emotional struggles, urinary problems). However, confidentiality laws (used by the well-intended and

*When you have allegations of child sexual abuse, the lack of physical evidence is the norm, not the exception. Look at the testimonial and circumstantial evidence to determine whether the disclosure is credible. Finally, look for records of contemporaneous disclosure or investigation, or both.*

self-serving alike) limit their release, and securing them in advance of subpoena power requires appropriate authorizations, public records requests, adoption judgments (if applicable) and/or protective orders.

■ **Perpetrator information:** Abusers are not created in a vacuum, but information about their past is initially limited to public records (police reports, court documents) and witness statements (neighbors, acquaintances, co-workers). Still, proper investigation can expose threads—childhood trauma, criminal history, additional victims—that, when pulled, reveal a history of transgressions and, therefore, notice to an agency or employer.

■ **Expert witness testimony:** Qualified experts then examine these indicators, observations, and symptoms through the lens of scientific understanding to provide context and clarification. By knitting fact and analysis into a historical tapestry, a litigator explains victim testimony and tells a story with sufficient depth and texture to weather dispositive motions and overcome our tendency to trust people who work with children.

#### 5. Lori Kornblum, Wisconsin

Child sexual abuse cases are among the most difficult to prove. To assess whether to take a case, I recommend carefully examining the evidence.

That is the core of factual information that you would be able to present to a judge or jury.

Evidence consists of three parts: physical evidence, testimonial evidence, and circumstantial evidence. Physical evidence consists of facts that someone can see, touch, or feel, whether tangibly or through reports. Examples include DNA evidence (for example, in a case involving alleged oral-genital contact, a perpetrator's saliva is found in a child's underwear), as well as medical evidence of injury. However, physical evidence is missing from 94–95 percent of child sexual abuse cases, even when reported immediately. Why is this? In many cases, the sexual abuse is touch, which does not leave injuries. In other cases, even intercourse, the perpetrator has groomed the victim to accept the contact so the intrusion does not leave injury.

The most powerful evidence in child sexual abuse cases is testimonial combined with circumstantial. Testimonial evidence is the child's account of what happened. In most cases of sexual abuse, the only two witnesses are the child and the perpetrator. Because the perpetrator is unlikely to tell what happened, only the child remains. Fortunately, we now have a rich field of research about how children tell and retell about sexual abuse and how to evaluate this evidence.

First, look for how the child initially disclosed the abuse. Most disclosures

are delayed. Unlike other crimes, very few children walk out of an abuse situation and tell someone. The reasons are varied and complicated. Children often do not understand what is happening to them. In about 90 percent of cases, the perpetrator is a well-known and trusted individual. The perpetrator may have threatened the child with harm to the child or the family if the child tells. The abuse may be a “secret.” For many children, the abuse itself is normal because it is ongoing. Thus, delays in disclosure are common and one should not discount a disclosure due to delays.

Second, look at the content of the disclosure. Is the disclosure sufficiently detailed to give a believable scenario? Is there a before and after? If the disclosure is a simple statement, “He/she did \_\_ to me,” without context, you will have a difficult time proving it without physical evidence. Children usually cannot provide dates for the abuse, but can provide context such as a place or around a certain time. They can say if it happened one time or more than one time, how it “usually” happened, and whether

any time was different. Good forensic interviewers can then explore the “different” times to find specific instances.

Third, use circumstantial evidence, the elements in the child’s statement that you can corroborate. For example, if the crime occurred in the bathroom at a baseball game, you should be able to corroborate that the child attended a baseball game, and with whom. If the child says that certain objects were present, you may be able to verify this. For example, in a case where a child described a “monster” as sexually assaulting her, police found Halloween costumes in the perpetrator’s closet, which the child identified as the “monster.” The more you can corroborate about incidental details, the more believable the statement becomes.

Finally, check for contemporaneous investigation or disclosure. Many children report abuse to a friend, a school counselor, teacher, relative, or other person. These people may or may not have reported the abuse to authorities. However, just because nobody investigated the abuse does not mean the abuse didn’t happen. If someone

did report the incident to police or Child Protective Services (or both), even if the investigation resulted in an “unsubstantiation,” you may be able to get the investigation files, including possibly a video- or audio-recorded forensic interview of the child.

When you have allegations of child sexual abuse, the lack of physical evidence is the norm, not the exception. Look at the testimonial and circumstantial evidence to determine whether the disclosure is credible. Finally, look for records of contemporaneous disclosure or investigation, or both.

## Conclusion

Child abuse survivors, even if they are now adults, may have viable causes of civil legal action. It is critical to consult with an experienced, knowledgeable attorney to determine the best litigation strategy. 📌

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provide the agency with the opportunity to control the case flow, rather than merely track the work.

**3. Innovate data insights.** There is considerable discussion regarding data analytics for child welfare, and predictive models remain controversial. But there are tremendous opportunities to leverage data to drive outcomes. This requires stepping back and evaluating how data are used as well as the impact and importance of that data in decision-making processes. When new data are identified, how is that data acted upon and by whom? What type of organizational structure would be best suited to analyzing and acting on the data? What new or additional data would help the agency better protect kids? Answering these key questions will enable the agency to determine whether and when case-workers and supervisors would benefit

*The discussions in the market regarding modularity and agile development approaches have drowned out the critical focus on dramatically improving process outcomes.*

from additional data support, as well as evaluate potential organizational changes that could facilitate more effective monitoring and analysis. For example, when educational outcomes change, or law enforcement actions

occur in families, these data could alert a team to consider reassessment or inform the next review rather than solely rely on workers to notice the change in circumstance themselves.

By developing a plan that incorporates these suggestions into your procurement strategy, you are poised to harness the full potential of CCWIS. Even if CCWIS projects are underway, it isn’t too late to take advantage of the benefits of a focus on capacity. Your agency will better manage case flow and deliver improved outcomes. Remember: While CCWIS innovations hold significant promise, driving improved outcomes isn’t about development techniques. It’s about an enduring focus on increasing capacity to improve the lives of the clients you serve. 📌

*Sean Toole is a Client Partner at the Change & Innovation Agency.*