

LAW Pre-Trial Preparation: When the child victim has a sexually transmitted disease

—by Susan Perlis Marx

Through pre-trial investigation, prosecutors and investigators must educate themselves about the relevant STD and, most importantly, find the clues that support the contentions that the defendant had the STD and transferred it to the child during the sexual assaults.

When a child victim has a sexually transmitted disease (STD), prosecutors may become overly confident: surely, with such clear medical evidence, the jury will believe that the child was sexually abused. However, in a recent study conducted in Philadelphia, no significant difference in the rate of felony conviction was found in cases with and without physical evidence of injury, seminal fluid, or sexually transmitted disease (DeJong & Rose, 1991). Jurors may believe the defense argument that an STD can be contracted by non-sexual means, or that the child was sexually assaulted, but not by the defendant.

A child victim can contract a variety of STDs during a sexual assault. Most common are gonorrhea, chlamydia, and syphilis. Others include herpes simplex, condylomayloma, trichomonas infection, human immunodeficiency virus (HIV), and pediculosis pubis (Reece, in press). Through pre-trial investigation, prosecutors and investigators must educate themselves about the relevant STD

and, most importantly, find the clues that support the contention that the defendant had the STD and transferred it to the child during the sexual assaults. The guidelines outlined below should be adapted to the law and practice in your jurisdiction.

Testing the victim for STDs

The Centers for Disease Control recommended in 1989 that sexually abused children who report oral-genital, oral-anal, genital-anal or genital-genital contact must be tested for gonorrhea, trichomonas, herpes simplex, syphilis, and HIV (Reece, in press). Medical professionals and laboratories should have protocols governing the collection

of specimens, including,

- a. standardized labeling and packaging of specimens;
- b. guidelines to ensure that all appropriate specimens will be collected;
- c. standardized collection kits;
- d. procedures to explain specimen collection to children and caretakers;
- e. consent forms;
- f. documentation guidelines to maintain proper chain of custody (Finkel & DeJong, 1994).

Talk with a medical expert

Take time prior to trial to discuss the specific STD and facts that the investigation has uncovered with an expert in the area of sexually transmitted diseases. Most doctors who are experts in the treatment of child sexual assault victims have had experience diagnosing and treating STDs in chil-

dren. Consider consulting, in addition, doctors who specialize in communicable diseases. A medical expert must educate you and then the jury about the mode and frequency of transmission of the particular STD, the symptoms (or lack thereof) that accompany the STD, the methods of cure, and whether an expert can tell when the child contracted the STD. The experts may have to explain the testing procedures used on the child, unless you decide to present an expert from the hospital laboratory to do so. Assemble charts, diagrams or other demonstrative evidence that will aid the expert in his/her trial testimony.

Medical records of the victim

Make sure that you have complete medical records of the victim. Obtain a release from the child and from his or her parent or guardian. Alternatively, send a subpoena to the hospital or doctor's office. The records should include laboratory reports. Lab paperwork may furnish critical information about the types of testing procedures done, the specific site(s) on the child's body where STD was isolated, and details about the nature of the STD. Complete and accurate information about the STD will enable a medical expert to better evaluate the medical evidence in the case.

Treating physician and laboratory personnel

Contact the physician who examined the child. Discuss the victim's medical records, including the history, symptoms, lab test results, and prescribed treatment. Have laboratory personnel identify the staff member who actually conducted the tests. Talk to the lab staff member about the procedures used both to do the testing and to ensure a proper chain of custody of the test samples. Subpoena the treating physician and the lab staff member for the trial date in the event that you need one or both to testify at the trial. If possible, keep these medical professionals "on call" during trial; the "on call" arrangement will avoid unnecessary waiting at the courthouse and will be appreciated by the witnesses.

Previous medical records of the victim

Obtain all of the medical records of the child regarding any prior hospitalizations and routine medical care. The defense attorney may argue that, if the sexual assaults were perpetrated by a family member and ongoing for years, as the child reports, regular check-ups would have revealed the presence of the STD. Generally, however, medical records will establish that the child had no genital exam or testing for an STD prior to disclosure of the sexual abuse. Detection, particularly when the child has no overt symptoms of the STD, would have been impossible. Should a medical expert inform you that the child's STD could have been contracted from the child's mother during the birth process, check the child's neonatal records and the mother's

continued on next page

Law

—by Susan Perlis Marx
continued from page 15

medical records for any indication of the presence of the STD. Maternal transmission of human papilloma virus (HPV), for example, has been documented in children up to two years of age (Reece, in press).

Defendant's medical records

Interview the non-offending parent or members of the defendant's family regarding clinics, doctors, and pharmacists that the defendant may have approached for treatment. Check the case law in your jurisdiction concerning any limitation on access to the defendant's medical records. Some states allow access to the defendant's medical records when the abuse of the child is at issue; subpoena the medical institution's medical records department to obtain those records. Other states require an *in camera* hearing prior to the release of medical records. At the hearing, a judge reviews the records privately to determine their relevance to the prosecution. If the defendant's medical records reveal evidence of the existence of the STD, the judge should disclose the records to the prosecutor and the defense attorney.

Defendant's prison medical records

Prison health procedures often mandate routine testing of incoming prisoners for certain sexually transmitted diseases. Subpoena the prison's medical records to ascertain if the defendant submitted to tests and to receive the results of those tests. If the defendant refused to take a test for an STD, such a refusal may be admissible to show consciousness of guilt. Scrutinize the list of medications prescribed for the defendant while in custody. Often, a defendant will complain of ailments, i.e., flu, chest cold, and toothache, until he obtains medication which then clears up symptoms of an STD.

Health history of the defendant's adult sex partners

The non-offending parent of the child may have had sex with the defendant. A jury or a judge will want to know whether the defendant's sex partner had the STD, particularly absent direct proof that the defendant had the STD himself.

Ask the defendant's adult sex partner whether she noticed any symptoms of an STD on her own body or on the defendant's. Was there ever a time that the defendant stopped having sex with her? Did he use a condom? Was she ever tested or treated for an STD? Obtain a release from the non-offending parent or the defendant's other adult sex partner to procure all medical records. If the defendant's adult sex partner had the same STD as the child, the inference clearly can be made that the defendant gave the STD to both of them.

Note, however, that an adult sex partner may not appear to have the STD. A medical expert can explain the possibility that the adult sex partner was asymptomatic and never tested; further, certain STDs may disappear without medication. Finally, determine if the adult partner took antibiotics for another purpose which then might have cured the STD.

Investigation and testing of other potential child victims

Whether or not they have disclosed sexual abuse, other children in the household or with whom the defendant has had contact must be tested for sexually transmitted diseases. A child may first disclose sexual abuse to the medical professional who discovers an STD. If a child in the household tests positive for an STD but does not disclose sexual assault, the child's safety can still be ensured; an appropriate placement will avoid continued contact with the perpetrator, and a supportive environment, including therapy, will provide the opportunity for later disclosure. Should other children reveal that the defendant sexually assaulted them, arrest the defendant on additional charges. Check your case law concerning consolidation of charges for trial.

Miscellaneous clues of defendant's STD

Interview members of the defendant's family or his friends who may be willing to provide information concerning the defendant's medical history. Family members may know, for example, that the defendant stole a health clinic card, returned it several days later, and then took large white pills every day for a week. A medical expert can explain to the jury that ampicillin, used to cure gonorrhea, may come in the form of large white pills. In closing to the jury, the argument is clear: the defendant cured himself of the disease.

Contact family members and friends to determine if the defendant's adult sex partner confided in them that the defendant had symptoms of an STD (e.g., penile discharge). Given the possible ambivalence on the part of the defendant's family members to testify against him, have the family members sign statements, give sworn depositions and/or testify under oath at a grand jury proceeding or preliminary hearing concerning their knowledge of the defendant's STD. By doing so, you will lock the family members into their statements and have the ammunition with which to impeach them should they recant at trial.

Testing the defendant for STDs

Jurors want to know if the defendant was tested for the STD and, if not, why no testing was done. Failure to provide this information could easily result in an acquittal. Discuss the viability of testing with a medical expert. Obtain a court order or search warrant as early as possible in the investi-

Should a medical expert inform you that the child's STD could have been contracted from the child's mother during the birth process, check the child's neonatal records and the mother's medical records for any indication of the presence of the STD. Maternal transmission of human papilloma virus (HPV), for example, has been documented in children up to two years of age.

continued on page 21

Media Reviews

continued from page 20

enforcement and child protection agencies. Additionally, the video could be used in parenting classes and with teachers and court officials. Any curriculum that addresses child abuse will find this video a useful addition.

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Law

—by Susan Perlis Marx
continued from page 16

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gation process to compel testing of the defendant. Did child protective services workers request that the defendant get tested? Again, if the defendant refused to be tested, the refusal may be admissible at the trial to show consciousness of guilt. If the test results show that the defendant had the same STD as the child, the case may end in a plea.

If, however, the test results show no evidence of the STD, analyze the entire investigation. Speak to the medical expert: could the testing procedure fail to pick up the disease? Did the defendant have notice that the child had an STD? Did he have time prior to the test to clear up the infection? Did the defendant agree to be tested only after a delay, during which time he procured

medication to destroy any evidence of the STD? Use a medical expert to describe the ease and secrecy with which the defendant could obtain

medication and the rapidity and thoroughness of the cure.

Conclusion

A case involving an STD will be particularly challenging for an investigator and prosecutor. With thorough preparation, prosecutors can use the presence of an STD to convincingly corroborate the child victim's testimony at trial and to secure a just result.

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LEGAL NEWS

New Jersey Supreme Court Hands Down Child Abuse Ruling With National Implications

—by John E.B. Myers

In 1984, Margaret Kelly Michaels was hired as a preschool teacher in Maplewood, NJ. Not long after Ms. Michaels left the preschool seven months later, a child made a statement that was interpreted as evidence of possible sexual abuse. A large-scale investigation followed, and eventually Ms. Michaels was charged with sexually abusing many children at the preschool. The case went to trial in 1987, and, following a nine-month trial, Ms. Michaels was convicted of multiple counts of abuse. In 1993, Ms. Michaels's conviction was reversed by New Jersey's intermediate court of appeal. Among the several reasons for reversal, the intermediate court expressed grave concern about the clearly improper way some of the children were interviewed by social workers and police. In an unprecedented ruling, the court held that if the prosecution decided to put Ms. Michaels on trial again, a separate pretrial hearing—called a "taint" hearing—would be necessary to determine whether defective interviewing rendered the children's statements so unreliable that the children should be barred from testifying.

The prosecution appealed the ruling of the intermediate court of appeal to the New Jersey Supreme Court, and on June 23, 1994, that Court handed down its unanimous decision in *State v. Michaels* affirming the intermediate court's decision to require a pretrial taint hearing. The New Jersey Supreme Court's *Michaels* decision is unquestionably one of the most important child abuse rulings in recent years, one that will likely have national ramifications. Although reasonable minds can differ on whether the Court reached the correct decision, there is little doubt that defense attorneys throughout the country will soon begin requesting taint hearings in child sexual abuse prosecutions.

The *Michaels* decision highlights more than ever

the importance of good interviewing. The decision also joins the rising judicial chorus calling for videotaping of investigative interviews. The Court wrote that, "As a matter of sound interviewing methodology, nearly all experts agree that initial interviews should be videotaped." The Florida Supreme Court made a similar statement, writing that "Experts generally agree that contacts between a child and an expert evaluating the child for sexual abuse should be videotaped to ensure trustworthiness and to ensure that the expert did not lead the child during the evaluation" (1994). In a report issued in July of this year, an advisory panel to the California Attorney General recommended that "investigative interviews conducted at well run multidisciplinary interview centers be videotaped." The advisory panel went on to state that its recommendation "does not pertain to therapy sessions with children. The Panel recommends that therapy sessions not be videotaped unless videotaping is done for therapeutic reasons" (1994).

The *Michaels* decision promises to make the already difficult job of prosecution even more difficult. Yet, the New Jersey Supreme Court is clearly right in its insistence on competent interviewing. If *Michaels* leads to better interviewing, the decision will do more good than harm.

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