Regional Training: Defending Sexual Offenses
February 8, 2018
Dennis A. Wicker Civic Center, Sanford, NC
Cosponsored by the UNC-Chapel Hill School of Government & Office of Indigent Defense Services

12:15 Check In

12:45 Welcome, Introductions and Announcements
   Austine Long, Program Attorney
   UNC School of Government, Chapel Hill, NC

1:00 Physical Evidence in Sexual Offense Cases (60 min.)
   Dr. Kendra K. Ham, Faculty, Dept. of Pediatrics, Child Maltreatment
   Levine Children’s Hospital, Charlotte, NC

2:00 Motions and Legal Issues in Sexual Offense Cases (60 min.)
   Jesse Jones, Attorney, Lillington, NC

2:45 Break (light snack provided)

3:00 Cross-examining Experts (60 min.)
   Fred Webb, Attorney, Sanford, NC

4:00 Closing Remarks

CLE HOURS: 3.0 (general CLE)
Physical Evidence in Sexual Offense Cases
Kendra K. Ham, MD, FAAP
Child Abuse Pediatrics Attending Physician and Assistant Professor
Regional Medical Director for Butterfly House and Jeff Gordon Child Advocacy Centers
Carolinas HealthCare System

Objectives
• To define sexual abuse
• To review epidemiology of sexual abuse
• To review general anatomy and the importance of a comprehensive evaluation and exam
• To discuss the types of sexual abuse and the physical findings that may result
• To understand the importance and limitations of a forensic evidence collection kit

Definition
• Sexual abuse
  • involvement of dependent, developmentally immature children and adolescents in sexual activities which they do not fully comprehend and to which they are unable to give informed consent
History

- Used to be considered a taboo issue
- People didn’t believe incest was real
- In 1970s, child sexual abuse report increased associated with the women’s movement
- Similar issues in other countries
  - Cultural reasons
    - e.g. female genital mutilation

Epidemiology

- Comprises 10-15% of child maltreatment reports made in US
- Prevalence: 20% of females, 10% of males report having been sexually abused by age 18
- Sexual assault prevalence: females 3-16%, males 2-6%
- Mean age at time of onset of sexual abuse is 9-10 years
- Unknown exactly how many cases actually occur each year

Sexual Abuse Data

<table>
<thead>
<tr>
<th>% of cases</th>
<th>US</th>
<th>NC</th>
<th>SC</th>
<th>GA</th>
<th>VA</th>
<th>TN</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCANDS 2015 Data</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Percent of the total number of child victims including physical abuse, neglect, etc

In NC: 1595 sexual abuse cases out of 14856 children abused
Types of Sexual Abuse

- Contact
  - Actual or attempted intercourse/contact (oral, genital, rectal)
  - Fondling
  - Finger manipulation or penetration, or masturbation
- Noncontact
  - Exhibitionism
- Exploitation
  - Child pornography, prostitution/CSEC, cyberenticement

Risk Factors for Sexual Abuse

- Divorce
- Intimate partner in the home
- Parental substance abuse
- Unavailable parents
- Child disability – 2x greater risk

Perpetrators

- Men > women
- Unknown what percent of men/women that find children sexually attractive
- <3% of men report children as focus of interest
- Men who molest out-of-home girls report average of 20 victims
- Men who molest out-of-home boys report average of 150 victims
- Small numbers of men with thousands of victims

https://www.d2l.org/the-issue/statistics/
Perpetrators

- Child molesters on a continuum
  - Some find children sexually attractive, but haven’t acted upon this
  - Some involved in noncontact
    - Exhibitionism
    - Voyeurism
    - Photography
    - Obtaining/disseminating child pornography
  - Some involved in full sexual contact with children

Perpetrators

- Victim access
  - Occupation, hobbies, neighborhood, etc
- Grooming
- Characteristics (Starling, Perpetrators of Child Abuse)
  - Over 25, never married
  - Lives alone or with parents
  - Limited dating
  - Limited peer relationships
  - Excessive interest in children
  - Associates and friends are young
  - Age and gender preference for victims

History is the most important part in diagnosing abuse
Child Advocacy Centers

The Forensic Interview

• Child-friendly way to interview regarding allegations of abuse.
  • Physical abuse, sexual abuse, neglect and other typologies
  • DSS/LE/medical provider can watch live
  • Recorded

Disclosures of Abuse

• Purposeful (active)
• Accidental
• Delayed
• Immediate
• Tentative/reluctant
• Recantation – rates reported from 4-27%
Disclosures of Abuse

• Failure to report victimization, even when asked, is common
  • In one study of 529 children with gonorrhea, only 43% disclosed
• Delayed disclosures are common
  • In one study of 336 children aged 8-15 years, 75% failed to disclose their
    victimization within the year after it occurred
• 2/3 of adults reporting sexual abuse as children had never reported to
  anyone prior

Why Disclosures Change

• Family not believing
  • Lack of support from family
• Child afraid of being removed from home
• Child feels guilty or embarrassed
• Child still has visitation with alleged perpetrator

What happens next after a child discloses sexual abuse?
Acute Sexual Assault

- SANE kit (can take 2.5+ hours)
  - Performed within 72 hours to obtain evidence
  - Some states will collect evidence up to 5 days after alleged assault

SANE exam and kit

- Focused history
- Medical clearance from ED
- Photographs
- Toxicology screening
- Examination
- Evidence collection

Process of kit collection

- Consent signed
- Examiner wears gloves
- Clothing collected
- Swabs
  - Oral, buccal, etc
- Skin exam
  - Bite marks, hickies, etc
- Alternative light source
- Hair (head and pubic)
- Nail scrapings
Forensic Evidence Findings in Prepubertal Victims of Sexual Assault

• Studied 273 children <10 years s/p acute sexual assault evaluation
• >90% of children with positive findings – within 24 hours
• No swabs positive for blood after 13 hours; sperm/semen 9 hours
• 23% had genital injuries
• Clothing/linens yield majority of evidence

Retrospective chart review of kits processed ages 0-20 years
• 97/388 (25%) positive kits (positive for semen, amylase [saliva] and/or blood)
• 63/97 (65%) produced identifiable DNA (of alleged perpetrator)
• 3 children with positive body samples after 24 hours, 1 positive after 54 hours
• Should evidence be collected after a longer period of time based on rarity?
Physical Exam and Findings

Top Contenders

Purpose of Medical Examination
• To ensure the health of the child after an alleged abusive act
• To document any injuries or other evidence that may support the allegation of child sexual abuse (Jenny)
• Not to prove something truly happened...
Nonacute Examination

• After the acute period (>72 hours)
• Usually at a Child Advocacy Center (CAC)
• Occurs when disclosures is outside of timeframe to collect forensic evidence
• Law enforcement/DSS investigation

Female External Genital Anatomy

• What we examine in office:
  • Labia majora/labia minora
  • Urethral opening
  • Hymen
  • Vaginal tissue if visible
  • Anus

• If concern for trauma or cannot see bleeding source, may use speculum in adolescents; if young child, may need anesthesia/sedation

Male External Genital Anatomy

• What we examine in office:
  • Penis
  • Urethral opening
  • Scrotum
  • Anus
Case example

- 2 young girls sexually abused by their father over the course of 1-2 years
- Acts were video recorded by him
- Both had normal exams, no STIs
- Both disclosed sexual acts; camera corroborated their story
- Why no physical findings?

Normal exam after sexual abuse?

- As reported in studies since 2000, the percentage of children giving a history of abuse who have abnormal physical examination findings is about 4% to 5% in most clinical settings – Adams (Medical eval of suspected child sexual abuse 2011 update)
"The Virginity Exam"

- Systematic review of 17 studies
- Hymen exam not accurate or reliable to predict/diagnose virginity status
- "The hole is too big"
  - Hymen expands/contracts with normal breathing

Examination Findings in Legally Confirmed Child Sexual Abuse:
It's Normal to be Normal

Joyce A. Adams, MD; Katherine Harper, PA-C; Sandra Rosades, FNP; and Juliette Revilla, FNP

- Studied notes and photos of 236 children with perpetrator conviction for sexual abuse
- Mean age of patients – 9 years (8 mos to <18 years)
- Genital exam findings rated
  - 28% normal
  - 49% nonspecific
  - 9% suspicious
  - 14% abnormal
- Anal findings – abnormal in 1%
Examination Findings in Legally Confirmed Child Sexual Abuse: It’s Normal to be Normal

Joyce A. Adams, MD; Katherine Harper, PA-C; Sandra Knudson, FNP; and Juliette Revilla, FNP

• Nature of assault may not cause injury
• Perception of penetration
  • Error
  • Intralabial
  • Partial
• Tissues are stretchy, heal well and fast
  • Like inside of mouth
• Disclosure may be delayed days to years after assault
• The hymen can “grow” as puberty progresses, masking prepubertal injuries

Genital Anatomy in Pregnant Adolescents: “Normal” Does Not Mean “Nothing Happened”

Nancy D. Kellogg, MDP; Shirley W. Menard, RN; PhD, CFNP; FAANP; and Annette Santos, RN, SAMRN

• 36 pregnant adolescents with sexual abuse evaluation, average age 15 yo
• 1 pregnant with 2nd infant (1st product of rape, born via c-section) - normal
• 1 miscarriage with D&C 2 weeks pre exam – normal
• 1 abortion 2 months pre-exam – normal
• 64% normal/nonspecific, 22% inconclusive, 8% suggestive, 6% definite evidence of penetrating trauma
• Average 3 months from sexual encounter in normal/inconclusive; 2 mo for suggestive and 1 mo for definitive group

Normal exam after alleged sexual abuse

• Multiple other studies
• Conclusions:
  • Hymen is recessed and protected by labia majora/minora
  • Labial penetration not painful
  • Hymen is elastic and stretches
  • Not possible to tell if penetration occurred without video or third party witness
  • Anus designed to open or dilate to allow stool to pass
  • Will also dilate to allow object to enter
  • Example: finger manipulation to aid newborn in stooling
  • 90-95% of exams will be normal
Other factors

- Size of penetrating object
- Force
- Use of lubricants
- Degree of cooperativeness
- Number of occurrences
- Time interval since last contact/assault
- Type of sexual abuse i.e. fondling

Adams Guidelines

Recently updated in 2016

- Guidelines
  - Findings documented in newborns or commonly seen in nonabused children
  - Findings commonly caused by medical conditions other than trauma or sexual contact
  - Conditions mistaken for abuse
  - Findings with no expert consensus
  - Findings caused by trauma and/or sexual contact
Findings documented in newborns or commonly seen in nonabused children

1. Normal variations in appearance of the hymen
2. Perineal or vestibular band(s)
3. Intravaginal ridge(s) or column(s)
4. Exocutaneous hymen
5. Linear velamentous (midline avascular area)
6. Diastasis ani (smooth area)
7. Perianal skin tags
8. Hypopigmentation of the skin of labia minora or perianal tissues in children of color
9. Dilation of the urethral opening

Findings commonly caused by medical conditions other than trauma/sexual contact

1. Edema of the genital tissues
2. Inward retraction of vestibule and hymen
3. Labial adhesions
4. Flaccidity of the posterior fornice
5. Vaginal discharge
6. Hemorrhagic cysts
7. Atypical lesions
8. Venous congestion or varicose veins in the perianal area
9. Axial dilatation in children with prediabetes conditions, such as celiac disease, Crohn's disease, or other gastrointestinal issues
10. Axial dilatation in children with prepubertal conditions, such as salt wasting due to hypoaldosteronism or other causes
Conditions mistaken for abuse

Findings with no expert consensus

Findings caused by trauma and/or sexual contact
Sexually transmitted infections

Infections transmitted by sexual contact, unless there is evidence of perinatal transmission or clearly, reasonably and independently documented non-sexual transmission
42. Genital, rectal or pharyngeal Neisseria gonorrhoeae infection
43. Syphilis
44. Genital or rectal Chlamydia trachomatis infection
45. Trichomonas vaginalis infection
46. HIV, if transmission by blood transfusion has been ruled out Diagnostic of sexual contact
47. Pregnancy
48. Semen identified in forensic specimens taken directly from a child's body

Sexually Transmitted Infections

- Chlamydia
- Gonorrhoea
- Trichomonas*
- HIV
- Syphilis
- Hepatitis B
- Hepatitis C

What about males?

- Penile bruising, scrotal bruising
- Anal findings
- Sexually transmitted infections
Physician’s role in the courtroom

- To explain and describe the clinical picture and provide medical testimony that is accurate and objective.
- A careful physical examination and excellent documentation will aid the physician when he or she is called upon to present evidence.

Summary

- Child sexual abuse may be underreported.
- Many reasons why children do not disclose or change/recant their disclosure.
- Acute sexual assault examinations within 72 hours, nonacute exams after 72 hours.
- Most children who disclose sexual abuse will have a normal exam. (~90-95%)
- Multiple factors contribute to normal exam.
- If there are injuries, they typically heal quickly and do not need repair.

Questions?
References


A defensive position in these types of cases will not prove your client’s innocence.

**Attack, Attack, Attack.**
This quote is very relevant in sex crime cases. You must have a plan before you attack.

"Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win."

Soo Tzu

This is a battle and if you don’t think that you shouldn’t be doing these type cases. It’s a battle for the truth, and in sex crimes cases 85% of the time you have no clue what the truth is!!!!!!!!!.

"Ponder and deliberate before you make a move."

Soo Tzu
After you go through your guideline. Sketch out now you can plan your Attack; your first line of Attack in almost every sex case is through motions. You must VIEW these motions as the sword in your Attack.

Defending a sex case will take all your skills.

The only cases tougher than a sex case ARE capital murders.

PREPARING THE MOTIONS

Use IDS Motions Bank
http://www.ncids.org/MotionsBankNonCap?TrainingMotionsLinks.htm

Forensic Motions
http://www.ncids.com/forensic/motions/motions.shtml

Brief Bank
http://www.ncids.org/Brief%20Bank/Main%20Index.htm?
c=Training%20and%20Resources,%20Training%20Index.htm

Capital Trial Motions
http://www.ncids.org/Motions%20Bank/Index%20of%20Motions.htm?
c=Training%20and%20Resources,%20Capital%20Trial%20Motions

Other Site
http://www.ncids.org/Defender%20Training/Training%20Index.htm
MOTIONS GUIDE


MOTIONS TO FILE:

- Discovery requests (most districts now this is not that important)
- Motion for probable cause hearing—(your district)
- Great time to see if the witness is credible
- Motion for an investigator. (Is a must [see part/7])
- Motion to Preserve Evidence. (A must in DNA case).
  - File these motions when there is social media out there.
  - Be creative in your motions to preserve evidence.
- Bond Reduction
- Speedy trial motions Waste of time
- FORENSIC EVALUATOR MOTION YOUR CALL/AGE/ETC
  http://www.nccourts.org/Forms/Documents/1411.pdf

ATTACK, ATTACK, ATTACK
Motions I use in sex cases:

- Motions to suppress electronic evidence:
  [link](https://benchbook.sog.unc.edu/criminal/motion-suppress-procedure)

- Motions to allow certain electronic evidence:
  I use these guides:
  [link](http://www.ncids.org/Defender%20Training/2016SpringConf/A
dmissibilityElecEvidence.pdf)
  [link](http://www.ncids.org/Defender%20Training/2011SpringConfere
cence/AdmissibilityWritings.pdf)

- RITCHIE MOTIONS (THIRD PARTY)
  This is a guide I use in my Ritchie motions:
  [link](https://benchbook.sog.unc.edu/criminal/defs-right-3rd-party-
confidential-records)

- EXPERT FUNDS
  Do District/use this form:
  [link](http://www.nccourts.org/Forms/Documents/1268.pdf)
  Expert fee application:
  [link](https://benchbook.sog.unc.edu/evidence/expert-testimony)
• Motion for deposition
• Motion for advance notice of 404B evidence
  A must if case going to trial
• Motion for Voir Dire of expert\incompetent witnesses\others

Authority

Motions in limine
Crawford out of child witness
Cross of exam of child expert
Litigating expert after McGrady
Junk science in child cases

Motions in limine, continued
Trying to limit the expert
Sex expert in child sex cases
DNA expert
Forensic Resources
http://www.ncids.com/forensic/resources/training1.asp
**Trial specific motions**

**Rule 412. Sex-Offense Cases: The Victim**

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

1. evidence offered to prove that a victim engaged in other sexual behavior; or
2. evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

1. Criminal Cases. The court may admit the following evidence in a criminal case:

   A. evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

   B. evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if suffered by the defendant to prove consent or if suffered by the prosecutor; and

   C. evidence whose exclusion would violate the defendant's constitutional rights.

Before any motion or argument review these data bases:

Search the UNC Criminal BLOG (why Judges love it)
[https://nccriminallaw.sog.unc.edu/](https://nccriminallaw.sog.unc.edu/)

Update your cases through the UNC Case Compendium
[https://www.sog.unc.edu/sccc](https://www.sog.unc.edu/sccc)

Throw it in their face (Judge in your notebook..)
[https://benchbook.sog.unc.edu](https://benchbook.sog.unc.edu)
CONTACT:

JESSE JONES
910-814-2661
jessejoneslaw@gmail.com
GUIDELINE FOR SEXUAL OFFENSES

Defendant Name: ____________________________

1. DSS (Department of Social Services)
   NO DSS
   DSS- (briefly note their involvement)

2. Victim group (MADD, SAFE ETC)
   NO VICTIM GROUP
   VICTIM GROUP (briefly note their involvement)

3. Doctors involved (brief list and name)

4. Relationship (I think this is important in most cases)

5. Physical Evidence
   Photos  YES  NO
   DNA  YES  NO
   OTHER
6. Reputation (yes you must go there)

7. Custody actions
   Pending yes no
   Past yes no
   Future yes no

8. Time
   When did the victim first tell someone _________________
   When was the matter reported to law enforcement ________
   Why ________________________________

9. Law enforcement agency

10. Social media
    FACEBOOK NO YES ____________
    GOOGLE NO YES ____________
    INSTAGRAM NO YES __________
    TUMBLR NO YES ____________
    TWITTER NO YES ____________
    SNAPCHAT NO YES __________
    BACK PAGE NO YES __________
    MATCH NO YES ____________
    GRINDR NO YES ____________
    TINDER NO YES ____________
    OTHER ______________________
Cross-Examination Experts
Fred D. Webb, Jr.
349 Carthage Street
Sanford, NC 27330
Email: fwebb@fredwebblawfirm.com

CROSS EXAMINATION
• IT IS A RIGHT
• IT IS A COMPONENT OF DUE PROCESS
• IT IS A COMPONENT OF THE SIXTH AMENDMENT RIGHT OF CONFRONTATION
• IT CAN BE IMPORTANT TO YOUR CASE

CROSS EXAMINATION AND ITS USE
• PROVIDE FAVORABLE FACTS NOT REVEALED ON DIRECT EXAMINATION
• REPEAT FAVORABLE FACTS NOT REVEALED ON DIRECT
• TESTIFY TO UNDISPUTED FACTS ESSENTIAL TO YOUR THEORY OF THE CASE
• QUALIFY, MODIFY OR SHED LIGHT ON TESTIMONY WITH RESPECT TO UNFAVORABLE VERSIONS OF DISPUTED FACTS
• SHOW THAT THE WITNESSES’ TESTIMONY IS NOT HARMFUL TO YOUR CASE ON THE CRITICAL POINTS UNDER DISPUTE
• USED TO KEEP YOUR THEORY OF THE CASE BEFORE THE JURY
• CREDIBILITY!!!!!!!!!!
SCOPE OF CROSS EXAMINATION

- Rule 611(b)
- Allows inquiry into any matter relevant to any issue in the case

Commandments of Cross – Irving Joyner
Taken from The Advocates Deskbook of Trying A Case by Irving Younger

- Be brief
- Use plain words
- Use only leading questions – 1 fact per question
- Be prepared
- Listen
- Do not quarrel
- Avoid repetition
- Do not allow witness to explain
- Limit questioning
- Save for summation

Preparing to Cross Examine Sex Experts

- Read the expert’s report
- Review the curriculum vitae
- Read the expert’s articles
- Read prior testimony of expert
- Use your own expert to determine if child abused
- Use your own expert to help with cross examination
- Review the standards for the expert’s evaluations
- Know the purpose of your cross – be organized
APSAC GUIDELINES CROSS-EXAMINATION
by Mark Montgomery

- Are recommendations
- Are general principles
- They have never been compared to any study
- Don't know how effective the APSAC Guidelines are
- Protocol made up of interviews, tests, by multiple people
- There is no standardized checklist
- Guidelines allow evaluator to use their own judgment in a lot of ways
- Use their personal judgment based on their experience
- Different investigator might ask same questions, get the same answers and disagree about whether child abused

- Generally agreed amongst professionals that child should be subjected to repeated interviews
- Knew child had been interviewed several times before talking to EW
- Sometimes children say things that are not true
- Sometimes children can be led by adults to make up claims
- Sometimes a child can make up things because they can't get their way
- Sometimes children exaggerate things that happen
- It is generally agreed amongst professionals that it is important to exclude the possibilities of false reports

- Children react in a lot of different ways to being abused
  - Some are severely traumatized
  - Some exhibit no trauma
  - Some act out
  - Some become with drawn
  - Some act perfectly normal
- Children can be traumatized by a lot of things
- Children have nightmares for all sorts of reasons
- Children wet the bed for all sorts of reasons
- Children do poorly in school for all sorts of reasons
- There is no way to say that because a child acts a certain way she has been abused
- The best and most accurate way to know a child has been abused is with physical evidence of sexual abuse
Be careful -

- Under certain circumstances, otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross-examination of the witness. Id. Thus, "[t]his evidence is allowed only if defendant "opened the door" by addressing the victims' credibility on cross-examination" of the witness presently testifying. State v. Thaggard, 168 N.C. App. 263, 274, 608 S.E.2d 774, 782 (2005).

- The only questions relevant to the child's credibility consisted of questions concerning whether "[s]ome people make up stories of abuse" and whether some children "make false accusations" or "false representations." We cannot say such generalized questions on cross-examination opened the door for Dr. Gutman to testify as to her opinion that the child in this case was not giving a fictitious story. State v. Ryan, 734 S.E.2d at 605 (2012).