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Defending the Internet sex sting case

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The face of the man sitting across from me in the visiting room of central booking is a face I have never seen before, yet I have known this person for nearly 25 years. He's my friend, neighbor, and fellow soccer coach--I've talked to this guy every week for almost half of my life. When the phone call came that he was arrested, I was shocked. When the voice on the other end of the phone told me he was arrested while attempting to meet a 15-year-old girl he had been chatting up on the Internet, I was floored.

As I raced to the courthouse, I prepared myself for the various disasters I was walking into: the press, my devastated client, his distraught family, a very confident assistant district attorney who will more than likely be seeking jail, a skeptical judge who may feel the client is despicable, and a potentially astronomical bail. I also prepared myself for the emotional damage. Unlike almost any other crime, an Internet sex crime is as much a psychodrama as it is a legal matter. Lawyers undertaking such a case must prepare to understand a lot of things that were not taught in law school--or anywhere else they have been.

This case did not involve an actual minor using the Internet. Instead, the local press had set up with the police to "catch a predator." According to my client, they only caught a guy in a midlife crisis who's not as tech-savvy as he thought. Apparently he went into an "adult" chat room on a well-known Internet service provider and had a conversation with a cop pretending to be a teenager. My friend claims that he didn't want to have sex with a kid--he wanted to engage in his fantasy of having sex with one of his high school students. He thought (he says) he was speaking to a female teacher who was playing the role of an ingenue from his lit class. He insists the woman he was speaking to was an adult. She acted like an adult, she identified herself as an adult, and they were role-playing in an "adults-only" chat room. The police say they identified themselves as a 15-year-old, they never said they were an adult, and my client is a sex fiend.

Entering this case without an arsenal of knowledge is a very dangerous pursuit. The lawyer must understand the vagaries of computer hardware and software, the phenomena that is "social networking," what a chat room is and how it works, the psychology of the pedophile, how to use and not be used by the press, and, of course, basic family and client counseling. If hand-holding is not your strong point, you can expect to have a very rough go of it: These cases usually require as much hand-holding as they do lawyering. And they require a lot of lawyering.

Intake and Interview

Your first job is understanding who your client is. He isn't usually a guy hanging around parks and schools looking to give candy to kids and lure them to his underground lair. Despite what every newspaper and television newscast says, those guys aren't looking for kids in adult chat rooms. Those guys are looking for kids where they will find them: in teenage chat rooms. They are lying about their ages and trying to throw the kid off track. They also seem to know when the person they are talking to is a cop or an adult playing the role of a kid to entice them into a game of cat and mouse.

The average defendant in an Internet sex sting case is male (99 percent), white (92 percent), and older than 25 (86 percent). Few are violent in any manner. Some 97 percent acted alone in the crimes of which they are accused. Only 10 percent had prior arrests for sexually offending against minors. They rarely lie online about who they are or their age. They claim there were not trying to "trick" a "mark," and, if indeed they were not seeking prepubescent children, they would not be classified psychologically as pedophiles. They are often married, and many are happily married. They have some knowledge of the Internet but not as much as they are alleged in the media to know. Most have never been involved in a crime before.

In interviewing the client, you must be ready to face the issues posed by the client's mental condition and legal position. Often clients accused of sex crimes are reluctant to speak to anyone honestly about what they have done or, more importantly, why they have done the things they have done. The client in an Internet sex sting may tell the lawyer that he was only chatting in a chat room. He

thought only adults could be there because the room was "moderated," and if he was arrested on the way to a rendezvous with the target of his affections, he only wanted to meet her--if she had turned out to be underage, he would have reported her to the police or her parents. He will claim that his true interest is often either playing out his fantasy or allowing his cyber-partners to play out their fantasy.

Now before shaking your head in disbelief, understand that the client may have had good cause to know his chat-room buddy was an adult--after all, the person your client was chatting with was, in fact, a police officer. Maybe the police officer "dropped character" in the chat at some point and used idioms or references that a minor would be too young to know about, or claimed to have done something that a minor couldn't have done (e.g., "I remember how scared I was when I saw the shark in Jaws on the big screen").

Be prepared to explain to your client why the police activity that set him up was likely not entrapment. Nearly every client will claim to have been entrapped. Most, however, were merely enticed and do not have the entrapment defense available to them. An officer can entice one otherwise disposed to commit a crime to commit the crime. That is different from entrapment, defined as an officer overcoming the will of an otherwise unwilling person to commit a crime. Assuming that the officer did not initiate contact with the defendant and didn't initiate the sexual discussions nor do anything that caused the defendant to do something he wouldn't have done if he had not been tricked or coerced, the actions are likely legal. Investigation into these types of police behavior is important, however, and hence should be pursued.

It is important that you answer the client's questions head-on and prepare him for what he is about to undergo. Chances are he has already been in a "perp walk" in front of the press. He will very likely be in the papers and in many cases on TV. He will be suspended or fired from his job in all likelihood, especially if he works for the government or a school.

It would be wise to determine if there is an employee handbook and if his workplace has mental health or addiction leave. If so, immediately inform the supervisors that, if released, he is going to take a leave of absence and will be going to in-patient treatment if possible. The employer will likely not fire him if he does this, and you or his civil attorney will have time to work out a procedure for him to quietly retire before he loses valuable pension benefits. Remember, in cases like this, the charge is enough; conviction is not required before the employer takes steps to "protect the public." Even if your client is ultimately acquitted, he can still be relieved of his employment. Employers likely need to see only a preponderance of evidence--not "evidence beyond a reasonable doubt"--to remove your client from their employ.

Your client will have questions about how his wife and family are taking this. More than likely they are in a state of disbelief and shock. I try to encourage the entire family to get into counseling so that the arguments that are surely to come can take place in a safe environment. It would be a good thing for the lawyer to know of professionals in this area of family counseling that can be contacted by the family.

Prepare the family and friends of the accused to be ready for a stiff bail even if it is a first offense. This accusation is like a scarlet letter, and judges are loath to set a bail that is low, especially when they have little information before them. They are unlikely to take into account that this is a first offender or that the defendant is an otherwise upstanding citizen.

After the bail hearing the case will likely go before a grand jury. You will have to work with your client to decide if it is wise for him to testify before such a body. He will have to give up his privilege against self-incrimination should he testify. On the other hand, if your client can be properly prepared, such testimony can keep him from ever going to a trial. A grand jury is secret. People do not have to go back before friends and neighbors and explain their decision to indict or not to indict the way petit jurors do; hence, you have a better chance than you may imagine to win the case without a trial.

Case Investigation

Investigations into Internet sex sting cases can be very difficult, often because the government has seized the computer of the client as well as his cell phone. Getting the hard drive cloned prior to a grand jury presentment is a key to the investigation. E-mail can be obtained by accessing the client's e-mail account from a different computer (so long as the client hasn't erased the files from his e-mail provider's storage). Images, saved e-mail not on the provider's storage, text messages, and the like will be hard to get without cooperation from opposing counsel or the court. A letter requesting this type of discovery should go out as soon as the client has retained you on the case. If the prosecutor will not turn over that evidence, you must consider going to the court with a motion to compel discovery and seeking a stay of any grand jury presentment. Remember this will probably entail waiving your client's right to a speedy trial while you are putting this together. Because it works to his benefit, he should not object, but if he is sitting in jail, it needs to be explained to him.

Another type of investigation is a "counter-investigation" into the nature of the sting. According to the 2003 Department of Justice report "Internet Sex Crimes Against Minors: The Response of Law Enforcement" (www.unh.edu/ccrc/pdf/CV70.pdf), in a properly organized sting operation:

[a] law-enforcement investigator posts a profile on the Internet or goes into a chat room posing as a girl or boy, usually in the age range of 13 to 15 and waits to be contacted by an adult seeking a young adolescent for a sexualS encounter. The investigator responds to a conversation initiated by an offender and allows the offender to develop a relationship that culminates in a face-to-face meeting, where the offender is arrested. The investigator is careful not to initiate conversations about sexual topics or propose sexual activity. The agent uses investigative resources to track down the identity of the offender and keeps logs of all online interactions, which constitute evidence of the crime. The offender is charged with attempted sexual assault and, in some jurisdictions, illegal use of a computer to solicit a minor. In some cases other crimes, like distribution of child pornography, are committed. The legal decisions pertaining to entrapment in undercover drug operations apply to Internet undercover operations. Investigators may not improperly induce a person to commit a criminal act. These cases are often referred to as "pro-active" because they allow law

enforcement to act without waiting for an offender to commit a crime against a juvenile victim.

Defense counsel may want to sign up for a MySpace or Facebook page and "friend" the police officer's online persona. This will allow you to see his other "friends" and help you to identify other potential targets. An investigator must then be retained to speak to them about the police officer's technique: Did the police officer use chat rooms or instant messages only to attract targets? Did the officer try to shame targets into speaking to him/her after the target had cut off the relationship? After initial conversations about sexuality, did the officer keep going back to the topic or raise it thereafter? Did the officer bring up the topic of meeting? Did the officer ever allow that he/she was seeking to role play or was into the other witness's fantasy?

The language used by the police in the "enticement" of the client is an important area of investigation. For this the attorney will want to use a forensic linguist. Pioneering work in the area of forensic linguistics by Dr. Roger Shuy and Dr. John Olsson examined how police and others in the criminal justice framework may use and misuse language to fool defendants and juries. They may overlap conversations, switch subjects after getting what they want said to be uttered, and purposefully use language to disguise their motives. They may take innocuous words and give them incriminating meanings.

Another area ripe for investigation is the use of words by the target (now defendant). In New York the statute (PL 235.20) that makes it a crime to disseminate indecent materials to a minor outlaws any language that is "harmful to minors," defined as any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(a) considered as a whole, appeals to the prurient interest in sex of minors;

(b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) considered as a whole, lacks serious literary, artistic, political, and scientific value for minors.

Hence the language, at least in New York, must be more than just a solicitation to meet and kiss. If the client was not initially explicit when describing his desires, chances are you will find that the police officer asked him to elaborate more and more on what he intended to do during the meeting and that the officer sought more and more prurient language. If this is the case, it is quite possible an entrapment defense may be raised. This is especially true when the target was reticent to talk about what types of acts he has in mind until the police officer threatened to cut off the chat because he was not taking "her" seriously or is hurting "her" feelings.

Because the motive of your client can become an issue, you should consult a psychologist who has a background in dealing with fantasy chats and sexual predators. If your client is a fetishist and not a predator, his behavior and expectations become part of his defense, and an expert who can explain the various phenomena can be utilized at trial (See *United States v. Joseph*, ___ F.3d ___ (2d Cir. 2008) [Slip Opinion No. 06-5911-CR]).

Motion Practice

The myriad motions available in most criminal cases are available in Internet sex sting cases, too. Counsel should, however, consider asking the court to dismiss if the language of the defendant was not prurient enough (see statute cited above). Counsel may also want to seek dismissal in the interest of justice if the target of the investigation is young enough to have been able to have sex with the victim legally under a "Romeo and Juliet" statute. Under such a statute, there is no crime in having sex with an underage partner if the adult partner is only a few years older (usually fewer than four years older). If the two parties could have sex with one another legally, it would be ridiculous to prosecute one of them for talking about it on the Internet or in a text message.

Motions in limine should include a request that the prosecution not be allowed to present a dramatic "reading of the chat" (a technique whereby the prosecution publishes the chat to the jury and then reads it aloud to them). Failing this, do not let the prosecutor use a female to read aloud the chat written by a male police officer posing as a girl. It should be read by the original police officer himself, as the words are his.

To convey the allegation that the target knew he was speaking to a child and not an adult as part of a fantasy chat, prosecutors will review a variety of evidence: the transcripts of instant messages (IMs), Twitter direct messages (tweet DMs), chat use of emoticons (typed symbols used to communicate a feeling), and even the names that undercover officers adopt as their aliases. For example, one officer took the name "CuteCindy11994" as his AOL alias; when read aloud by the officer to the jury, the officer read the name as "CuteCindy, Eleven, Nine, Ninety-four" as opposed to "Cute Cindy, One, One, Nine, Nine, Four." The former reading makes it sound like a date of birth that would reveal the detective's character to be 14 at the time of the crime; the latter makes it sound like a zip code giving no concept of the character's age. You should therefore request that screen names with numbers in them be read in the singular unless originally spelled out in words or typed in such a way that would clearly denote numbers above nine.

Further, during the reading be careful to object to the use of intonation that gives the language a meaning that favors the prosecution. I would also urge you to demand that the reading be recorded so that it is preserved for an appeal on the grounds that the "dramatic" effect caused the jury to look at the evidence differently than it appears on the page.

Motions should also include a request for all communications between the detective and his or her superiors and district attorney about the nature and funding of the sting. Often, "true crime" television producers will pay for the sting house (the place where the meetings will take place) and buy equipment for the police department for the privilege of taping the arrests and being allowed to "interview" the defendant even before he is Mirandized. This could lead to a ripe motion to suppress any statement given to the media if it can be shown that they are actually part of the operation.

Another perk sometimes stemming from the police-media relationship is a "wrap party." Demand the prosecution produce all photography from the shoot and any such parties, including private pictures taken by police. I had one case in which the then-current Miss America was one of the active participants in the sting operation. After a day spent taking down men who came to see her 15-year-old persona, there was a party where she took pictures with the police as they ate, drank, and partied with the cast and crew of America's Most Wanted. The producers of that television show provided the food and drink, not to mention the sting house, camera equipment, and other facilities used in the operation. In exchange, the police allowed John Walsh, the show's host, to question my client as he was arrested and brought to a waiting squad car for transport to booking. These pictures and facts made for some interesting cross-examination.

Counsel should also make a motion to present linguistic forensic evidence and may want to seek permission to call a psychologist who can describe the difference in mens rea between someone engaged in a fantasy and someone who is a predator. In the Joseph case referenced above, the Second Circuit reversed a conviction and allowed for an expert witness to testify about fantasy role play on the Internet and in Internet chat rooms. It even allowed expert testimony about a meeting between the parties being part of the "game" (the meeting was referred to as a "de-masking"). This testimony can be especially helpful if the defendant decides to testify on his own behalf as it will support his defense that he thought he was dealing with an adult.

Final Suggestions

These cases are very difficult. The results of losing them can mean far more than a conviction and jail. It opens the client up to being listed on the sex offender registry for life and could in some cases expose the client to the risk of life in a mental institution after he is released from prison. Less than 1 percent of these cases are won by the defense at trial, and fewer than 12 percent are even brought to trial. Counsel must provide a hearty defense while at the same time working to negotiate a reasonable way out of the matter without the case coming to trial. If that is not possible, it will take all of counsel's resources to secure victory in these cases. Major hurdles for trial lawyers include careful jury selection and the correct and comfortable use in the courtroom of language related to sex. Failure to strongly pursue a defense will spell disaster for the client. Lawyers not steeped in forensics and computer jargon and usage should consider taking on an attorney who can help with these technologies and, if necessary, act as second seat or even lead counsel should the case need to go to trial.

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