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Natalie Weatherford
TAYLOR & RING

Afnan Shukry
TAYLOR & RING

Discovery in sexual-abuse cases

RESTORING CONTROL AND EMPOWERING VICTIMS OF SEXUAL ABUSE THROUGH DISCOVERY

The discovery phase of a civil lawsuit involving sexual abuse can be overwhelming for anyone unfamiliar with this category of cases. Absent a clear discovery plan, the plaintiff in a sexual-abuse case may feel that they are, again, in a situation where they have lost control and are revictimized. Through careful planning and focus, the discovery phase of a sexual-abuse case can empower your plaintiff to tell their story, build lost trust and reestablish control, while protecting your plaintiff from further harm through the often contentious litigation process.

First things first: Items to obtain

Criminal case files

In some, but not all, sexual-abuse cases, the perpetrator of a plaintiff's abuse has been reported to law enforcement and charged with a crime. Get a copy of the police report as well as the underlying criminal file early. This will help kickstart your discovery. This is especially useful when the criminal case is close in time to the abuse. Also, witnesses tend to be more forthcoming when speaking to law enforcement.

If the perpetrator was charged with a felony and convicted, the conviction could serve as conclusive evidence in your case. (See Evid. Code, § 1300; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, (1962) 58 Cal.2d 601, 607.)

Personnel files

Where a perpetrator's employer is a defendant, request the employee-perpetrator's personnel file. Personnel files contain hiring and termination documents. They may also contain complaints about the employee, documents related to the employer's investigations into complaints, and any related reprimands. These documents tend to reveal what the employer knew or should have known and whether they acted negligently in their supervision and retention of the perpetrator. They could also help establish that the actions of the employer and/or perpetrator justify punitive damages.

Expect employers to fight tooth and nail to avoid producing a perpetrator's personnel file. The most common objection is that producing responsive documents would violate the perpetrator's privacy rights. However, privacy rights are not absolute. Personnel records are not protected from discovery where a "litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from non-confidential sources." (*Harding Lawson Associates v. Sup. Ct.* (1992) 10 Cal.App.4th 7, 10.)

In *Lopez v. Watchtower Bible and Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, the plaintiff alleged that he was sexually abused as a child by his bible instructor. He brought causes of action against the instructor and the religious organization for negligent hiring, supervision and retention, and failure to warn. The plaintiff also sought punitive damages from both. In discovery, the plaintiff requested pre-abuse, post-abuse, and other perpetrator-related documents in the organization's possession. The trial court determined that the responsive documents were relevant and should be produced. On appeal, the court found that the trial court's finding was not an abuse of discretion. The court's findings included that the documents were potentially relevant to: (1) punitive damages claims and to liability issues; (2) testing the validity of the organization's defenses; and (3) the post-incident sexual abuse reports potentially contained information helpful to the plaintiff's case. (*Id.* at 591-592.)

The *Lopez* court also found that sexual abuse reports prepared after the subject incident potentially contained information helpful to a victim's request for punitive damages. "The degree of reprehensibility of the defendant's conduct is the most important indicator of the reasonableness of a punitive damage award" (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 985), and one relevant factor in this analysis is the extent to which the defendant's alleged wrongful conduct involved repeated actions, including conduct occurring after the incident in question (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419; *Izell, supra*, at pp. 985-986). Although punitive damages may not be used to punish a defendant for injury inflicted on third parties, a jury may consider evidence of harm to others in determining the reprehensibility of a defendant's conduct toward the plaintiff. (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1202-1204; *Izell, supra*, at p. 986, fn. 10; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1691; see CACI No. 3943. *Lopez, supra,* at 592.)

A perpetrator-employee's personnel file could contain a gold mine of relevant information. If the defense puts up a fight, stay in the ring. It will be worth the fight.

Stay alert – What defendants are not entitled to

Sexual history

In any civil action alleging sexual harassment, sexual assault, or sexual battery, a victim's sexual history with individuals *other than the perpetrator* is generally not discoverable. (Code Civ. Proc., § 2017.220.) The reason being that, "The discovery of sexual aspects of complainant[s'] lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant or respondent inquiries, is unnecessary and deplorable. Without protection against it, individuals whose intimate lives are

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unjustifiably and offensively intruded upon might face the 'Catch-22' of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings." (Senate Bill No. 1057 (1985-1985 Reg. Sess.), Stats. 1985, ch. 1328, § 1, pp. 4654-4655.)

A party who seeks to inquire about a victim's sexual history must first obtain a court order by demonstrating *extraordinary* circumstances justifying such discovery. (Code Civ. Proc., § 2017.220.) They must establish *specific* facts showing: 1) there is good cause for that discovery; and 2) that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. (*Ibid*.)

Sexual conduct to attack credibility

Defendants are prohibited from attacking the credibility of a plaintiff with evidence of the plaintiff's sexual conduct unless the defendant satisfies strict requirements. (Evid. Code, § 783.) Evidence Code section 783 requires a motion, an affidavit accompanied by an offer of proof, and a hearing outside the presence of the jury. The party must demonstrate to the court that the probative value of that evidence outweighs the probability of: (1) undue consumption of time, or (2) creating a substantial danger of undue prejudice to the plaintiff, confusing the issues, or of misleading the jury. (Evid. Code, § 352.) If the evidence is allowed, the court must make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. (Evid. Code, § 783, subd. (d).)

Along those same lines, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, are not admissible to prove consent by the plaintiff or *the absence of injury to the plaintiff*, unless the injury alleged is loss of consortium. (Evid. Code, § 1106.)

Consent evidence

In childhood sexual-abuse cases where the sexual battery was perpetrated by an adult in position of authority over the minor, consent may not be used as a defense and evidence of "consent" is not admissible. An adult is in a "position of authority" if they, by reason of that position, can exercise undue influence over a minor. This includes a broad array of people including relatives, caretakers, coaches, teachers, religious leaders, youth leaders, counselors, and employees thereof. (Code Civ. Proc., § 1708.5.5.)

Information from plaintiff's social media

Social media has become virtually unavoidable. Due to the vast amount of information a plaintiff's social media account may reveal, Defendants regularly seek information contained therein. However, the use of social media applications and websites necessarily involves private information and communication, which directly implicates a Constitutional right to privacy.

Under Article I of the California Constitution, a right to privacy arises where there is "'(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest.'" (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal. App.4th 443, 449; see also *Hernandez v. Hillsides, Inc*. (2009) 47 Cal.4th 272, 287.) Whether a particular type of information or a specific personal decision is protected by this constitutional right of privacy is determined by established social norms. (*Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 36.)

Where well-established social norms recognize the need to maximize individual control over the dissemination and use of a particular class of information to prevent unjustified embarrassment or indignity, the information is private. "Such norms create a threshold reasonable expectation of privacy in the data at issue." (*Id.* at pp. 35-36; *TBG Ins. Services Corp., supra*, 96 Cal.App.4th at 449-50 citing *Hill, supra*, 7 Cal.4th at 36.)

A "claimed expectation of privacy must take into account any 'accepted community norms,' .... [Citations.]" (*TBG, supra*, at 449-50.) "'The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.'" (*Id.*, at 449-51, citing *Hill, supra*, 7 Cal.4th at 37, quoting Rest.2d, Torts, § 652D, com. c.)

Case law recognizes that the private information stored within a social-media account is subject to protections. California state and federal decisions have recognized that social-media websites uniformly employ *privacy settings* controllable by the users of these websites, which enable those users to limit to whom information is being disseminated. In *Crispin v. Audigier, Inc*. (2010) 717 F. Supp.2d 965, the federal court addressed a subpoena for production of documents served on the social media websites used by the plaintiff. The *Crispin* Court made it clear that if evidence was produced from plaintiff's profile which *was set to private*, the defendant's subpoena for private wall information would fail. (*Id.* at 991 [court did not allow for disclosure of videos that are set to "private" by YouTube users].)

If your client wishes to maintain a privacy interest in the data within their social media accounts, advise them to set their accounts to private.

Medical records

Often in sexual-abuse cases, defendant seeks copies of the plaintiff's medical records via improper and overbroad requests. Sexual-abuse cases are unique in that most of plaintiff's damages are for emotional distress. Defendants regularly, and sometimes successfully, claim that this entitles them to discover additional stressors in plaintiff's life – including, but not limited to, stressors related to plaintiff's general health and entire psychological history.

Plaintiffs are entitled to retain confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone, including those related to their sexual history. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 864-865; Code Civ. Proc., § 2017.220.) Defendants seeking information and documents related to a plaintiff's medical records must meet a heightened standard.

Plaintiffs are not obligated to sacrifice all privacy to seek redress for specific physical, mental, or emotional

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injury. Plaintiff's health records for parts of his or her body other than those that have been put into controversy are protected by the plaintiff's "inalienable right of privacy" and the "inalienable right of privacy" of third parties. (*Id.* at 855-856; *Griswold v. Connecticut* (1965) 381 U.S. 479, 484.) "Discovery of constitutionally protected information is on par with discovery of privileged information and is more narrowly proscribed than traditional discovery." (*Britt v. Superior Court, supra*, 20 Cal.3d at 852-853.)

Defendants are precluded from fishing expeditions when privacy issues are involved. Where there is an obvious invasion of an interest fundamental to personal autonomy, a disclosure of confidential conditions and records must be justified by a *compelling interest*. (*Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.App.4th 1, 34.) Requests for medical records must be precisely tailored to the specific emotional and physical injuries claimed by a plaintiff in the instant suit. (*Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1388; *Britt*, *supra*, at 865.) Defendants must demonstrate there is a nexus between the damages from the sexual misconduct claimed and the records sought. (See *Tylo*, *supra*; *Britt*, *supra*, at 864-865.) "Simple speculation that an answer may uncover something helpful is not enough." (*Fults v. Superior Court* (1979) 88 Cal.App.3d 899, 905.)

Plaintiff's deposition

At some point, the plaintiff will be deposed. In a room full of strangers, the Plaintiff will be required to testify about the abuse they endured, and the impact it's had on them and their loved ones. Set a time to prepare the plaintiff beforehand.

In your meeting, explain what the deposition will entail. Let the plaintiff know that questions about their sexual history are off limits. If the plaintiff is a childhood sexual abuse victim, let them know that consent-related questions are also off limits. Together, go through the plaintiff's background and history, the facts related to the suit, the injuries claimed, the medical records produced in discovery, and any other documents the defense may question the plaintiff about. Be sure to address potentially harmful facts. Reassure the plaintiff that you will be there to object to inappropriate questions, and if necessary, you will instruct them not to answer.

If your client filed their suit under a pseudonym, ensure their full name does not appear in any deposition transcript. Enter a stipulation with opposing counsel regarding references to the plaintiff's name during depositions. The plaintiff's name may be replaced with John or Jane Doe, or the victim's first name and last initial. Let the court reporter know about your agreement with the defense, and they will make the necessary changes when preparing the transcript.

Defense medical examination

Sexual-abuse cases almost always involve mental injuries to the plaintiff. Defendants will likely want these injuries to be evaluated by a psychological forensic expert. These evaluations tend to be long, and mentally taxing on the plaintiff. Defendants are not entitled to a mental exam without a court order. (Code Civ. Proc., § 2032.310.) But where good cause is shown, a judge will allow it. (Code Civ. Proc., § 2032.320, subd. (a); also see *Vinson v. Superior Court of Alameda County* (1987) 43 Cal.3d 833 [finding good cause for mental examination where plaintiff alleged diminished self-esteem, reduced motivation, fear, anxiety, mental anguish, and severe emotional distress].) Entering a stipulation allowing the defense to conduct a mental exam will avoid an unnecessary motion, and it will allow you to set the terms of the examination.

Make sure the stipulation identifies the tests to be administered and limits the length of the evaluation. Include terms outlining questions that may *not* be asked, i.e., questions related to a plaintiff's sexual history, consent, and unrelated injuries.

Attorneys may not accompany their client to a mental exam. (Code. Civ. Proc., § 2032.530, subd. (b).) Unfortunately, this opens the door for the defense expert to take advantage of a vulnerable plaintiff. Keep defense experts in line by having the plaintiff audio-record the entire evaluation. (Code. Civ. Proc., § 2032.530, subd. (a).) Some psych experts have a problem with this. To avoid the issue being raised at the evaluation, address audio recordings in the stipulation.

To avoid later unwanted surprises, include a demand for the expert's file in the stipulation. Pursuant to a demand, defense counsel must provide a copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner. (Code. Civ. Proc., § 2032.610.) Once you get the defense expert's file, send it to the plaintiff's psych expert for review, along with the plaintiff's audio recording.

Understandably, plaintiffs are usually apprehensive going into a mental exam. Meet with the plaintiff before the exam and explain the purpose of the examination: to evaluate the plaintiff's claimed injuries related to the abuse. In your meeting, make sure to go over the terms of the stipulation. Taking these steps could help alleviate some of the plaintiff's concerns.

Conclusion

Sexual abuse can forever impact the lives of victims. One of the greatest detrimental impacts is the victim's feelings that they have lost control over their life and their body. Done right, discovery in sexual-abuse cases can empower your plaintiff to stand up for themselves and restore the feelings of being in control.

Natalie Weatherford is a partner at Taylor & Ring. *Her practice focuses on cases involving childhood sexual abuse and sexual assault.*

Afnan Shukry is an associate at Taylor & Ring. *Her practice focuses on cases involving childhood sexual abuse and sexual assault.*