# Creative Discovery Motions in Sex Cases: Getting to 360 Degrees “Anything But the ‘Big Easy’: Defending Sexual Assault and Child Abuse Cases”

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In sexual assault cases, let’s imagine that we’re trying to see a 360 degree view of the accuser. In other words, we want a complete picture of her motivations, any influences others may have had on her story, any mental disorders or disabilities that influence her recall—*anything* that might explain why her story can’t be trusted. With that in mind, we get our first batch of discovery from the prosecutor, and that 360 degree view we’re after? Well, it’s more like an 80 to 90 degree view…if we’re lucky. What do we know about the accuser after reviewing what we receive from the prosecutor?

1. The accuser’s version of the offense;
2. Some biographical information about the accuser;
3. That there are collateral witnesses, like parents or teachers, who believe that the accuser “never makes things up;”
4. Whether there is a severe, obvious cognitive impairment.

What don’t we generally know?

1. Whether the accuser has a mental illness or developmental delay that influences recall (or if it’s obvious there is a delay or illness, its scope);
2. Has the accuser made up these accusations before;
3. Have any adults improperly questioned the accuser;
4. Are there other adults who could have done this instead;
5. Whether the accuser has a motive for making these allegations up;
6. And any number of other pieces of evidence that might give us reasonable doubt.

As we try more and more of these cases, we develop excellent instincts for the kinds of cases where that elusive evidence, that reasonable doubt, exists. Maybe we read a witness interview, and there’s an odd, slightly paranoid statement that the accuser makes that blows up into a major psychiatric illness. Maybe a well-meaning parent mentions something about hearing that our client had touched a different child, and felt it was necessary to question his own child about whether he was touched again…and again…and again. Or, perhaps there’s a break during a witness

interview, during which the child denied any abuse, and the interview resumes…and suddenly, the child’s memory has been restored.

But getting at this evidence isn’t easy. At. All. More often than not, this evidence hides behind:

1. Advocate-victim privileges
2. Medical record privileges
3. Psychologist-patient privileges
4. School officials who are intent on not revealing student records
5. Reluctant or uncooperative witnesses

If we want to get this evidence, we need to get creative. We need to first, think creatively about the issues we can spot in our sex cases, and second, be creative in the motions we bring to get the evidence we want. My talk will tell you how to spot those unusual issues in sex cases and what motions you need to file to get a 360 degree view of the accuser—and, reasonable doubt.

And finally, keep in mind, too, that in these cases, the issues are often the thing. Sometimes we are able to use these issues to convince the prosecutor to dismiss, or persuade a jury to return a verdict of not guilty. But sometimes, our strategy is simply to generate enough conflict that the prosecutor makes an offer that is substantially better than the last offer on the table. By thinking creatively about how we spot issues and blow them up, we get the results we want for our clients.

Attached are motions in two cases in which, through aggressive motions practice, I was able to demolish the barriers that limited my view of the accuser to 90 degrees, and uncover reasonable doubt. One concerned a case where a 9 year old changed her story after a break in the interview, and when I asked her whether anyone told her what to say, she pointed to her victim advocate. The other involved a 14 year old who made an odd statement during her state interview which caused me to think she might be mentally ill, and after subpoenaing what turned out to be 184 pages of psychiatric records, I learned she was a paranoid schizophrenic.1 Once I had the facts, I relentlessly litigated those cases, and ended up with excellent results for my clients. I specifically chose those pleadings because while the case concerned Washington law, the issues are universal, and much of the law cited concerned federal constitutional issues which are universally applicable. Finally, I’m also including a write up I did about the sexual assault advocate privilege case for Washington’s Defense magazine.

Remember—it’s a 360 degree view you’re after—or at least, enough of a wider view to reveal reasonable doubt. Our job is to find the barriers that restrict our view and knock them down through aggressive motions practice.

1 In those motions, I relied heavily from materials that Seattle criminal defense

attorney David Allen was kind enough to share.