Strategies for Defending Sex Crimes
Leading Lawyers on Understanding the Current Sex Crimes Environment and Building a Thorough Defense

ASPATORE
The High Stakes of Sex Crime Cases

Kenneth R. Brown

Founding Partner

Brown Bradshaw and Moffat LLP

ASPATORE
Understanding the Nature of Sex Crimes

While on a certain level individuals can understand and justify why many crimes are committed, society has a most difficult time understanding sexual offenses. The fundamental role of the defense lawyer in these types of cases, then, is to make the defendant human, make the case understandable to the jury, and try to take the base emotion out of the allegations. In this way, the defense lawyer must guide the jury to focus on the actual proof and evidence (or lack thereof) of whether the sexual misconduct occurred, rather than being misled by the tears and sometimes hysteria that will form the basis of the prosecution’s case.

Types of Sex Crime Cases

I handle all types of sexual allegations, including rape, child sexual abuse, sexual battery, and forcible sexual abuse. In every state, the elements of these crimes are substantially the same, although tending to be given different labels in different jurisdictions. The commonality is that these offenses all involve allegations of sexual misconduct against either adults or children to varying degrees.

Defendants who are ultimately convicted of sexual crimes almost always go to prison, so the stakes are very high when working on these cases. In Utah, where I practice, sex offenders who go to prison are supposed to receive specific sex offender treatment in order to be considered for parole. However, this opportunity has been largely eliminated due to funding issues. As a result, there is a long waiting list for those who need to receive the treatment, so sex offenders often end up serving very long prison sentences since they will not be released unless they have been sufficiently “rehabilitated.” I view this as a significant problem throughout the entire country, because typically I believe sex offenders will not re-offend if they receive proper treatment and stay focused on changing their lives. Therefore, it is my practice to usually have my clients obtain a psychosexual evaluation privately, at the beginning of my representation, so I can better understand the issues we are dealing with from the beginning of the legal process. Assuming the worst case scenario that the client will be found guilty, or will plead guilty, this up-front evaluation leaves us better prepared
in the event that the client will eventually be sentenced, because it helps us give the judge more options.

The Law Enforcement Investigation Process

The law enforcement investigation process for sex crimes is typically different from other areas of law. In Utah, there exists an agency set up to specifically interview alleged child victims of crimes, known as the Children’s Justice Center. At the Children’s Justice Center, police officers interview the children. This interview is recorded and videotaped, and it usually occurs close in time to the initial report of the offense to law enforcement and prior to interviews with the accused. Because theses interviews are taken so early in the process, there is often more information available to the parties in the case when the case is eventually charged.

In general, by the time an accused walks through my door needing representation, the information initially available to me might include a police report where the alleged victim has been interviewed by a police officer. If there is a child victim, the Children’s Justice Center interview has been completed by another part of the prosecution team, and there is often more than one interview that is recorded and videotaped. Sometimes, there have been “ruse” telephone calls made to my client wherein the victim (being recorded by law enforcement) confronts the accused and asks for an apology or some variation thereof. Sometimes, much to my chagrin, my new client has also given an interview to law enforcement and possibly submitted to a polygraph examination. Overall, since there is usually more factual information available to us from the outset in sex crime cases, we have an increased opportunity of creating a legitimate defense theory and a better chance of convincing the jury that there is reasonable doubt about the case.

One final thought on the initial interviews of the alleged victims: these initial interviews of the victim can cut both ways from the defense point of view. Because there is more information to work with, and because several statements have already been made to various persons, there is a higher chance that the person being interviewed will be inconsistent (or has already been inconsistent) at some point. As defense attorneys, we take absolute advantage of these inconsistencies. In doing so, however, it has been my
experience that in cases involving allegations of child sexual abuse, inconsistency by a child does not matter as much. Adult jurors give child witnesses a lot of leeway, seemingly finding what we feel to be marked inconsistencies and potential "lies" and "fabrications" to be simple mistakes that a scared and abused child would certainly make. When an adult is inconsistent in a sex offense case, however, the jury can usually agree that adults have the capability, and should be able to tell the truth consistently throughout interviews and trials.

Unique Cases in Utah

Some of the most fascinating cases I have dealt with in Utah have involved "late reported" allegations that are at least ten years old. For most serious sex offenses in Utah, there is not typically a statute of limitations. So there are often situations where a sex offense may have occurred when a victim was thirteen years old or younger, but the incident is not reported until ten years later when the person is an adult. I have experienced much success with these cases because we are usually dealing with older witnesses and it has been many years since the incident purportedly occurred. Important to these cases is the lingering question in the back of everyone’s mind: Why did this take so long to report? This question causes many juries, and rightfully so, to question the motivation of the accuser and question whether the incident occurred in the first place. Because most of these situations have no corroborating evidence, they are much easier to defend because there are fewer witnesses, little or no physical or corroborating proof, and the victims are older, so we can cross-examine them more vigorously than we can a child.

The Changing Arena of Modern Sex Crimes

Bringing Crimes into the Open

The rise in sex crime prosecutions has occurred in recent years for several reasons. Most importantly, in the past, sexual offenses were often "swept under the rug"—handled privately, among families and/or within their religious organizations. The modern mandatory reporting requirements of sex crimes have greatly changed this area of law, because when it is discovered that someone has been abused, it must be reported to law
enforcement authorities. This requirement has greatly increased the number of reported cases, but the numbers of accurate reports versus false reports are unclear. Everybody is becoming more aware that they have a duty to report sex crimes, and if an issue does arise, people are not talking to parents or the clergy, but to child protection agencies or the police. In my estimation, prosecutors are taking these cases very seriously, which is a positive development in this area of law. They are prosecuting them aggressively and insisting on prison sentences if the suspect is convicted.

Representing Sex Crime Clients

I have defended people from all walks of life who have been accused of sex offenses—some have been acquitted, others convicted. For example, several years ago, I tried a case involving a high school teacher who was accused of sexual improprieties with a student. The case was tried, and our client was acquitted. Under Utah law, public employees accused of crimes that arose in connection with their employment are entitled to reimbursement of defense costs paid by the public agency. In this case, we sued the school district for our fees on behalf of our client, and the school district resisted. The Utah Supreme Court just recently issued a ruling siding with us, and ordered the school district to pay our client’s fees. Many other states have similar provisions, so lawyers should be aware that their clients might be entitled to reimbursement of fees depending on the type of job they have.

Of more significance, however, is that the school district’s resistance to reimburse our client, as they were statutorily required upon acquittal, is representative of society’s resistance in general to accept and believe an acquittal of a sex offense. In our case, the school district basically took the position that the jury “got it wrong” and that they “shouldn’t have to pay for the defense of a sex offender.” This position was being outwardly taken in the face of a jury finding of not guilty. You will find that this will be the same position that will be taken by many of those in your accused client’s lives—including friends, family members, future employers, and future neighbors. The cold reality is that once the allegation is made, once those damning words are spoken accusing one of a sexual crime, whether proven or not, your client’s life will be changed forever. Even if found not guilty, even if the case is dismissed, even if the alleged victim recants and states the
accusation was a lie, there will always be doubters and those who just believe that fancy lawyering allowed your client to walk away. As lawyers, you need to prepare your clients for this reality and help them cope with life after the accusation is made and your client is found not guilty. I represented a very popular award-winning teacher who was accused of having a long-running affair with one of his fifteen-year-old students. He was charged with several felonies, and despite his acquittal, he has been unable to land a job in over two years. The case was highly publicized, and all of his potential employers have lingering doubts about the case and whether he was innocent or simply not guilty. That is the reality for people charged with these types of crimes, and the lawyer needs to prepare the client for life after trial.

*Changing Laws in the Sex Crime Arena*

Legislators are always tinkering with the laws involving sex crimes. One area I have noticed has changed most dramatically is sex offender registration. In Utah, almost every “sex offense” is now registerable on the local and national database, and many complicated issues arise as a result. For instance, what may not have been registerable ten years ago may be registerable for a lifetime today. Further, assume a defendant is convicted of a crime in Utah that requires registration for a ten-year period. This means the convicted offender is required to register with the agency where he or she lives for ten years after serving their sentence and being released from probation. However, if this offender moves to a state that requires a lifetime registration, but does not have the same crime for which the Utah offender was convicted, the question becomes whether he or she must still register for ten years, register for life, or register at all. In these types of situations, it is important to work with lawyers and practitioners in other jurisdictions.

Many sexual crimes that people were convicted of years ago were not registerable offenses and were actually expungeable. Today, the laws have changed and do not allow for the expungement for certain offenses. So, to attempt to try to remedy this problem, if I advise my client to enter into a plea bargain today for an offense that is non-registerable, we try to include some language in the plea documents that indicates that in the event that the registration requirements change, the offense for which the client is
pleading and for which he or she is bargaining will still be considered a non-
registrable offense. I believe these constant changes in the registration
requirements occur because many politicians want to be seen as hard on
crime and criminals, especially sex offenders. As a result, the political
climate tends to allow for amendments to laws without much resistance.

Creating Successful Defense Strategies

A person charged with a sex crime should be given the opportunity to first
review the investigation that has been conducted concerning the allegations,
especially with regard to the evidence (or lack thereof) in the possession of
the state, prior to any discussion about involvement in the case. My typical
scenario is to gather all available information and help my client understand
that this will be an ongoing process. We first deal with police reports, then
further interviews and Children’s Justice Center interviews if the crime is
alleged against a child. We end up with extensive investigative material the
police and prosecutor have gathered, and my clients usually have the
opportunity to review all of this information before I talk to them about
whether they may have committed a crime, and to what extent.

Sex Crime Witnesses

When you first take on a sex crime case, you really have no idea who your
eventual witnesses will be. They may be spouses, family members, or
unknown third parties. Because of this, I have developed a very strict policy
of not allowing clients to talk to anybody else about the case, period. We
want clean witnesses who have not been polluted by having had
conversations with the accused. In one case I defended, a spouse was able
to act as a witness and offer some very critical evidence that probably would
have been challenged successfully had the client talked to the spouse about
the case. The case involved allegations of sexual conduct that occurred at
various places and times over a six-month period, so we did not know who
our witnesses would be until we obtained all the information about where
the offenses allegedly occurred, how they allegedly happened, and who may
have been present. Had our client conferred with the spouse, the testimony
would have been tainted and seemingly contrived, and the client may not
have been acquitted. We simply want our clients to refrain from talking to
anybody, because we want to give them the best opportunity to succeed.
INSIDE THE MINDS

If an accused sex offender talks to spouses and friends, it is equivalent to police officers interviewing two witnesses at the same time. This is always bad practice, because it results in the combination of two people's memories instead of one. If police officers talk to two witnesses at once, as defense attorneys we exploit that occurrence. The same is true when trying to defend sex crime cases. We have to create an atmosphere where every available potential witness is able to give the best possible testimony, because you never know who you will need to testify and to make what point.

The Importance of Consistent Evidence

As a general rule that seems obvious, if there is forensic evidence in a case, the defense theory must be consistent with that physical evidence. If not, your case is ruined. For example, if semen and DNA evidence are found on the victim's underwear, the defense theory of the case cannot be "I have never met that woman." Rather, the defense of consent or no actual intercourse would be a more consistent defense theory. Forensic evidence in sex offense cases is very common and includes rape kits, physical exams, and DNA. Again, to have a chance at winning the case, your theory must be consistent with physical evidence.

The Uniqueness of a Sex Crime Defense

The defense strategy for sex cases differs from other types of cases largely because sexual allegations are highly emotionally charged crimes. Consequently, lawyers must take into account that jurors will look at these crimes themselves differently, will look at your client the accused perpetrator very differently, and will look at you, as the attorney, very differently. Your typical juror will be offended at the very notion of what is being alleged, and they may be embarrassed at hearing the very words you will need to use or at seeing the sexual images that may be at issue in the case. You must prepare to deal with these emotional issues during voir dire and throughout the entire case.

In voir dire with potential jurors, you must address the tough and embarrassing and offensive issues with the jurors head-on. You must make
them understand that no matter how embarrassing or offensive the alleged actions may be to them as individuals, what is being alleged may not have happened or, rather, may have occurred consensually between adults.

If your case involves inappropriate activity with a child, deal with the accusations head-on and get the potential jurors accustomed to hearing the words that will shock them in the first instance. Make sure they are aware that the defendant has been charged with touching a young person inappropriately. You must ask the jurors how they will deal with hearing details about the case and whether it will be too difficult for them to do so. You must ask the jurors how they will deal with cross-examination of a child, and possibly quite poignant and direct cross-examination of a child. You must ask jurors their views and beliefs on the ability of children to be directed and influenced by others, as well as their overall ability to tell the truth. And you must ask the jurors to be able to look past the tears and emotions of the case, and judge the case on the actual proof that is presented rather than determining the case on the unanswerable idea—why would a child say this if it didn’t happen? I have lost cases I shouldn’t have lost by ignoring the need to deal with the emotion of the allegations effectively in voir dire. We as lawyers are so prepared on the facts and law that we forget that the people who decide are emotional beings and make decisions all the time on how something feels. I have found it helpful to talk to non-lawyers about the case to get their input on the “feeling” of the case.

Often in these cases, the empanelling process takes longer than it does in other types of cases, because there are so many different emotions attached to the case. It is often surprising that during the empanelling of a jury, many people on the panel have been affected in one way or another by sex crimes. It may be discovered that a potential juror’s family member was abused, but because the abuse was never reported the juror’s emotions come to the surface during the process. Lawyers must remember that if they approach a sex crime as they do a theft crime, they are missing an important concept. A jury can understand theft, and perhaps justify it, and thereafter refrain from applying and being affected by their emotions. A jury cannot do so with sex crimes.
Keeping Emotions Out by Objectifying the Sex Crime

Even if members of the jury do not have any personal experience in their lives or families, the nature of sex crimes and allegations bring out a host of emotions for those individuals who are going to be making a life-altering decision for your client. Basically, you have to objectify the offense as much as possible, and try to take the raw emotion out of it.

For example, you may be defending a case where an adult woman claims the crime occurred on one day, but the defendant has an alibi. When the accuser finds out about the alibi, she changes the story to claim that the crime occurred on a different day. To keep emotion out of this case, you could compare the case to a theft crime where the victim claims the thief came to his house on a Wednesday to steal furniture, but the thief has an alibi for Wednesday. In a theft case such as this with an adult victim, the jury would typically have reasonable doubt based on the alibi. Unfortunately, in sex crime cases, jurors are often unable to find reasonable doubt because emotions carry so much weight. Lawyers must acknowledge that each case is unique, and you must figure out how to exploit the good facts in the case by keeping emotions and allegations separate.

Imprisonment and Judicial Limitations

While there are various categories of sex offenses in every state, those convicted of sex offenses tend to go to prison for longer periods of time and more frequently than others convicted of similar degrees of crimes. In most states, the judge is not allowed to participate in plea negotiations, which is how 80 to 90 percent of these cases are resolved. Further, every state has provisions informing the client that despite any sentencing recommendations made by any of the parities, it is up to the court what ultimate sentence is imposed. With this in mind, many states (including Utah) have provisions that allow you to “bind” the prosecutor to a recommendation and then “bind” the judge. Under the Utah provision, the plea agreement is presented to the court as a “binding plea,” and the judge then considers the terms and informs the parties whether it is willing to be bound by the agreement. If the judge indicates a willingness, the plea proceeds. If the court will not be bound, a plea is not entered, the parties resume negotiations, or the matter is set for trial. By the use of binding
pleas, two individuals convicted of the same crime may not get the same ultimate sentence. One individual may be sent to prison. The other individual, because of efforts by lawyers to bind the judge, may serve jail time with a lengthy probation instead.

It is also important to keep in mind that if the prosecutor is satisfied with a recommendation of jail instead of prison, a lawyer can often succeed in avoiding prison. Many seasoned prosecutors are satisfied with recommending jail instead of prison because they have seen the whole gambit of crimes and realize that many of the sex crimes we deal with are not the crimes of the century (such as the twenty-one-year old having sex with his younger seventeen-year-old girlfriend). However, if you fail to bind a judge in a case like this, your client may go to prison. It is simply important to understand and point out adamantly that many of these cases involve people who have never been in trouble before and are otherwise respectable people with families, jobs, children, and are otherwise productive members of society.

Surprisingly, many judges agree to being bound if the lawyers engage with them personally and face to face. Typically, when judges believe the lawyers have worked out the plea negotiation themselves, they know more about the case than anybody else does, and if the prosecutor is satisfied with the agreement, the judge probably will not object to it.

Working with Sex Crime Clients

Meeting with a Client

During my initial meeting with clients, I set a fee and make arrangements for the payment of that fee. I also instruct my clients how they should conduct themselves for the remainder of the legal process, including refraining from talking to anybody else about the case. They should also comply with whatever conditions have been set in terms of bail and release conditions, and must make sure they come to regular meetings with my staff or me. I remind them that they must cooperate with my investigator and provide all the necessary information requested, because I absolutely do not want my clients doing their own investigations, talking to others about the case, or making any waves with the accuser. I want my staff and
contacts to complete the investigation, so I make sure my clients understand who is in charge of the case.

The Role of the Client

Although it seems counterintuitive, the client has very little involvement in the actual preparation of the defense. I obtain all of the information from the police, the prosecutor, and other potential witnesses. I then meet with the client to review the information. I do not, however, talk about whether the client is guilty, because I want to make sure the client understands what the case is about and what actual accusations are involved. We have regular meetings with the client throughout the progress of the case, we provide the client with investigator reports, and we then discuss the client’s recollection of the event that is being reported.

In sex cases, the most damning evidence comes from the mouth of my client, either in a police interview or in a pretext meeting or telephone call initiated by the alleged victim with the police recording or monitoring the contact. The police have a strange habit of assuming guilt if our clients don’t strongly protest their innocence during the pretext encounter. This allows the lawyer to cross-examine the police officer on the presumption of innocence and the burden of proof, and establish clearly the fact that our client did not confess and may in fact be innocent, and that he told the world that in open court when he said he was not guilty. If you can establish something through a police officer, it is a lot better than trying to establish it through your client’s uncle.

Developing Evidence in Sex Crimes

Evidence in sex crime cases obviously depends on the facts of each case, but often scientific evidence comes into play. To create a successful defense, you must understand whether you need an expert to become involved in your case, and thereafter, what kind of expert. For example, if you have a case that involves scientific evidence, clearly you need a scientist. If you do not know any scientists who deal with the particular and relevant issue, you must find one. The best resources are other lawyers who can help you find an expert in the necessary field. Call local practitioners, your local
public defender's office (both state and federal), and make use of your local and national defense association's contacts and experience.

It is also essential to retain a good investigator for the defense team. This person will be instrumental in finding witnesses, conducting interviews, obtaining necessary documents, and being available for client and case management and control. There simply must be well-established ground rules between you and your client about who controls the investigation of the case, because it can in no way be left up to the client.

Cross-Examining the Witness

The most important aspect of a sex crime case is cross-examining the accuser. This is where most cases are won or lost. I have found that you can usually be aggressive with adult witnesses without getting into trouble, but if you are too aggressive with child witnesses, the jury will hold that against you and your client. Cross-examining children requires more thought than cross-examining adults. For example, if you are dealing with a child who is accusing her uncle of touching her inappropriately, she will typically testify through tears. There will be a lot of emotion involved in the case, and there will be a lot of leeway allowed for the witness to be somewhat inconsistent.

The lawyer’s task is to decide how to make the necessary points with the witness and develop the case’s theory without allowing the jury to be overwhelmed by the emotion of the testimony. This is not an easy task, since you will likely have to be firm with the child, so this is something that must be addressed during voir dire. You must be very clear with the jury that it is not your intention to be mean to the witness, but it is also your job to establish certain facts with the witness. You should explain that you will be confronted with a vulnerable witness who is going to testify about very personal experiences that are claimed to have occurred between the witness and your client, but there are certain parts of that testimony you believe are largely false. The jury must understand that you do not believe the child is telling the truth, not that you are tasked with representing the dirt bag and you are just fulfilling your constitutional duty to defend this guy.
Collecting Evidence

Typically, the defense attorney does not collect physical evidence. Instead, we focus our time on identifying and interviewing witnesses. These are independent witnesses who have not been coached by your client. When a new case comes in my door, I do not know the absolute specifics surrounding the incident, background information surrounding the relationship between the accused and the accuser (if any), where the incident allegedly occurred, or who was allegedly present, including who was present in the surrounding areas (e.g., in the next room, in the house, in the same room). As the case develops, the number of potential witnesses begins to broaden, so the lawyer must figure out who should be interviewed. For example, if you find out that the incident occurred at a school, you could be dealing with approximately 300 potential witnesses you must talk to in order to narrow down relevant and helpful testimony. This is why it is so important to keep your client away from any potential witnesses. If you allowed your client to talk to any of these people, you will have committed malpractice because the witness is no longer independent and there is a question mark as to the credibility of that witness. However, do not be afraid to do a little investigation on your own (with your investigator). I was defending a man accused of raping the victim in a remote part of Utah, and in the police report, she had told the police that my client had “ripped” her bra off along with her panties. Her panties were entered into evidence at the preliminary hearing, but the bra was still on the hillside somewhere. At the hearing, we had her describe her bra in great detail over the objection of the prosecutor and the court’s admonition to move on, and then before trial we went on a field trip and found the black lacy bra. At trial, the victim was forced to admit that a bra very similar to the one we found, but not that particular one, was what she was wearing that night and of course, it was not “ripped.” Coincidently, it was the very size she had testified to at the preliminary hearing.

Putting the Defendant on the Stand

If I can try a case without putting my client on the witness stand, I usually opt to do so. The main question I ask myself is whether I can tell the client’s story and create reasonable doubt without my client having to utter a word. Just as importantly, do I believe the complaining witness has been
sufficiently impeached so the jury does not believe him or her. Often, it is unclear just how effective you have been in impeaching witnesses or creating reasonable doubt until the verdict (obviously, I was very effective when that not-guilty verdict is read). Unfortunately, the issues clients testify about are going to distract from the quality of the defense evidence you have tried to create. For example, if your innocent client had a relationship with the victim that was not sexual, but the relationship was such that there are specific instances where other witnesses can paint a picture of the client and victim in compromising situations, this information is usually only discovered through the defendant’s testimony. In that type of situation, I would opt out of having my client testify if I felt I had created reasonable doubt with the jury. When a client does not testify, it does not say (or should not say) anything about whether that client is guilty, because if there is reasonable doubt, the client is entitled to an acquittal.

The best way to present the defendant to the jury is as a human being—a human being who is scared, upset, and just as mortified at hearing the allegations against him or her as the jury was when they heard what was being said. If the defendant is not going to testify, you must face that fact head-on and explain that to the jury. In my opinion, you cannot simply rest upon the instructions the judge gives explaining that a defendant has an absolute right to remain silent and no inferences should be taken from this silence. The reality is that the jury wants to hear from the defendant. The jury wants to watch and listen to a defendant proclaim innocence. You must do that for your client. You must tell the jury that all your client can do is say he or she is not guilty and testify about his or her innocence. This, however, has already been done by your client having this trial and pleading not guilty. Therefore, you explain, there is no reason for your client to testify and say he or she “is not guilty” when he or she has already done so, and what the jury must consider, really, is whether there is enough evidence for the government to have proven its case beyond a reasonable doubt. In such circumstances, I usually tell the jury that it is impossible for you or your client to prove a negative (“I didn’t do it”), and all he or she can do is say just that, and he or she has already done that with his or her plea. You must deal with this in voir dire, or the jury will wonder why the accused hasn’t testified and proclaimed his or her innocence. You must also have long discussions with your client about testifying (it is his or her absolute right) and offer your opinion about the subject. Your client has paid you a
lot of money to say what he or she should do, and you shouldn’t be afraid to tell him or her. I have never had a client in thirty-three years of practice insist on testifying when I have suggested he or she should not.

Common Challenges in Creating a Successful Defense Strategy

The Emotions of the Case

The most challenging part in putting together a successful defense strategy is dealing with the emotions that accompany the case. Lawyers are used to dealing with evidence, subjective facts, and other legalese, but we are often not prepared for the deep, complicated emotions of a sex crime case and how far that emotion may carry the case. When I was a younger lawyer, I always believed reasonable doubt would allow my client to be acquitted. But when I walked into the courtroom and heard children testifying through tears, I finally understood how powerful that scenario can be. If you have not prepared the jury for dealing with that, you will not be able to succeed at trial because emotion carries the day and it will not matter what anybody else says. If the jury sees the witness as a true vulnerable victim who has been abused by a monstrous person, your client will never win. No two cases are the same, and no two accusers are the same, so you have to take the time to think about how to approach the emotion issue and help the jury understand their role.

The Impact of Media and Politics

There may or may not have been media attention given to your specific case. It is likely, if not your case, that there has been media given to “sex crimes” in general, and politicians have touted that they will be tough on these “perverts” wreaking havoc on the streets of your community.

It is important to deal with these opinions of the current media and politicians concerning sex crimes openly and honestly during voir dire. You must tell the jury that you understand that we, as a society, hate sex offenders. You must show the prospective jurors that you understand that fear and anger. But because there is so much fear and anger, and absolute hatred, that accompanies the label “sex offender,” the jury’s duties are all the more serious since they are the ones who will be placing that label on
THE HIGH STAKES OF SEX CRIME CASES

your client, and what if that label is placed and the defendant is not guilty? The jury must keep this in mind throughout the trial.

If you simply fail to acknowledge and deal with the emotional side of these types of accusations (the fear, anger, hatred, and disgust), you will lose horribly because jurors will always be influenced by that emotion. You must address these issues from the beginning of the process, because if you do not, they will undoubtedly sit upon the shoulders of your jurors throughout the trial and be voiced in the deliberation room, ultimately convicting your client in the end.

Conclusion

In my estimation, our prisons are unnecessarily filling up with sex offenders. We, as a society, must find a better way of treating these people, and we should create alternative treatment options. It is very expensive to put sex offenders in prison, and quite frankly, most of these types of convicted criminals will not re-offend. But our society is, in general, so offended by sex offender conduct that the only answer we can come up with is sending them to prison. Sex offenders are being kept incarcerated for an inordinate amount of time, and treatment options are becoming less available in prison. Thereafter, these people are released from prison only after whatever job they may have had and whatever resources they may have been given to be productive members of society have been completely eliminated and are no longer available. We send them outside of the prison bars, telling them, actually requiring them, to succeed after they are released, but in doing so, we are sending them to nothing and giving them nothing to work with, except the scarlet letter of being a sex offender. We must create some alternative treatment options and have judges and legislators consider the possibility that there is a better way of dealing with sex offenders than locking them up in prison.

Unfortunately, I do not believe there will suddenly be fewer people accused of committing sex crimes. I also believe that one of the biggest reasons there has been an increase in reports of sexual abuse is not because sexual misconduct is occurring more often, but because alleged victims are becoming more sophisticated and knowledgeable about the process and how to report these crimes. With this knowledge, however, lies the danger
of fabrication. We have very educated youth right now, many of whom have discovered, and been taught, how they can get the adults in their lives into trouble—or even, for that matter, an ex-boyfriend or unwilling father of a child. Many young teenagers are aware of what happens to one accused of sex crimes because their friends have experienced the process, which has caused havoc for various family members or other friends. They have come to understand that the mere allegation of sex abuse (whether truthful or not) will get anyone into trouble, and they know how to pull the legal strings. I have seen instance after instance where there is absolutely no truth to an allegation, but these minors make the allegation for their own reasons. They may simply want a stepfather or mother’s boyfriend out of their lives because he is too “strict” or not their “real father.” They also know that an allegation of sexual abuse will solve that problem.

As a new lawyer, if you have not worked on sex crime cases in the past, you should find lawyers who have experience with them, because they are very complicated. Unlike any other alleged crime or any other area of the law, you have to think carefully through every step of the process. And, unlike any other alleged crime, you must be prepared for the emotion and simple inability for a juror to understand. Again, we can all understand DUls, and jurors can usually evaluate driving patterns, field sobriety tests, and blood alcohol levels relatively well. But a jury not only cannot understand sex offenders, but on its most basic level, a jury cannot understand the allegation itself—why it is being made if it weren’t true. You, as the attorney, must be able to present to that jury that reasonable doubt is a viable option, and convince them to reach the conclusion that favors your client.

Key Takeaways

- Deal with the emotion head-on while, at the same time, trying to keep emotions out of the minds of jurors by objectifying the sex crime.
- Try to bind the judge with a lesser plea agreement in order to get your client sentenced to jail for a shorter period of time, rather than sentenced to prison. If you make a good-faith effort to work out this agreement with the prosecutor, most judges will agree to it.
- Address media and political concerns about sex offenders with the jury openly and honestly during voir dire to avoid additional issues as the trial progresses.
- Present the defendant to the jury as a human being so they can better understand the situation and be able to make a better decision.
- Find other lawyers who have worked on sex crimes if you are new to this area of the law, because it is extremely complicated and unlike any other type of law.

Kenneth R. Brown is a founding partner of Brown Bradshaw and Moffat LLP. He received his law degree from the J. Reuben Clark College of Law at Brigham Young University in 1978. From 1979 to 1998, he was in private practice in Salt Lake City. He also served as a public defender from 1979 to 1984. In 1998, he became a founding partner of Brown, Bradshaw & Moffat. His practice focuses on criminal defense in both state and federal courts. He has tried cases in Utah and surrounding states.

Mr. Brown has an “AV” rating with Martindale-Hubbell and has been listed frequently among “Utah’s Legal Elite” in Utah Business magazine. He is a member of the Utah State Bar and is licensed to practice in all Utah state and federal courts, the Tenth Circuit Court of Appeals, and the US Supreme Court. He has also served as a member of the Supreme Court Advisory Committee for Rules of Evidence, the Supreme Court Criminal Jury Instruction Committee, the Rule 8 Capital Qualified Defense Attorneys Panel, and the Governor’s Task Force on Justice—Law Enforcement. He is a member of the National Association of Criminal Defense Lawyers, and he was one of the founding members of the Utah Association of Criminal Defense Lawyers.