

Investigation and Prosecution of Child Abuse

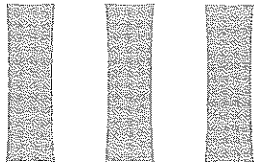
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Charging, Plea Negotiation, and Disposition

I. INTRODUCTION

Some of the most important, yet under-emphasized, aspects of the child abuse prosecutor's responsibilities relate to filing appropriate charges, maintaining a proper policy relating to plea negotiations, and achieving proper sentencing when offenders are convicted of a crime. Child abuse cases focus a prosecutor's attention upon factors not even considered in many other types of crime. Appropriate decision making requires a basic understanding of the underlying dynamics of child abuse. The prosecutor must understand why abusers act the way they do, the difference between a single act of abuse and a pattern of abuse, the effects of abuse on the victim, the effectiveness of treatment in changing an offender's behavior, and the recidivism rates for child abuse offenders.

The prosecutor's power to file criminal charges, or to refrain from filing charges, is considerable. Competing considerations include the needs and desires of the victim and the victim's family, the need for accountability and punishment for the offender, the public desire for justice and safety from future criminal acts, and the aspiration that the criminal justice system will operate in a way that deters future criminal behavior by others. It is impossible to please every contingent in every case. In the field of child abuse prosecution, it is even more likely than in other types of cases that public attitudes will affect how the charging and disposition of criminal cases is perceived. Public opinion concerning child abuse is often swayed by high-profile criminal cases and whatever spin the media chooses to place upon the issues in such cases. The prosecutor's overriding duty to achieve justice should always take precedence over the public's demands or other pressures.

Underlying all child abuse prosecutions is a public desire to disbelieve what studies show to be a high prevalence of sexual and physical abuse of children. It is common for the general public to refuse to believe that a parent or caregiver would

intentionally cause harm to a child, especially serious or life-threatening injury. Most members of the general public have been stressed themselves by child care responsibilities and feel some sense of sympathy for the abuser, who is seen as having lost control. In addition, there is still a general public belief that it is appropriate to use at least some corporal punishment when disciplining children. Thus, the public often understands and forgives a person who goes a "bit too far" when punishing a child. Most jurisdictions continue to have an affirmative defense of "reasonable discipline" for acts toward children that would otherwise be considered abusive.

Similarly, public attitudes toward those who sexually abuse children continue to be shaped by abhorrence of the act itself and the general belief that anyone who would use a child for sexual gratification must be "sick." Such attitudes prevail, even though studies have established the nature of pedophilia and that offenders exhibiting this behavior are generally not mentally ill. It becomes the prosecutor's duty to educate the trier of fact as to the underlying dynamics of child abuse in each case. To some extent, prosecutors can also help get accurate information to the general public so that attitudes are informed not by media sensationalism but by scientifically accurate knowledge about child abuse, victims, and perpetrators.

When formulating policies and procedures for a prosecuting office, it is important that the decision-making process is perceived as not only fair but as consistent and driven by a cogent understanding of child abuse and child abusers. If the decision-making process is seen as well informed and consistent across cases, there is a better chance that decisions in individual cases will be seen as appropriate. The lack of such informed decision-making guidelines will often be criticized as resulting in arbitrary or capricious handling of cases, and the public respect essential for operation of a public prosecutor's office will be lacking.

A. The Establishment of Policies and Standards

Every prosecutor's office has its own policies governing the manner in which decisions related to charging and disposition of criminal cases are made. In many offices, these policies take the form of clearly articulated guidelines. Some are fairly detailed written guidelines specifying the procedures for charging and sentencing different crimes, while others express only general principles. It can be difficult to delineate decision-making criteria, as no objective formula can determine appropriate action in every case. Prosecutors must have flexibility to exercise discretion and make decisions that take into account unique circumstances. They must also maintain an ongoing assessment of the strengths and weaknesses of the case. Nonetheless, written standards can provide guidance in an effort to build consistency and guard against arbitrariness.

The establishment of guidelines promotes uniformity within a prosecutor's office by helping to ensure that similarly situated defendants are treated consistently no matter who handles their particular case. Guidelines will also improve the efficiency of new staff members who are learning to make such decisions. Some offices have published their guidelines, increasing defendants' understanding of the reasons for their treatment, allowing the public to better appreciate the way in which criminal cases are charged and negotiations are carried out, and providing the opportunity for community feedback on policies. Since the prosecutor's duty is to serve the community, this kind of accountability makes sense. A procedure for seeking

supervisory approval for exceptions to policies and standards can also be specified, such as requiring written justification for the departure and review and approval by the elected prosecutor or another supervisory prosecutor. Since published guidelines cannot anticipate every fact situation, they should not be overly detailed or "set in stone." There should be room for flexibility and deviation. Written standards that are not followed may become the basis for civil liability claims that may not fall within the "absolute" or "qualified immunity" historically granted to prosecutors.

In the area of child abuse, guidelines should call for vertical prosecution and can emphasize the need to prosecute crimes against children or within families with the same vigor as crimes against adults or involving strangers. Guidelines should also clearly state that the race, ethnicity, marital status, sex, creed, religion, sexual preference, or economic class of the defendant or victim shall not influence the manner in which a case is handled. They can specify what should be considered when deciding how many counts to charge, what crime should be charged when a choice among crimes exists, and the process for plea negotiations. Plea negotiation guidelines should include when and if charges will be reduced, components of sentence recommendations, a requirement to consult with victims and their families, and other factors. (See National District Attorneys Association. [1991]. *National prosecution standards* [2nd ed., Ch. 42, 43]. Alexandria, VA: National District Attorneys Association.)

General standards for filing child abuse charges have been adopted in some jurisdictions. These standards are often the same as those used for all crimes against persons, reflecting a more aggressive stance than that taken with property crimes. For example, Wash. Rev. Code § 9.94A.411(2) (2001) provides that crimes against persons, including all child abuse cases, may be filed "if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a conviction by a reasonable and objective fact finder." The same statutory section indicates that property crimes can be filed "if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised." Such standards recognize that the emphasis in child abuse cases should be on seeking justice even though the case may be difficult to prove. Although the public, judges, and even juries may not have a good understanding of what makes a case strong or appropriate for prosecution, the prosecutor's office must strive to educate and not give in to the opinions of others as to what cases should be pursued and what cases should be dropped or resolved. Child abuse cases are some of the most difficult of all criminal cases to prove, but the degree of difficulty should not discourage prosecutors from rising to the challenge to seek justice on behalf of the most helpless members of society.

B. The Interdisciplinary Process

The development of interdisciplinary teams means that prosecutors, who regularly staff cases with a group of professionals, are no longer alone in making decisions about which cases should be charged and what should happen to the case once it is charged. The prosecutor retains the final discretion as to what charges to file, which cases to pursue, and which cases cannot be pursued, but the exercise of such discretion is easier when the prosecutor has been fully informed by members of other disciplines.

An example illustrates the proper functioning of the process. A 9-month-old baby has been shaken at her home. She is now on life support and is not expected to survive. A staffing of the case is held with the treating pediatrician, the pediatric director of the Children's Hospital, a pediatric neurosurgeon, social workers from the hospital and from CPS, a psychologist, the victim-witness advocate from the prosecutor's office, the child protection attorneys, a guardian *ad litem* for the child, the criminal investigator, and the prosecutor.

Criminal investigators have examined the scene and have determined that the caregivers, the mother and her live-in boyfriend, contend that the baby tumbled down the stairs when one of the other children left the gate unlocked. The criminal investigator explains the caregivers' account that the baby tumbled down the stairs at approximately 10:30 A.M. while they were both in another room, getting dressed. They heard the baby screaming at the bottom of the stairs and ran to find out what happened. They claim the baby cried for a few minutes and rubbed her head, but she was otherwise "fine" within about 15 minutes. She ate baby food and drank a bottle before playing with her older siblings. She went down for a nap at about noon. The boyfriend then said he went in to check on her and to change her diaper at 2:30 P.M. He woke her from her nap, placed her on the changing table, when she suddenly started stiffening and her eyes rolled up into her head. He noticed that she was not breathing well and her color was gray, so he yelled at the mother to call 9-1-1. He gently shook her to start her breathing again, which seemed to work for a few minutes; then she got worse. When paramedics arrived, they described the baby as comatose, blue in color, with skin cool to the touch. They believed that she had been in distress for more than the 10 minutes that had elapsed since the distress call was received.

The physicians explain that the victim's life-threatening injuries were caused by being violently shaken and possibly hit or slammed against something. The child's injuries include bilateral retinal hemorrhages, subdural hematoma, severe brain swelling consistent with widespread brain damage, and a focal area of bleeding at the back of the skull. The baby also has bruises at various stages of healing. The physicians further advise the group that there is no accidental mechanism that would explain this collection of injuries, including a fall down stairs. The physicians explain that the caregiver's discrepant story is a good indicator that the baby is a battered child. The doctors also explain that the delay in seeking medical attention for this critically injured child is common among child abusers. The neurosurgeon explains that a child with such a serious head injury would not have a lucid interval between the infliction of the injury and the onset of symptoms; rather, she would almost immediately have become unconscious, had difficulty breathing, and possibly also would have had seizures. The neurosurgeon also explains that it is extremely uncommon for a child with such severe injuries to be described as "fine," then suddenly go into arrest in the presence of the caregiver with no other injury inflicted.

The CPS agency has removed the two older siblings from the home while the investigation proceeds. CPS workers and the hospital social worker notify the group that there is a history of several prior referrals of this family for abuse and neglect involving the baby and her older siblings. Interestingly, it is noted that all of the referrals are dated after the boyfriend moved in with Mom and her children. The victim-witness advocate indicates that there is a history of Mom reporting domestic violence perpetrated against her by the boyfriend, but each time Mom has recanted her account of what happened and asked that charges not be pursued. Both the advocate and the psychologist explain the effects of battering on women in general

and encourage consideration of whether Mom was capable of protecting the baby from the live-in boyfriend's apparent abuse. They also point out the unusual nature of the boyfriend's claim that he went in to "wake the baby up" at 2:30 P.M. to check on her and change her diaper, noting that it is not common for caregivers to awaken a sleeping and content child.

The prosecutor has gained much by participating in this interdisciplinary team meeting. This meeting gives the prosecutor the opportunity to consider the collective experience of all the diverse professionals when deciding what crime was committed and who is likely to have committed it. The prosecutor has also learned that although Mom is not likely to have committed the severe injury, there are other considerations to look into prior to deciding whether Mom should be charged either with being an accomplice to the boyfriend or with failure to protect the victim from abuse.

C. The Involvement of Victims, Their Families, and Others

Decisions regarding whether to file charges, what to offer, if anything, during plea negotiations, and what to recommend at sentencing should be made only after considering all available information and consulting with other professionals involved in the case. In addition, victims, their families and therapists, and the investigating officer(s) may have competing interests in the charging process and may also be consulted. These parties should be consulted before reaching a final charging decision. Not only will this consultation ensure that a prosecutor has all the information needed to make a decision, but it will also give those affected or involved an opportunity to express their concerns and reaction. Most likely it will increase their level of support for the final decision. This two-way communication should continue throughout the process. While it is important that victims, their families, and others involved in criminal child abuse cases understand that their wishes will be taken into account, they should also recognize they will not necessarily determine whether charges are filed. Many people do not realize that the prosecutor represents the collective community rather than a single individual and must make an independent and objective determination. It is best to explain this concept at the outset, not only to those directly involved in cases, but also when setting up a multidisciplinary team review process.

II. THE CHARGING DETERMINATION

A. Who Should Make Charging Decisions?

1. Consultation With Experienced Prosecutors

The good news concerning the increase in the prosecution of child abuse cases is the development of a network of experienced child abuse prosecutors throughout the country who are willing to consult on cases and offer the benefits of their many years of experience. The National Center for Prosecution of Child Abuse has senior attorneys who are available to discuss cases and put the prosecutor in touch with