

Trying Rape Cases in Juvenile Court

- A. **Mental Preparation** – Preparing yourself mentally to try a rape case is the most important (and difficult) aspect of your preparation. Rape cases often present fact patterns that offend the conscience. It is impossible to effectively represent a rape defendant if you find him abhorrent or fear him. If your heart's not in it, the D/A and the Judge will sense your lack of commitment. In order to be effective, you must be comfortable with your client and the fact pattern. There is no magic elixir for this. Experience helps. Other things that can help:
1. **Separate yourself from your client** - As attorneys, it is important to remind ourselves that we are the attorney, not the client. If your client is found guilty, it's your client who lost, not you. And it's your client who gets placed, not you. As defense lawyers, we often forget this.
 2. **Lesser consequences for juveniles** – If your client is adjudicated, the consequences are much less than for comparable behavior in adult court. Criminal conduct that will get an adult 15 years typically lands a juvenile in placement for a couple of years, at most.
 3. **Conquer your fear** - Practice not being offended or scared by your client. Remind yourself, he's charged with doing this, not you; if he loses, he loses, not you, and he gets placed, not you.
- B. **Complainant** – Who is your complainant? This is your first level of inquiry. Find out as much as possible about him/her. You're telling a story; the details are crucial.
1. **Age** – younger complainants are always worse for defense than older ones. Remember that a complainant under 13 legally cannot consent, so consent is not a viable defense (even if the contact was in fact consensual) if your complainant is 12 or younger. A pre-pubescent complainant is the worst- case scenario for defense.
 2. **Sex** – is the complainant male or female? With many judges, same sex contact is more offensive. Know your judge.
 3. **Sympathetic/Unsympathetic Characteristics**. What is the home life of the complainant? Is she in foster care? DHS issues? Is she retarded, or of low intelligence? What does she look like? Does she look like she's 10, or 20? Is she especially attractive, or ugly? Does she have a criminal record? Bad attitude? Is she physically tiny? Timid? Obese? Is she large/big/tall? Aggressive? Is she a star athlete at the local high school? How has she handled the incident? Is she in therapy? Traumatized? Or conversely, seemingly OK? Any and all of these factors may work for or against you.
- C. **Defendant** – Who is your client? You need to know everything about him/her. It's impossible to tell a compelling story about your client if you don't all the details that are his life. Find out:
1. **Age** - How old is your client? Younger clients are more sympathetic than older ones.

2. Prior record - Does your client have priors? For sex crimes?
 3. School – Where does your client go to school? What grade? How is he doing? Public School? Special Ed? Learning disabilities? Behavioral problems? Truant? Disciplinary School? Star student? Athlete? Teachers who will be character witnesses?
 4. Home - What is your client's home life like? Where does he live? With whom? Poverty? Alcoholism? Abuse? Violence? Pornography? Who cares for your client? Level of family involvement and support?
 5. Custody Status. Just like with adults, pre-trial detainees are more likely to be placed than those who are home prior to trial. Try and get your client out of custody prior to trial!
 6. Sympathetic/Unsympathetic Characteristics. Just like with the complainant, any and all the details that make up your client's life can become part of the story your telling. Is your client a small child? Or is he huge? Retarded? Using drugs? A victim of sexual abuse? Handsome? Ugly? Pathetic? Aggressive? Bad attitude? What does he do in his spare time? Involved with his local church? Angry? Scary?
- D. **Relationship Between C/W and Def** - After you've thought about who the complainant and your client are, put them together in your head. How do they look? Does it work? Is the image offensive? Or is it plausible? Or at least, understandable? Forgivable? Remember, just because your client is sympathetic, and the complainant is also, doesn't mean they fit together well. Your well-dressed, handsome, articulate, 17 year old High School basketball star on his way to Penn State next year makes a very sympathetic defendant. But not when he's standing next to a cute, timid, 13 year old with pigtails who speaks in a whisper and cries at the sight of your client.
1. Age Difference - The greater the age difference, the less likely it is the judge will accept your consent defense, and the more offensive the contact becomes.
 2. Prior Knowledge - Usually, the client and complainant know each other. How do they know each other? What is the nature of this relationship? How long has it existed? Does the nature of this relationship generate a motive on behalf of the complainant to fabricate?
 3. Same Family (Incest) – Is the complainant your client's sister? Younger brother? Step-sibling?
 4. Prior Sex (consensual) - Do the parties have a sexual history? Is there a prior consensual sexual relationship between the two? Has anything recently changed in this relationship?
 5. Ongoing Course of Conduct - Is the Commonwealth alleging your client has been raping the complainant over a period of time?
- E. **Source of Complaint** - How the criminal complaint comes to be filed reveals lots about the complainant and her family's commitment to the prosecution.
1. Who filed complaint? - Did the complainant call the police? Or did she tell her mom, or girlfriend? Did Mom call the police? Was the complaint brought by DHS, or a therapist? Schoolteacher? Does the

complainant's family support the complainant, or was the complaint brought over the complainant's objections?

2. Prompt Complaint? (Sec. 3106) – When did the complainant first tell somebody? Who did she tell? Under what circumstances? Was this the first opportunity the complainant had to tell somebody?

F. **Source of Defendant's Sexual Knowledge** - Children don't invent sexual behavior; they learn it. If your client is being charged with sexual contact that seems beyond the ken of the average 15 year old, ask yourself where your client could have learned this kind of sexual conduct. Is it plausible? Will a judge believe your client sodomized his younger brother? Common sources of sexual knowledge are:

1. Sexual Abuse – Victims of abuse often go on to abuse others. This is the most common source of inappropriate knowledge. Is your client the victim of sexual abuse? If so, it's more likely that a judge will believe he did this to his younger brother.
2. Pornography - Is there pornography readably available to your client in his home, or at his friend's house? Ask your client about this. Is he viewing pornography, either in or outside the home?
3. Older Siblings - Is your client sleeping in the same room as parents or siblings? Do the sleeping arrangements provide your client with the opportunity to observe parents or siblings having sex?

G. **Plea or Trial?** - Early on, you're going to have to decide whether to plead or go to trial. Factors to consider:

1. Offer? - Often, in rape cases, the D/A will make no offer. If there's no offer, will your judge penalize your client for going to trial? Does the judge know there was no offer? If there is an offer for misdemeanors, will this mean the difference between freedom and placement?
2. D/A? - Who's trying the case for the Commonwealth? Is the D/A any good? Experienced? What is the D/A's rapport with the judge? Reasonable?
3. Judge? - Who's your judge? Is your judge likely to be offended by the particular facts of this case.
4. Def/Adj? - Will the D/A agree to a deferred adjudication in exchange for a guilty plea? Is the judge likely to defer adjudication? Will going to trial affect the likelihood of getting a deferred?
5. Placement? - Remaining home is the single most important thing to your client. If you keep him home, even if he's found guilty, adjudicated, and placed on probation, he'll believe you beat his case. Will pleading keep your client home? Is the D/A open to a deal that keeps your client home?

H. **Investigation** – Like all serious cases, rape cases are often won with thorough investigation. Fertile areas of investigation include:

1. E/Ws – Are there any E/Ws to the incident? Typically there are no E/Ws to the incident itself. But often, people see the Defendant with the C/W prior to the incident. Did anybody see the C/W & the Defendant together prior to the incident? If the C/W is alleging she doesn't know the

defendant, or didn't have a consensual relationship with the defendant, E/Ws who saw the defendant together can serve to impeach the C/W as well as lay a foundation for a consent defense.

2. Def's family – The defendant's family is often a valuable source of information about the incident that will not be found in police reports. Typically, the defendant's family will have spoken to the C/Ws family shortly after the allegations were made. These discussions will reveal credibility issues and motives not apparent in the police reports.
3. C/W & C/W's family – Often the D/A will have instructed the C/W not to speak with your investigator, but send an investigator to speak with the C/W anyway. Is the C/W willing to speak to your investigator? Is the C/W cooperative or hostile to the prosecution? Get her side of the story. Have your investigator prepare a written report. If the C/W testifies differently at trial, you can impeach the C/W with her prior inconsistent statement to your investigator.
4. Meds – Medical records must be subpoenaed. Stipulations to admissibility agreed upon in advance. Doctors subpoenaed if stipulations not agreed upon. Are there medical records? Did the C/W go to the hospital? Was a rape kit done? What does it reveal? Is the hymen intact? Is there evidence of forced entry? Is the medical evidence also consistent with non-criminal activity such as masturbation, rash, or excessive pushing?
5. DHS File – Often the C/W has had DHS involvement. Is there an open DHS file? Is so, subpoena it. Has the C/W made similar allegations in the past? Is she under psychiatric care? Did the C/W complain to her DHS worker about the incident?

I. Evidence

1. C/W – Is the C/W going to testify, or will the Commonwealth attempt to proceed by way of Tender Years?
2. E/W – Does the D/A have E/Ws to the incident? Are there defense E/Ws who corroborate a prior relationship between the C/W and the Defendant?
3. Physical Evidence – Is there physical evidence corroborating the D/A claim of force?
 - a. Clothing – Was the C/W's clothing ripped or damaged? If not, is that consistent with the C/W's account?
 - b. Other signs of struggle – Damaged or knocked-over furniture? Broken lamps? Is the absence of this consistent with the Complainant's version?
4. Meds – Will the Commonwealth be introducing medical records and/or the testimony of a doctor? Do you need a medical expert to contradict the Commonwealth's expert?
 - a. Injury – Was the C/W hurt? Is there medical evidence corroborating the C/W's allegation? Redness or trauma to the anus or vulva?
 - b. Hymen - Is the hymen intact?

5. Rape Kit – Was a rape kit done? What were the results? Is there sperm inside the vagina? On clothing?
 6. DNA Test – Has the D/A done a DNA test on a collected sample? Does it match your client? Does the DNA test reveal multiple donors? Is this consistent with your trial theory?
 7. Photographs – Does the D/A intent to introduce pictures of the crime scene or the C/W? What do they show?
 8. Phone Records/Letters/Diary - Often the D/A will attempt to introduce the C/W's diary, or letters written by the defendant to the C/W, or telephone records showing calls made between the C/W and the defendant. Do you want this evidence introduced? If not, what evidentiary arguments can be made against their admission? Conversely, if you want to show a prior relationship and want to introduce this evidence, will the D/A stipulate? If not, what arguments can you make for their admission?
 9. Psychiatrist/DHS Reports – Sometimes the C/W discloses the alleged rape to either a DHS worker or a psychiatrist/psychologist. Recaptured Memory issue? Has the C/W cried “rape” before? Evidentiary issues.
- J. **Know Your Judge** – Judges are human. Different trial theories will play differently to different judges. The judge's personal life experiences may make him or her more (or less) open to your theory, your defendant, or the commonwealth's C/W. Ask yourself: Is this the right judge for this case? Consider:
1. Offensive Fact Pattern – Are the facts of this case likely to offend this particular judge? Will he or she be open to my trial theory after hearing the facts of this case?
 2. Sympathetic C/W or Def – Is the C/W or defendant in this case likely to be treated sympathetically by your judge? Likely to offend?
 3. Open to Your Theory of the Case – Some theories don't play well with some judges. Will your judge be open to the theory of this case?
 4. Open to Equities – Some cases present extra-judicial issues that your judge may or may not be willing to factor into his or her decision. For example: Is this a consent case even though the C/W is legally too young to consent?
 5. Likelihood of Def/Adj or Probation – Is this judge likely to defer adjudication if the defendant admits, or is found guilty? Will admitting increase the likelihood this judge defers adjudication, or places defendant on probation rather than placing him?
- K. **Theory Of The Case** - Rape case are almost always consent or fabrication cases. Some facts patterns lend themselves to mere presence. Theoretically, ID is also a possible defense.
1. Consent – In a consent case, the defendant does not deny having sex with the C/W; he merely denies that it was rape.
 - a. Physical Evidence - Does physical evidence (DNA, Rape Kit) put the defendant inside the C/W? If so, this is your only defense.

- b. Can C/W consent? (Sec. 3121(a)(6)) Pursuant to the PA Crimes Code, if the C/W is under the age of 13, she cannot legally consent
 - c. Age of def, In Re B.A.M. Is your client is less than 13? If so, you can argue that, under BAM, this cannot be rape.
 - d. Age Difference Between C/W And Def. – The greater the age difference between the C/W and the Defendant, the harder it will be to convince the judge the sex was consensual.
 - e. Prior Relationship – Consent is an easier defense when there is an established prior relationship between the parties.
 - f. Was C/W high/drunk? (Sec 3121(a)(4)) – Under the PA Crimes Code, if the C/W’s judgment is substantially impaired due to drug use or intoxication, she cannot legally consent.
 - g. Is C/W mentally disabled? (Sec 3121(a)(5)) – Under the PA Crimes Code, if the C/W is mentally retarded or disabled, she cannot legally consent.
 - h. Does C/W corroborate? In some cases, the C/W admits the sex was consensual.
 - i. Does P/E corroborate? Is the physical evidence consistent with consent? If the sex was consensual, one would not expect a struggle. There should be no evidence of a struggle.
 - j. Credibility – Does the C/W or Defendant have a prior record or prior bad acts with which he or she can be impeached? Does the C/W have a motive to lie?
2. Fabrication – In a fabrication case, the defense is alleging that the C/W is lying about the act itself rather than the nature of the act.
 - a. C/W lying about act or actor? What is your theory? Is the C/W lying about sex that never happened, or is she lying about whom she had sex with? Does the physical evidence support her claim?
 - b. Testimonial Evidence re: motive! – If your going to call the C/W a liar, you need to give him or her a motive to lie. People don’t lie just for fun. Why is he or she lying? This usually requires the defendant to testify about the C/W’s motive or bias to lie.
 3. Mere Presence – Sometimes the defendant can allege he was present, but did not participate in the rape. This defense usually arises in cases where there are multiple co-defendants and a lack of physical evidence tying your client to the act.
 4. ID – In theory, the defendant can allege misidentification. Of course, the rather personal nature of sex usually renders this defense implausible. If you have an ID case, make sure to preserve any line-up issues by sequestering your client.
- L. Pre-Trial Motions – Rape cases often present a variety of pre-trial motions. You will need to have thought about these in advance and be prepared to litigate them.
1. Motions in Limine - Does the Commonwealth intend to introduce the C/W’s diary or phone records? Are you seeking to introduce phone records, DHS records, psychiatric evidence, or evidence of prior false complaints made by the C/W?

2. MTS P/E – Does the D/A intend to introduce physical evidence seized from your client? Was the seizure lawful? Have you filed a MTS?
 3. MTS Statement – Does the D/A intend to introduce statements made by your client? Was the statement made knowingly, intelligently, and voluntarily? Have you filed a MTS?
 4. MTS ID – If ID is an issue, does the D/A intend to introduce evidence of an ID of your client? Was the ID unduly suggestive? Have u file a MTS?
- M. **Defendant To Testify?** – One of the most important decisions you’ll have to make is whether to call your client as a witness. Consider:
1. Character? – Does your client have any prior convictions? If so, how old are they? If your client has not priors, who will be his character witness? Will the D/A stip to the defendant’s reputation in the community for being peaceful, honest, and law-abiding, or will you call a character witness?
 2. Crimen Falsi? – If your client has priors, does he have priors for crimes of dishonesty? Can he testify w/o being impeached?
 3. Credibility/demeanor – How will your client do on the witness stand? Does he tell his story well? Does he make good eye contact? Present well? Dress well? Does his story have the ring of truth? Can he be prepped to withstand cross-examination?
 4. Judge – Does your judge not acquit defendants who don’t testify? Does your client have to testify in order to present his defense?
- N. **Character Evidence (Rule 404(a)(1))** – If your client has no prior record you must introduce evidence of his reputation in the community for being peaceful, honest, and law-abiding.
1. Crimen Falsi – Even if your client has priors, he can still testify without being impeached unless the priors are crimes of dishonesty, (theft crimes), and are less than 10 years old.
 2. First, not last! - If your client has good character, introduce evidence of this at the beginning of your case-in-chief, not at the end! This lets the judge know your client has character evidence prior to your client testifying.
 3. Character witness – Will you be proceeding by way of stipulation? Or calling a character witness? Remember the pitfalls of calling a live character witness. Foundation requirements.
 4. Must be introduced! – If your client is able to introduce character evidence, (that is to say, he has no priors), it is per se ineffective assistance of counsel to fail to introduce character evidence on his behalf.
 5. Must be argued! – It is not enough to merely put the character evidence onto the record. You must argue your client’s good reputation in the community for being peaceful, honest, and law-abiding in your closing. Remind the judge that character evidence, in and of itself, is enough to raise a reasonable doubt. Failure to argue your client’s good character in closing is per se ineffective assistance of counsel.
- O. **Impeachment of C/W** – If your theory is fabrication or consent, it will be important to impeach the C/W during trial. You must be prepared to effectively impeach when the opportunity arises. Common areas of impeachment include:

1. Prior Inconsistent Statement – Statements to police? Parents? Defendant? Friends of C/W or Defendant? Investigator? Therapist? DHS worker?
 2. Crimen Falsi (Rule 609) – Has the C/W ever been convicted of a theft crime?
 3. Bad Character (Rule 404(a)(2)(i), Rule 608) - Does the C/W has a reputation in the community for being a liar? Has she made accusations like this in the past? You can call character witnesses to testify about the C/W's bad reputation in the community for being dishonest and/or unlawful.
- P. **Tender Years Motion** – If the C/W is young, the D/A may attempt to proceed by way of Tender Years. In cases where the C/W has spoken with the police, (and presumably wasn't traumatized by discussing the incident with a stranger), a strong argument can be made that equity compels that the C/W to testify. If your judge is hesitant, promise to be nice and ask the judge to allow you to try. The judge can always stop the proceedings if the examination doesn't proceed well.
1. When to oppose - Don't necessarily oppose Tender Years. If your theory is that the C/W's parent coerced the C/W to lie, or fed the story to the C/W, you want to examine the coercive parent. The same judge who looks unkindly upon your aggressive cross of the 6 yr old C/W won't fault you for attacking the C/W's parent on cross. This may be your best opportunity to get this witness on the stand.
 2. Sympathetic C/W? – Is the C/W a child? Is everybody going to feel sorry for the C/W? Maybe your case tries better without the C/W testifying.
 3. Unsympathetic Witness? – Who does the Commonwealth intend to call as a Tender Years witness? Parent? Police Officer? Therapist? DHS worker?
 - a. Crimen Falsi – Does the Tender Years witness have prior crimes of dishonesty? Anybody who testifies puts their credibility at issue, so the adult TY witness may be fertile ground for impeachment.
 - b. Motive/Bias consistent with fabrication defense – Does the TY witness have a motive or bias to lie? The TY witness can be crossed on this, often a great way to put your theory of the case out to the judge.
 4. Two Prongs - In order to proceed by way of TY, the Commonwealth must show 2 things:
 - a. Competency of Declarant – This is the same test for all witnesses. The issue is whether the C/W is too young to testify. The D/A will try to shape the issue in terms of trauma to the C/W. That is not the standard!
 - i.) Understands Right From Wrong – can the C/W discern a lie from the truth?
 - ii.) Understands The Oath – Does the C/W understand what it means to swear, under oath, to tell the truth?
 - iii.) Prior Statements? Did the C/W speak with the police and/or investigators about the incident? If so, then the C/W can speak in court.

- b. **Reliability Of Hearsay** – If the judge rules the C/W is not competent to testify, he or she must then determine if the TY witness is reliable. By definition, TY testimony is hearsay. Is the hearsay reliable? This inquiry allows for a mini-trial prior to the trial. An opportunity to put your theory of the case out to the judge. Consider whether you're entitled to (or want) a recusal.
- Q. **Rape Shield Act (Sec. 3104)** – The D/A will argue that the Rape Shield Act is an absolute bar to cross-examining the C/W about her prior sexual history with the defendant or other partners. This is not the law. The defense position is that the defendant's constitutional right to put on a defense always trumps the Rape Shield Act. If you intend to cross the C/W about his/her prior sexual history, the PA crimes code requires that you give notice to the D/A and the judge.
1. **Consent exception** – If your defense is consent, the PA Crimes Code allows you to cross the C/W about his/her prior sexual relationship with the defendant.
 2. **Motive exception** – If your theory is that the C/W is lying to conceal some other sexual relationship, you can cross the C/W about this other sexual relationship. The C/W's motive or bias to lie is always permissible cross-examination.
- R. **Expert Testimony** – Rape cases often require Expert Witnesses. Does the D/A intend to call a doctor? Will you be calling your own expert? Have stipulations to expertise been worked out?
1. **MD** – Are there medical records? Is there a stipulation to their admissibility? Have inadmissible hearsay statements been redacted? Only statements made to the doctor in furtherance of treatment are admissible.
 2. **DNA Expert** – Does the D/A intend to introduce DNA evidence? Is there a stipulation to its admissibility? Do you intend to call an expert to rebuke the reliability of DNA technology?
 3. **Psych/Therapist Expert** – Are there Psych or DHS records? Is there a stipulation to their admissibility? Does this case involve recaptured memory? Do you have an expert to testify on this issue?
- S. **Closing Argument** – This is your opportunity to tell your client's story. Remember, you can argue reasonable inferences drawn from the evidence.
1. **Weave Theory With Facts** – Highlight those facts that corroborate your theory and contradict the Commonwealth's case.
 2. **Character Evidence** – Defendant and C/W. Does your client have a reputation in the community for being peaceful, honest, and law-abiding? You must argue this to the judge. Remind the judge that such a reputation in and of itself is enough to raise a reasonable doubt. Explain why!!! These are not just words. Explain the import of character evidence. Conversely, does the C/W have a reputation for being a liar? Is so, argue this to the judge. Failure to argue your client's good character is per se ineffective assistance of counsel.
- T. **Sentencing** – As defense lawyers, we never like to lose. But it happens. You need to be prepared with an alternate sentencing plan to the one the D/A will propose. Keep your client from being placed and he'll consider you a winner

even if he's adjudicated delinquent.

1. Treatment plan – What does the psych evaluation recommend? Do you need to have your own psych done? Out-patient treatment? Alternate living arrangement?
2. Social Service – Does defendant having S/S needs? Schooling? Housing? Drug/Alcohol abuse? Is your client a victim as well? Counseling?
3. RTF – Does the psych evaluation recommending a Residential Treatment Program? Is there one local?
4. Sex Offender Evaluation – Does this adjudication require the defendant to register as a sex offender? Act 21 ramifications? Will the D/A agree to waive the registration requirement in exchange for a plea?
5. Out-patient Treatment – Are there equities in the case that increase the likelihood you can convince the judge to allow your client to remain home and receive out-patient therapy? Do you have an out-patient treatment plan ready to go?