

ACCUSED OF A SEX CRIME
IN KANSAS?

How to Protect Your Future, Career and Good Name

JOHN DEMARCO, ESQ.

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INTRODUCTION

If you have been accused of a sex crime, either because you were contacted by a law enforcement officer who wanted to talk to you or because you were actually arrested for such an offense, you are likely scared, anxious, outraged, and possibly overwhelmed. These emotions often cause people to act out of panic or anger, and can cause people to make extremely serious mistakes that can have devastating consequences for them and their families down the road.

Sex crimes can be categorized in a number of different ways. Some crimes directly affect actual victims, while other crimes are more technology-based. Those crimes designated as more serious are felonies, while others are less serious misdemeanor offenses. A conviction for some crimes requires public registration as a sex offender, while convictions for other crimes do not. Regardless of the nature of the crime, there are complicated legal and evidentiary issues that arise in this unique area of the law. Moreover, there are significant differences in how law enforcement officers investigate each type of offense.

Few attorneys have the experience or the stomach necessary to defend cases involving sex crimes allegations. The reason is two-fold: 1) these types of cases have a stigma that shocks or offends many people; and 2) the penalties associated with these types of offenses are so life-changing and devastating for the accused that the pressure associated with representing people in these cases often turns many attorneys away. The stakes are

high when an allegation of this nature is made. This is precisely why selecting the right attorney to represent you is the most important decision you can make.

The purpose of this book is to give an overview of the issues you are likely facing and how to best get a handle on the situation. Every situation is unique, and this book cannot substitute for the advice of an attorney with experience and knowledge about these types of cases. If you are faced with a sex crime allegation in Kansas or Missouri, you need to take a deep breath, get educated and begin making decisions methodically and wisely to protect your interests and to put you in the best possible position to resolve the situation with the least impact upon your life and the lives of those around you. This book should give you a start.



ABOUT THE AUTHOR

My name is John DeMarco. I am a criminal defense attorney licensed in both Kansas and Missouri. My law firm is Norton Hare, LLC, and we are located in Overland Park, Johnson County, Kansas.



I have spent my entire legal career defending people who have been accused of crimes. After graduating from law school I worked for the Johnson County Public Defender's Office for five years, defending clients solely on felony charges, including Aggravated Battery, Aggravated Sexual Battery, Aggravated Assault, Rape, Aggravated Sodomy, Felony Drug Sales, Methamphetamine Manufacturing, Forgery, Theft, Criminal Threat, and more. This time included many jury trials and high-stakes negotiations and evidentiary hearings.

Since then I have been in private practice defending people charged in the courts of Kansas and Missouri. I have years of experience working with law enforcement, expert and lay witnesses, as well as victims in these matters. I have also become very adept at evaluating the evidentiary and legal issues that are unique to sex crimes and child abuse cases. That knowledge allows me to provide effective assistance to people

who have been accused of these types of offenses. Because there are so many issues unique to this area of the law, it can take an attorney a long time to develop a background and level of comfort with traversing this type of case. A suspect in this type of case requires a fearless and experienced attorney who is knowledgeable and dedicated to providing an aggressive and thorough defense.

As a criminal defense attorney, I handle all types of criminal matters including DUI, domestic violence, and general criminal defense. However, I have vast experience in handling serious felony matters, and in particular, cases involving allegations of sex crimes.



THE ALLEGATION OF A SEX CRIME

Sex crimes are reported in any number of ways. Someone may walk into a police station and report that they have been the victim of sexual assault. A parent, family member, or friend may contact police because they have been the recipient of a disclosure by a victim. Police or social services may be contacted by teachers, counselors, or day care providers because each of those individuals has a legal obligation as a mandated reporter to bring allegations of sexual abuse to an authority's attention.

When somebody walks into my office and says that they believe that they are the subject of a sex crime investigation, I need to know how they became aware of the accusation. It is important to determine who the reporting party is and how the report was actually initiated. This information is often crucial in deciding what I need to do to begin my own investigation and zealous defense of my client.

I encounter a wide range of scenarios:

1. In many situations, a person will contact police because they want to report that they have been the victim of sexual assault. The suspect may be a stranger, a social acquaintance or even a loved one.

2. Some cases arise because a teacher, counselor, or day care provider receives a disclosure of abuse - a child makes a statement that they have been a subject of sexual assault either by a peer, family member, friend or even a stranger. In Kansas, those reports are usually hot-lined to the Division of Children and Family Services (DCFS), formerly known as SRS or Social and Rehabilitative Services. DCFS will begin an investigation and then they will contact law enforcement to begin the criminal investigation.
3. Other cases begin when there is dysfunction within a family, maybe because people are getting divorced or some other relationship is in turmoil. One parent might accuse another parent of perpetrating an offense against a child in order to create leverage in a custody battle.
4. Yet other situations are initiated when parents contact police because they have received a disclosure from the child that something has happened. Parents can discover sex crimes by reviewing their child's phone, email account or Facebook.



CONTACTING A LAWYER AT THE BEGINNING OF THE INVESTIGATION

Sometimes a person is under investigation for a long time by law enforcement, and other times that person is arrested in a flash and only later realizes what has happened. A person might be told that someone is going to make a report to the police about them. Someone may be concerned because their significant other refuses to allow them to see their children, or maybe the police have contacted them by phone and said, “We’d like to speak with you.” Regardless, the best-case scenario is that you get an attorney the instant you are concerned that you have become the subject of an investigation. This is an absolutely crucial time in the case and there are a number of things that can happen during the early course of an investigation that inexperienced people are not equipped to handle themselves.

At this beginning stage in the proceedings, my job as a lawyer is to immediately meet with my client and figure out as much as I can about the facts of the underlying incident so that I can determine what, if anything, we need to do to protect my client, both at that moment and in the long-term. This means putting law enforcement and other professionals on notice that my client will not be communicating with them directly. I want all communication to go through me so that I can stay informed and in control of access to my client. This also gives

me an opportunity to communicate with the investigating detective, figure out what is going on and to insert myself into the investigation.



GETTING INVOLVED IN THE INVESTIGATION

Having your attorney talk with the police early on is very important because it can sometimes help redirect or control the direction of the investigation. In other words, if I know that there is another suspect who ought to be the focus of the investigation, or I know there is some ulterior motive that caused the accusation, then I can provide that information to police and maybe that will direct attention away from my client. If I know that there is going to be evidence that is going to be particularly helpful for my client, I can provide that information to police. Often, it is more persuasive to a prosecutor, judge or a jury that the police, rather than a defense attorney, collected exculpatory evidence, and it may assist in preventing charges from ever being filed.

Having an attorney who maintains a positive working relationship with both police and prosecutors is very important. Some defense attorneys have a poor reputation or relationship with police and prosecutors. While there are certainly times to be aggressive and times to play coy by holding cards close to the vest, these are tactics that must be used at the right time and in appropriate situations. I've found that these techniques are not always the best way to defend or even exonerate my clients. When police and prosecutors feel comfortable communicating with a defense attorney if they have questions or need further information, that attorney will be more effective in protecting the client. It does not mean an attorney should always provide

the requested information or cooperate with and investigation, but being approachable and available goes a long way. It also helps to ensure that I have the most reliable and up-to-date information for my client.



GIVING A STATEMENT

The biggest mistake you can make, without a doubt, is waiting too long to seek representation. One of the first things I want to know is what my client has communicated to the police or others. That allows me to assess what, if any, statement my client should provide.

Many people believe themselves to be innocent and will give a statement or provide information to police in an attempt to clear their name. Often, police have heard only one side of a story, and we can provide information that will lead the investigation down a different path. But it is important that this is done correctly and under the right circumstances. Giving a statement to the police before getting an attorney involved can often make a bad situation much worse.

Unfortunately, when you speak with police without speaking to a lawyer first, it usually results in the information that you provide being twisted, misinterpreted or taken out of context. An innocent mistake or misstatement about times, events, or other information can be devastating. Even simple confusion about what a particular question means can cause a person to appear deceptive, or worse, guilty. This appearance can affect decisions made by both the police and prosecutors. What you say *can, and will*, be used against you.



USING A PRIVATE INVESTIGATOR

The next thing that I often do is hire a private investigator. Police have many investigative tools at their disposal. They collect evidence and speak with witnesses during the course of an investigation. It is crucial that you hire an attorney who is familiar with how to conduct a similar investigation on your behalf. In many cases, it may be vital to your defense to have your attorney hire a private investigator to work for you. Conducting and recording as many interviews as possible with witnesses, some unknown to even the police, before their memories fade can be a very useful tool. It is also common for people to change their stories, and recording statements prevents this. Time is of the essence.

It also helps to know what, if any, other types of evidence might be pertinent. Text messages can be deleted, cell phone photos and videos can disappear, and other evidence can be lost over time. We may need to obtain bar or restaurant receipts to determine how much alcohol was, or was not, provided to someone. An investigator may need to take photographs or obtain surveillance videos from a bar, a restaurant, or apartment complex. There may be physical evidence that needs to be secured or evidence of an alibi that needs to be provided. Taking these steps is not done to destroy evidence or to mislead police. That would be unethical. Rather, it is done to preserve information that may be very important for my client's defense

later. I need to know as much, if not more, than the police about the situation being investigated.

It is always important to prepare as if a case will ultimately proceed to trial, whether it will or not. At any hearing where evidence and testimony are presented, I want my witness(es) to be able to testify objectively and accurately. I do not want to create a scenario where the only way to present an effective defense or cast doubt on the state's case is by my client taking the stand and testifying. Usually, it is not in my client's best interest to testify, even if they are innocent and have a story that is credible. It is going to make a big difference to a judge or a jury that a private investigator interviewed witnesses and collected evidence as opposed to the accused taking the stand and attempting to introduce such evidence on their own behalf. Maybe a client is particularly nervous and they present themselves as though they are hiding something. Maybe they have information that is helpful but they also have information that may appear to be harmful. Objective witnesses are much more believable to a jury than a suspect who is naturally self-interested. You cannot provide only limited snippets of information rather than an entire story without appearing deceptive or suspicious. So, hiring a private investigator is often a very important step in your defense.



LIE-DETECTOR TESTS

Sometimes, police ask suspects or witnesses to take a polygraph examination, also known as a lie detector test. Although usually inadmissible in court, police still rely on these tests as a tool to rule out suspects or to re-focus their investigations. It may be important to hire a private polygrapher to conduct a lie detector test on my client before deciding whether to take the one requested by police. Using someone we have privately hired helps me determine if my client were to provide a statement to the police whether there might be anything detrimental to them which could surface and then be used against them. It is certainly not appropriate in every case, but it is a useful tool I can use to decide how much access or contact my client should have with law enforcement, or in trying to negotiate a plea offer or convince police and prosecutors that my client is innocent.



THE PROSECUTOR'S DECISION TO CRIMINALLY CHARGE SOMEONE WITH A SEX CRIME

After police conclude their investigation, which usually includes obtaining statements from witnesses, issuing search warrants and collecting any existing evidence, the case will be turned over to the prosecutor who will review the case and decide whether to file criminal charges. The prosecutor reviewing the reports and evidence generally wants to answer three questions, and so I analyze cases the same way.

1. “Was a crime committed?” Many times people will report what they believe to be a crime when no crime actually occurred. For example, if someone reports a rape because they claim to have only consented to sex after consuming alcohol, a rape has only occurred IF that person consumed so much alcohol that they were legally too impaired to give consent AND IF the suspect knew or should have known of the “victim’s” inability to consent due to the level of impairment.
2. “Do we know who did it?” In some cases it is clear that a crime has been committed, but it is not clear who perpetrated the offense. For example, situations arise where

somebody is sexually assaulted at a party after they have lost consciousness. They are aware that something has happened to them. They can tell from evidence left or an injury that they were assaulted, but they have no idea as to the identity or the assailant. In that case, physical evidence, like DNA, other biological materials and eye witness accounts, becomes very important in determining the identity of the suspect.

3. “Can we prove it?” The level of proof that prosecutor must have in order to file a case is probable cause. But to convict a person of a crime the prosecutor must have proof beyond a reasonable doubt, which is a much higher standard.

Your attorney needs to get involved before the case ever gets to the prosecutor and provide information and counter-arguments to attempt to influence the prosecutor’s decision-making. The right defense attorney may be able to persuade a prosecutor to decline formal charges or to charge a less serious crime than the facts might support. If a prosecutor determines that he/she does in fact intend to file formal criminal charges, the prosecutor must convince a judge that evidence exists to support the filing of such charges. Next, a case would be filed, a warrant would likely be issued for the arrest of the person accused and a judge would make decisions about what, if any, pretrial conditions would be required upon the accused’s release on bond.



SEX CRIMES AND NO CONTACT ORDERS WITH VICTIMS AND WITNESSES

Once you are charged with a sex crime, you are likely prohibited from having any contact with witnesses or alleged victims. This is very common. The intent of this prohibition is to prevent you from influencing another person or intimidating them into recanting or changing their story. A “No Contact” order may prevent you from talking to your family members, friends or complete strangers. It may require you to move out of your house. It may even prevent you from seeing your own children.

In many situations, victims and witnesses choose not to wait for a judge to issue a “No Contact” order in a criminal case. Instead, they apply for a civil restraining order. Judges will often grant a temporary protection order until evidence can be presented to support the need for a final order of protection. This is a common situation. It can be especially devastating when a parent is prohibited from seeing his children or speaking to his spouse for one reason or another. Sometimes, these investigations and prosecutions can take months, if not years. An attorney can often intervene to get some supervised visitation arranged between a parent and child and may be able to get these types of orders set aside altogether.



EVIDENCE USED IN CASES OF SEX CRIMES AGAINST PEOPLE

Our Constitution holds that in order to be convicted of a crime the government must prove your guilt beyond a reasonable doubt. Unfortunately, because of the nature of these types of crimes and because of the public's perception of them, it does not always take much evidence to convince a judge or jury that there is no reasonable doubt as to your guilt. A mere disclosure in and of itself can result in a conviction. My personal belief is that one person's word should not be enough to convict, but it can be. It may simply depend on how the accuser presents himself or how the original disclosure is made. This is especially true in the case of a child disclosure. If a child makes a disclosure in a manner that is not vindictive and it appears to be credible, sometimes that alone can be enough.

Often times, however, there are many other types of evidence that are available. There are statements from witnesses and other people that the alleged victim may or may not have told about the incident. Many times, physical evidence exists. There may be injuries or biological evidence that was collected as part of a sexual assault kit. There may be text messages, photographs or videos on someone's phone that can be used. As technology changes, social media has begun to play a much bigger role in sex crimes investigations. There are many examples of cases in which suspects or witnesses will make statements on Facebook,

Twitter, or any other type of social media outlet that is later used as evidence at trial to persuade a jury.



SEX CRIMES AND THE MEDIA

The investigation of a sex crime is not typically something that receives a lot of media attention, unless there are extenuating circumstances. If a teacher is accused of a crime of this nature, or a coach, or a public personality, many times that scenario may receive unwanted media coverage. If someone reports a sexual assault by a nurse or a doctor, it has shock value and may gain media attention.

Generally law enforcement agencies do not want an investigation to become public before they complete their work. Likewise, a defense attorney does not likely want media attention on a case because it can affect how parties view or handle the disposition. If a situation becomes public before law enforcement intends it to, evidence or witnesses may be affected. Sometimes new witnesses may surface who give contradictory or misleading statements. Some witnesses may change their stories or even quit cooperating because they are concerned about being involved in a situation that has received publicity.

Obviously, being accused of a sex crime is embarrassing, to say the least. Hiring an attorney who knows how to fight for you is imperative. The mere allegation of such an act can be devastating to your life. You and your family may be stigmatized. Careers, relationships and even living situations may end. Some people lose respect in the community and become a pariah in the eyes of family or friends. Parenting rights may be affected. These

types of accusations can cause people to hurt themselves out of despair or fear, even if they are completely innocent. If you are in this situation, get help immediately. Your attorney can help you access the resources that are available.

For these reasons it is extremely important that these cases be taken seriously by both the defense attorney and the prosecutor. Not only does it affect the suspect, but the filing of a case like this can have huge impact on witnesses and victim's lives. The filing of a sex crimes case can change forever the life of a victim because they now have to testify and will likely be subjected to lengthy, invasive and even embarrassing questioning and cross examination. It can become public to their family members and friends. Many people have anxiety, depression, or mental health issues as a result. It can affect their jobs, their education, and even their personal relationships.



SEX CRIMES AND PENALTIES IN KANSAS

As I discussed earlier, sex crimes can vary in both type and severity. In the eyes of the law, some crimes are more serious than others, and penalties increase accordingly. There are 3 classes of misdemeanors: class “C” misdemeanors have a maximum penalty of 30 days in jail; class “B” misdemeanors carry a maximum penalty of 180 days in jail; class “A” misdemeanors carry a maximum penalty of 1 year in jail.

Sentences for felony convictions are governed by the Kansas Sentencing Guidelines. The two things that dictate what sentence a particular defendant faces are the severity level of the crime and the defendant’s criminal history. Severity levels range from 1 – 10, with 1 being the most serious. A select group of crimes are classified as “off grid”, and these crimes carry a presumptive life sentence. Criminal history depends on the number and type of prior convictions. Based on criminal history and severity level, a judge is limited (with a few exceptions) to the prison sentences found in the applicable box on the Kansas Sentencing Guidelines Grid. Before a defendant is sentenced for a felony conviction, the law requires that the State conduct a “pre-sentence investigation” in order to uncover all prior convictions.

RAPE

Rape is engaging in sexual intercourse with a person who does not consent. Saying “no” is not necessary to prove lack of consent. The crime occurs when a victim is overcome by force or fear, unconscious or physically powerless, unable to give consent because of a mental deficiency or disease, or because of the effects of alcohol or drugs. Rape also occurs when consent is obtained by fraud or deceit regarding a medical or therapeutic procedure. The term “statutory rape” refers to a situation when two parties engage in sexual intercourse, but one of the parties is under the age of fourteen. Rape of a person 14 years or older is a severity level 1, person felony. A conviction results in almost certain extensive incarceration.

AGGRAVATED CRIMINAL SODOMY

Non-consensual oral or anal penetration is known as aggravated criminal sodomy. Only females can be “raped” in the legal sense of the word. This is because the crime of rape requires sexual intercourse, which is defined as the penetration of the female sex organ. Non-consensual penetration of a male is referred to as aggravated criminal sodomy. Consent may be overcome in the same manners as the crime of rape. Aggravated criminal sodomy against a person 14 years or older is a severity level 1, person felony. Extensive incarceration is the presumptive sentence.

AGGRAVATED INDECENT LIBERTIES WITH A CHILD

The crime of aggravated indecent liberties with a child involves more than one type of situation. It occurs when one engages in otherwise consensual sexual intercourse with someone between the ages of 14 and 16. It also includes lewd fondling or touching

of a child under 14. This crime is a severity level 3, person felony when the child is under 14. It is a severity level 4, person felony when the child is less than 16 but at least 14 years of age.

INDECENT LIBERTIES WITH A CHILD

This crime is defined as lewd fondling or touching with a child at least 14, but less than 16, years of age or older. It is a severity level 4, person felony.

AGGRAVATED INDECENT SOLICITATION OF A CHILD

Aggravated indecent solicitation of a child is enticing or soliciting a child under the age of 14 to engage in an unlawful sex act. It is a severity level 5, person felony.

INDECENT SOLICITATION OF A CHILD

Indecent solicitation is to entice or solicit a child over 14 but less than 16 years of age to engage in an unlawful sex act. Indecent solicitation is a severity level 6, person felony.

LEWD AND LASCIVIOUS BEHAVIOR

Lewd and lascivious behavior is engaging publicly in an otherwise lawful sex act of intercourse or sodomy knowing that other people are viewing the participants. It can also mean exposing a sex organ in the presence of someone who is not your spouse and who has not consented with the purpose of trying to arouse or gratify either your sexual desires or those of the victim. The severity level of lewd and lascivious behavior changes depending on the age of the alleged victim. If someone is over the age of 16 and sees the suspect's sex organ or an otherwise lawful sex act of intercourse or sodomy, it is a class

B misdemeanor. If the victim is less than 16 years of age, the crime is a severity level 9, person felony.

ADULTERY

Adultery is engaging in sexual intercourse or sodomy with someone other than your spouse. Adultery is a class C misdemeanor. It is rarely prosecuted, but it is a crime.

PROMOTING PROSTITUTION

Promoting prostitution is establishing, owning or managing a house of prostitution or permitting your residence or business to be used for soliciting or inducing someone to engage in prostitution. This crime is a Class A misdemeanor if the alleged prostitute is over 16 years of age. It is a severity level 6 felonies when the prostitute is less than 16 years of age. Promoting prostitution when the prostitute is under the age of 14 is an off the grid felony.

AGGRAVATED SEXUAL BATTERY

Aggravated sexual battery is committing a nonconsensual touching of another person, excluding intercourse or sodomy, in a sexual manner. The lack of consent can occur in the same manners as the crimes of rape and aggravated criminal sodomy. It is a severity level 5, person felony.

SEXUAL BATTERY

Sexual battery is an unwanted touching of another in a sexual manner, but it does not require that force or fear be present. An example of sexual battery is grabbing someone on the breast or rear-end, done for a sexual purpose, and the contact is unwanted. It is not just slapping a teammate on his rear-end in a

football game. The act of touching and the intent behind it must be considered contextually. The crime is a class A misdemeanor.

UNLAWFUL SEXUAL RELATIONS

Unlawful sexual relations occur when a sexual act is committed between two people where there is a distinct difference in the level of power or an opportunity for manipulation. Two examples are a teacher/student relationship or an inmate/corrections officer relationship. This crime is a severity level 5, person felony.

UNLAWFUL VOLUNTARY SEXUAL RELATIONS

Unlawful voluntary sexual relations is engaging in a sex act, either intercourse, sodomy, or lewd fondling and touching with somebody who is over 14 but less than 16 when the offender is less than 19 years of age, and the two parties have less than 4 years difference in age. This crime is often referred to as the “Romeo and Juliet” law. Basically, it involves someone less than 19 years of age engaging in sexual activity with somebody who is under the age of legal consent but within four years of the suspect’s age. For example, the crime can occur between a senior and freshman in high school or a freshman in college and sophomore in high school. In these two scenarios, the victim is under 16, so unable to legally consent, but it is recognized that the relationship of the parties is somewhat age appropriate, other than the victim being too young to give consent to engage in sexual activity. This crime is a severity level 7, 8 or 9 felony, depending on the nature of the sexual activity.

AGGRAVATED INCEST AND INCEST

Aggravated incest or incest is engaging in a sexual act with someone whom the law precludes you from having such contact because of either your legal relationship or familial relationship with them. When the victim is under 18 years of age, aggravated incest is a severity level 5, person felony. When the parties are simply related, but are both over 18, the crime is a class B misdemeanor.



JESSICA'S LAW CRIMES

As discussed earlier, some sex crimes are considered “off grid felonies” and applicable sentences are not governed by the Kansas Sentencing Guidelines Grid. These “Jessica’s Law” offenses include sexually violent crimes against children less than 14 years of age committed by suspects over 18 years of age. These acts include rape, aggravated criminal sodomy, aggravated indecent liberties, promoting prostitution and sexual exploitation. The penalty for an off grid felony is substantially more drastic because of the disparity in age between the perpetrator and victim. For instance, the rape of an adult is a severity level 1 felony, and the maximum sentence depends on the suspect’s prior criminal convictions. Rape of a child under the age of 14 by an adult over the age of 18 is an off grid felony, and carries a penalty of life in prison with no eligibility for parole for 25 years. Subsequent convictions for a “Jessica’s Law” offense would carry a life sentence, but the mandatory minimum sentence prior to parole eligibility would increase to 40 years or even life with no parole.



TECHNOLOGY-BASED SEX CRIMES

There are number of other sex crimes that have evolved as technology has advanced. These include sexual exploitation of a child (child pornography) and electronic solicitation of a child. Electronic sex crimes are a relatively new and ever-changing area of the law. Possession and manufacturing of child pornography are crimes that pre-date technological advancements like the Internet. As technology has advanced, the nature and types of evidence that exist have changed and, as such, the types of investigative tools and techniques utilized by law enforcement have changed as well. These changes have created new legal issues to address and contend with.

SEXUAL EXPLOITATION OF A CHILD

“Possession of child pornography” is a familiar phrase to the general public. The actual crime in Kansas is called “Sexual Exploitation of a Child”. This offense is a severity level 5, person felony. The crime is committed when you knowingly possess material containing sexually-explicit images of someone under the age of 18. The image need not depict an actual sex act. A pose alone may be sufficient if it is clearly sexually graphic in nature. Child pornography takes many different forms as technology has advanced. In the past, the most prevalent medium of child pornography in existence was paper-based pictures or movies. Obviously, that has changed, not only because of the

advancement of cameras, but because of how people are able to share or exchange these materials.

It is now possible to transfer images between electronic devices or via the Internet. Video clips or photographs can be scanned, copied and shared with little effort. You can take a screen shot on a computer. You can search the Internet and find pictures or movies. There are photos, texts and videos captured and stored on cell phones. Materials are widely shared in social media outlets. Because evidence has developed and adapted according to technological advancements, so have the methods employed by law enforcement in investigating these crimes.

Historically, sharing child pornography was a matter of physically handing or mailing a picture or video to another person. Now, a person can email photos or videos, attach them to text messages, post them online, or even make them available to the entire world through the use of a computer-based file-sharing program. Programs like Kazaa or Napster that were initially intended for sharing music or picture files suddenly became platforms for people who sought to either obtain or share pornographic material. Anyone seeking access to a particular image or video can, with a click of mouse, download a computer file from the hard drive of someone halfway around the world who has chosen to share the materials on their own computer. The two individuals would never meet or even communicate, and yet they worked together to exchange unlawful sexually-graphic materials.

Additionally, technology enables people to create, or even modify, files creating the appearance of a sexually explicit image of a minor. For example, a person could take a photograph of someone's body and add a different person's head to it, and to the naked eye it is impossible to detect any modification. These

changes to an image may make something appear to be child pornography that really is not.

TOOLS USED BY LAW ENFORCEMENT TO INVESTIGATE CHILD PORNOGRAPHY

These types of cases can come to the attention of law enforcement in a number of different ways. Sometimes, people will take their computer into Best Buy or some other place to get it fixed. A technician at the store will see an image and immediately contact the police. Sometimes, it is a girlfriend, a wife, a friend, or somebody accessing your computer that sees these images and alerts the authorities

As technology has progressed, computer programs have been developed that will allow police to engage in file sharing as a means of investigation. A detective can get online and type in a particular file name that is used to identify a known strain of child pornography. For example, by using keywords or key phrases to identify a particular pornographic movie or picture, police can obtain a list of people who are on the Internet sharing those particular files. Police then download those files directly from a suspect. It is then a matter of identifying the IP address of the suspect's computer and tracing the IP address to a physical location. Police will attempt to locate individuals within their jurisdiction who are sharing, and thus are in possession of, child pornography. For example, police in Connecticut might be doing an online investigation and determine that someone with an IP address in Kansas is sharing child pornography with them. They can alert law enforcement officers in Kansas who will then contact the suspect, or obtain a search warrant and begin an investigation.

Another resource that police rely on in these types of investigations is The National Center for Missing and Exploited Children, or NCMEC. This agency maintains an electronic database of known child pornography. This database is routinely used by police as an investigative tool. A law enforcement officer in Kansas who is investigating the possession of what appears to be child pornography can send an image to the National Center for Missing and Exploited Children and compare it against the database of verified known child pornography. If that database contains a match to verified child pornography it means that someone has positively identified the child in the picture as a real child who was a minor at the time the image was created. Because that confirmation enables a prosecutor to prove that the material collected by the detective in Kansas is truly child pornography, the suspect can be formally prosecuted. Although an image or video does not necessarily match a file in the NCMEC database, that does not mean the image or video is not child pornography. However, that becomes a very important evidentiary obstacle that law enforcement will have to overcome. An experienced defense attorney should be able to use this issue to effectively defend his client.

When police seize a computer or other medium during an investigation, a forensic examination will likely be conducted to search the medium for illegal images and the electronic data associated with the prohibited files. There are police technology experts who are trained to conduct these forensic examinations and to testify regarding their findings. It is important to hire an attorney who has an extensive background in reading and evaluating the results of these forensic examinations. Sometimes, it may be important to hire a computer forensics expert to conduct an independent evaluation of the computer.

HOW MUCH CHILD PORNOGRAPHIC MATERIAL MUST A PERSON POSSESS TO BE PROSECUTED?

There is no specific threshold that exists as to the amount of alleged child pornography a person must possess to be charged criminally. Possessing only one image or video which contains child pornography is legally sufficient. The question, however, may become whether or not there was a willful intent to possess the unlawful material.

When you view an image online, you are technically in legal “possession” of that image while it is on your computer screen. It is not necessary for you to actually download the file to “possess” it. If you are viewing it, you are in possession of the file, albeit briefly. Someone who is simply viewing those images without actually saving or downloading them is less likely to be caught by authorities because it is such a short window of time. But many people do not know that their computer will store images in a “cookie file” or a deleted images file. Trace evidence of the image will likely still exist on their computer, and the image is thus in their possession. It is not illegal to “view” child pornography, but one cannot view such a file without actually possessing it, however briefly.

For example, if a person were to get online and search for pictures of Britney Spears, they would likely find thousands of images and videos. If the person chooses to download dozens, or even hundreds of these files of Britney Spears all at the same time, it may be that someone somewhere around the world has mis-labeled some image of child pornography as Britney Spears and now the illicit image has been inadvertently downloaded. If police examine the person’s computer and find this mis-labeled image of child pornography, clearly the suspect is in

actual possession of the contraband. The factual issue becomes whether the *illegal material* was intentionally downloaded, and therefore possessed. Did the suspect have an opportunity to actually view that file? Did the suspect intentionally save the file to my computer, or did I attempt to discard the file once I viewed it? Did the suspect move it to a folder where the file can be viewed at a later time? If it is in the computer's deleted folder, and it is the only image of child pornography on the computer, it makes it a much tougher case for prosecutors to prove that a suspect intentionally possessed the file(s).

However, if a computer contains a file folder that is used to store 500 different illicit images, the case becomes easier for a prosecutor to prove. Or, if a suspect possesses an external hard drive that is hidden in a closet that contains nothing but illegal pornographic images, that fact is strong evidence that illicit materials were intentionally possessed. The quantity of material will likely aid a judge or jury in determining whether there was a willful or intentional possession.

Possessing a significant volume of child pornography can result in the investigation being transferred from Kansas or Missouri law enforcement to federal authorities. Generally, there are much more severe penalties for these offenses in federal court than in state court. The more that a person possesses; the more likely it is to meet the threshold for federal authorities to pursue prosecution. In many cases, federal authorities may already be working in conjunction with local authorities to investigate an offense. For example, Kansas and Missouri law enforcement agencies work closely with the Heart of America Regional Computer Forensics Laboratory, or HARCFL, to conduct investigations. Local law enforcement authorities will be trained and work side by side with other local law enforcement authorities and federal law enforcement agencies, such as the

FBI Cyber Crimes Task Force. Working to combine multi-jurisdictional resources and experience makes the investigation and prosecution of these crimes easier for police.

Local law enforcement officers will volunteer or be assigned to serve at the HARCFL. The assignment provides training and resources to local agencies. Additionally, the FBI Cyber Crimes Task Force has ongoing investigations into websites that are sharing child pornography to paying members. These investigations often identify people in multiple jurisdictions. A person might be prosecuted by federal authorities simply because he becomes a subject of a federal investigation, despite being peripheral to that investigation. This is especially true if a person is suspected of transporting, transferring or distributing such materials across state lines. Additionally, if it is determined that a person transported or induced a child into participating in the manufacturing or production of child pornography, or if a person is part of a larger, organized distribution ring, it is much more likely that the case will be pursued in federal court.

ELECTRONIC SOLICITATION OF A CHILD

The other electronic sex crime which is aggressively investigated and prosecuted in Kansas is the crime of Electronic Solicitation of a Child. This crime has received much publicity and scrutiny because of the Dateline television series “To Catch a Predator”. This crime occurs when a suspect uses either a computer or telephone to solicit or entice a child under the legal age of consent to engage in an unlawful sex act. The list of applicable sex acts can include intercourse, sodomy, posing for the production of child pornography, and lewd fondling and touching.

In the Dateline series, law enforcement officers create fake online personas of children and troll Internet chat rooms

waiting for a predator to initiate contact and attempt to arrange a meeting with the “child” in order to engage in sexual acts. The investigation culminates in a meeting with the predator who shows up at a pre-arranged location, only to learn that the “child” they were planning to meet was actually an undercover detective.

In real-life, non-sensationalized investigations, a police officer in a particular jurisdiction will log on to the Internet and create a fake profile for use in an Internet chat room such as Yahoo. This profile will contain enough information about the age, interests and location of the fictitious child that other Internet users will have no reason to suspect that the profile is fictitious. The age of the “child” is always younger than the lawful age of consent (which is 16 years of age in Kansas). Once the profile is created, the undercover officer will enter a chat room and wait to be contacted by another Internet user in the chat room. Rather than initiating contact with other users, the detective will typically wait to be contacted so as to avoid the appearance of entrapment. Usually, the detective will enter a room that is specifically designated for single adults in the detective’s jurisdiction. The theory is that the user who initiates contact with a “child” in an adult singles chat room is the type of predator that is trolling for unsupervised children online.

Once this user makes contact, the two will begin chatting. The detective will make sure to mention the fictitious child’s age and make other comments to ensure the suspect cannot later claim to have really believed that the child was actually above the legal age of consent. For example, the undercover detective will mention things about junior high school or about her parents being gone at work. Once the suspect begins discussing the topic of sexual activity, the detective will play along, but initiate no plans or suggestions of the two meeting.

Inevitably, the suspect will suggest a meeting and ask to engage in sexual contact. Once a plan has been established, the police will wait at the pre-arranged location to arrest the suspect upon arrival. Sometimes, suspects will also engage in recorded phone conversations. They may not feel comfortable meeting the “child” without hearing a live voice first. They may simply call for directions to the meeting place. A law enforcement officer will then reiterate that they are a particular age (below the age of consent).

In most cases, the conversations don’t end with just a computer conversation. Police want the suspect to take affirmative steps toward engaging in sexual contact with the “child”. These steps can include discussing what is going to happen, what type of activity they would engage in, how they are going to meet, and where they are going to meet. It is always better evidence for law enforcement when a suspect shows up at the location of the “child” because the police are able to identify the suspect in person.

In most electronic solicitation case, no real victim exists. The vast majority of the cases in Kansas are undercover investigations. While it may seem silly that such extensive resources are used to investigate cases where no actual victim exists, the legislature and the public have made it clear that this law is intended to protect against predators trolling the Internet for unsupervised minors. The way the law is written, no real victim or real opportunity to engage in sexual activity with a child is necessary. The law only requires that a suspect engage in online or electronic solicitation of somebody they *believe* to be a minor.

LEGAL DEFENSES

One legal issue that defense attorneys have raised in electronic solicitation cases is “entrapment”. Entrapment occurs when law enforcement encourages a person to commit a crime that he was not otherwise predisposed to commit. Police officers who hold themselves out to be minors and troll the Internet can tread very close to the line of entrapment. To ensure that my clients have not been the victim of entrapment by police, I spend a great deal of time closely analyzing the chat logs between my client and the police. Determining who first initiated contact, who first mentioned sexual activity and who suggested a face-to-face meeting are all important considerations. I also meticulously review the computer forensic exam that was conducted on my client’s computer. If the undercover detective raises the idea of sex or suggests meeting, it is more likely that entrapment can be an effective defense.

Another legal issue I may raise is a failure to prove my client’s identity. Police and prosecutors must actually prove that a particular suspect is the one who actually engaged in the online solicitation of a minor. Police will often request that the subject of their investigation send a personal photograph. Obviously, it is better evidence for law enforcement if a web cam is being used, because then they can see the person sitting at a computer engaged in the online chat. Because these chats occur via the Internet, it may be difficult to prove identity if there is no webcam or if the suspect chooses not to follow through with an in-person meeting.

Sometimes people are actually set up by another person. An individual can get on the computer, have an illegal conversation with law enforcement and then tell their friend to meet at a specific location. Meanwhile, they have given law

enforcement details about the person's car, their clothing, and other descriptors. Questions regarding identity can be a very effective defense. Is it possible that someone else had access to your computer and was chatting with an undercover detective in your absence?

Finally, it may be important to raise the issue of my client's actual intent. In some cases, it is less apparent that the detective is a minor because the chat log does not clearly indicate that the suspect was put on notice of the age of the "child". In other cases, it may not be clear from the chat log exactly what the suspect's intentions are when he meets the "child". Some suspects will arrive at the meeting location with money, sex toys, or other specific items which aid law enforcement in demonstrating the subject's intent. It is tough to say that you were showing up for a completely innocent purpose if you show up with condoms. However, there is not always concrete evidence of a suspect's intent. Did you actually know or believe that it was a minor you were conversing with or did you just think you were engaging in some sort of role playing? Did you just want to meet to talk, or was there another motive? These are all important issues to analyze.

Each case is unique and you should hire an attorney who has vast experience in dealing with each of the possible factual scenarios and defenses. There are also various types of evidence collected during the investigation and used during the prosecution of the case. First, there is usually a forensic examination of your computer. Often, when a search warrant is served, any devices with memory are taken including cell phones, cameras, laptops, memory sticks and discs. It requires a lot of research and experience to know how to evaluate and understand forensic examinations. You need an attorney who understands how the examination actually took place, whether a particular screen

shot is accurate, what the IP address is, what was deleted, and what was left out of the examination.

Electronic Solicitation of a Child can be either a severity level 3 or a severity level 1 person felony, depending on the age of the “child”. If the child is less than 14 years of age, the crime is the more serious level 1 offense. If the child is over 14 but less than 16 years of age, the crime is a severity level 3 felony. For example, if an undercover detective tells one suspect online that he is 14 and tells another suspect at the exact same time that he is 13, and each of those two conversations culminate in each suspect making sexual overtures - soliciting, inducing, or asking the fictitious “child” to engage in sex acts, one suspect has committed a level 3 felony and the other suspect has committed a level 1 felony.



SEX OFFENDER EVALUATIONS

Sex offender evaluations are psychological assessments conducted by court-approved therapists. An evaluation consists of comprehensive tests and interviews designed to determine if someone suffers from a psychological disorder, if they pose a risk to re-offend, and what if any treatment is appropriate to address any existing issues. These are almost always ordered by the court upon conviction for a sex crime.

However, there are other ways to use these assessments as well. A sex offender evaluation is a tool that I sometimes use in my representation of somebody in a pre-charging situation. If a person is accused of a sex crime, but has not yet been formally charged, I may speak with a prosecutor who wants to see that a client has been evaluated by a licensed therapist to determine if my client poses a risk to commit a new offense. Sometimes, a sex offender evaluation can be an effective tool in preventing a client from being charged with a crime at all, or it may help to ensure that the client only gets charged with a less serious crime.



ALWAYS HIRE A QUALIFIED LAWYER TO REPRESENT YOU

Any time you have been accused or are under investigation for a sex crime, it is absolutely essential to have qualified legal representation. This is no time for amateur hour. There are attorneys who spend their entire practices handling DUI cases. There are attorneys who focus solely on handling divorce cases. There are also those who have a great deal of experience handling felony criminal matters and sex crimes. The attorney who fixed your speeding ticket or who designed your will may not be the right attorney if you are facing serious criminal charges. These cases are unique in the criminal justice system and they require a special skill set to appropriately manage the case. The stakes are simply too high to be represented by someone with insufficient experience with these types of issues. Keep in mind that the consequences are likely to affect you for a lifetime.



SEX OFFENDER REGISTRATION

Sex offender registration is a very real, very serious, and often times absolutely debilitating consequence of a conviction for a sex crime. Many of the crimes that we have discussed require registration as a sex offender upon conviction. In Kansas, that means your name becomes part of a database or list that is monitored and maintained by the Kansas Bureau of Investigations. That list is almost always publicly accessible, so your designation as a sexual offender will be known to the community. The length of your registration depends on the type of crime of conviction. Some crimes require that you register as a sex offender for 15 years. Some convictions require registration for 25 years. Convictions for some crimes require sex offender registration for the rest of your life.

As for juveniles convicted, or “adjudicated” of sex offenses, judges still have the authority to order private registration as opposed to public registration. Somebody under the age of 18 who commits a crime of sexual violence might be required to register with the KBI as an offender, but that information is not provided to the public if the judge orders private registration.

People can, and do, get online to search for registered sex offenders in their neighborhoods. Registration is something that can completely cripple and ruin someone’s life. Many jobs become unavailable because the conviction and registration will appear on a background check. You cannot live in certain

areas that are within a particular distance from a school, church, or residence where juveniles reside. You cannot rent in many apartment buildings. You cannot go to your child's school to have lunch because you are not allowed to be on the premises of the school. Registration is a modern day scarlet letter and the ramifications can be very serious.

REQUIREMENTS FOR REGISTERING AS A SEX OFFENDER

Sex offender registration requires you to maintain contact with your local law enforcement agency, usually the sheriff's office, in the county in which you reside. Every 3 months, you are required to report in, pay a fee, and update your personal information – address, where you work, what you drive, etc. so that police can keep tabs on you. If you want to travel, you have to let get permission first, and you may have to register in other places that you visit.

Sex offender registration laws are subject to change. Several years ago, the length of time someone was required to register changed by statute. In the past, the period for registration as a sex offender was 10 years. Then the registration laws changed. The terms of registration, as stated earlier, have been extended to 15 years, 25 years, or even life depending on the crime. Some people were within a week from completing their registration periods when they received a letter that changed their 10 year registration period to lifetime registration. Whether that change in the law regarding registration as a sex offender can be retroactively applied (as it has been) is currently being litigated in Kansas.



SEXUAL PREDATOR DESIGNATION

Kansas has a set of laws called the Sexually Violent Predator Act which allows for civil commitment of somebody deemed a violent sexual predator after and beyond their term of criminal incarceration. When a person convicted of a sex crime is nearing the end of their period of incarceration, the Attorney General is notified and given the opportunity to file a petition to have that person designated a sexually violent predator and to seek indefinite civil commitment of that person. If determined to be a sexually violent predator you will essentially be committed to a mental health hospital unless and until a judge determines that you no longer pose a risk to re-offend.

The state must prove to a judge or jury a number of elements beyond a reasonable doubt in order to designate someone a sexual predator. It must be proven that the individual has at least 2 prior convictions for sex-related crimes, that the individual has a mental disease or defect, and that the particular mental disease or defect makes them a danger to re-offend. If those elements are proven beyond a reasonable doubt, the person is committed to a mental health treatment program in a prison-type setting. Many people will never graduate beyond that program.

The risk of designation as a sexually violent predator is something that must be considered prior to entering into a

plea agreement or deciding to fight your case. Because a person may repay their entire debt to society in their criminal case only to have a petition filed to have that person designated a sexually violent predator, the civil implications of a sex crimes conviction can be devastating. The length of civil commitment is indefinite. A person found to be a sexual predator is unable to be released from the program until he actually works his way through that program. Prior to release, a judge must eventually determine that the person is no longer a risk to re-offend and that he no longer suffers from the mental disease or defect previously proven. Many judges are reluctant to ever make that finding. It takes a very specific and specialized knowledge of the complicated mental health issues that will be relevant to defend against a petition to determine someone is a sexually violent predator or to assist in getting someone through and out of the program.



THE ENORMOUS BENEFITS OF HIRING A LAWYER WITH EXPERIENCE

If you are accused of a sex offense, the decision that you make regarding who will represent you is one of the most important decisions you will make in your life. You should not be pressured or rushed into that decision. You should not settle on an attorney until you have a strong level of comfort and trust in that person.

The penalties that follow a sex crimes conviction can vary greatly depending on type of crime charged and the severity level of that crime. Convictions for some crimes can result in simply being placed on probation and no requirement that you spend any time in jail. You may have a jail or prison sentence that is suspended during a term of probation. Some sex crimes nearly always result in incarceration. In addition, the court may order a sex offender evaluation to determine the types of treatment or therapy a person should be required to complete while on probation, or whether to grant the person probation as opposed to prison. Other types of services, including mental health or drug and alcohol evaluations, may also be ordered.

Ultimately, you are putting your life in the hands of your attorney. You need to make sure that whoever you hire has a significant background working in these types of crimes. You

want somebody with experience in actually presenting or evaluating the types of evidence and legal issues prevalent in these types of cases. Finally, you want a lawyer with a great deal of trial experience. Having police and prosecutors know that your attorney is willing to defend you all the way up to, and including, arguing in front of a jury can make the difference between a close case getting charged or dismissed.

If you hire somebody that has a reputation for always entering into plea agreements or always caving in at the last minute, a prosecutor is less concerned or worried about the case ever proceeding to trial. If you have an attorney who is a zealous advocate and has a reputation for being aggressive and successful at trial, that can sometimes be all the difference you need to get a case to go away or to get a better plea offer. You must make sure that whoever you hire knows how to evaluate these types of cases, has significant experience handling them, and is eager to represent your interests fearlessly.

There is no doubt that damage control is a big part of what I do. There are many people I represent who find themselves in very serious situations. They need somebody to make sure that the police and prosecutors do their jobs the right way and do not cut corners. They need to make sure they receive every benefit of the law and the presumption of innocence the Constitution affords.

I represent many people who are innocent and have been wrongly accused. Having a knowledgeable and experienced attorney represent them can be the difference between walking away free or spending the rest of their lives in prison. There is no limit to the amount of benefit someone can gain from having a seasoned attorney represent them in a case involving sexual allegations.

I have been involved in thousands of investigations and/or cases concerning sex crimes. I have worked with law enforcement and prosecutors to evaluate evidence to determine if charges are appropriate. I have both prosecuted and defended these cases. I have resolved these matters via diversion, pleas, motions and trial, both to a judge and a jury. I have helped train law enforcement in how to investigate these crimes and helped educate them on the evidentiary and legal pitfalls associated with cutting corners.

I have trained medical staff on how to communicate with witnesses, how to collect evidence during a sexual assault examination and how to present their observations to a judge or a jury. I have assisted in preparing thousands of witnesses and victims to testify about these types of crimes. I have worked with forensic interviewers that are specially trained to interview children in these types of situations. I have received training in a number of different settings on how to handle and evaluate evidence, and present evidence and arguments in these types of cases.

If you or someone you know has been accused of a sexually oriented crime in the Kansas City area, I am here to help and answer questions. If you take away nothing else from this book, remember this: get informed, get prepared and get the best defense attorney you can.

DISCLAIMER:

This publication is intended to be informational only. No legal advice is being given, and no attorney-client relationship is intended to be created by reading this material. This information concerns legal issues in Kansas and Missouri only. If you are facing legal issues, whether criminal or civil, seek professional legal counsel to get your questions answered. The decision of hiring a lawyer is an important one and should not be based on advertising alone.

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ACCUSED OF A SEX CRIME
IN KANSAS?

Your attorney needs to get involved before the case ever gets to the prosecutor and provide information and counter-arguments to attempt to influence the prosecutor's decision-making.

This is no time for amateur hour.

Any time you have been accused or are under investigation for a sex crime, it is absolutely essential to have qualified legal representation.

Attorney John DeMarco has spent his entire legal career defending people accused of crimes in Kansas and Missouri. He has a well-earned reputation for aggressively protecting the rights of defendants in the most serious of cases. In this book he shares his firsthand knowledge about Kansas sex crimes cases, including:

- What the potential charges are
- How they are investigated
- How to best defend yourself from an accusation.

Accused of a Sex Crime in Kansas? provides essential information about the investigation of charging process in sex crimes cases, the process of hiring an attorney, ideas for defending against a charge of sexual misconduct and various legal standards and potential sentences for sex crimes in Kansas.



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