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Prosecuting and Defending Campus Assaults: Practitioners' Perspectives

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PROSECUTING AND DEFENDING CAMPUS ASSAULTS: PRACTITIONERS' PERSPECTIVES

Featuring:

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Moderated by Professor Jeffrey Omar Usman

Moderator: We started our Symposium this morning with the Title IX Coordinators as a background focus for this discussion; let's start with the complexities in general with handling prosecution and defense in sexual assault cases. I wonder if you could offer, Mr. McGee, some perspective in terms of what are the challenges of a criminal defense attorney in terms of defending a sexual assault case?

Richard McGee: In all cases when you are in your case analysis, or when you are in your prep session, you have to identify the factor that can lead a jury to rule against your client -- state or defense -- either way. In defending these kinds of cases one of the most important considerations is sympathy. You have a woman who is coming in, or a man for that matter, saying, "I've been sexually abused," particularly in cases where you are not disputing anything. In other words, you are just saying "I'm sorry this happened to you, but you got the wrong guy," you must be able to deal with the issue of emotion. The judge, of course, will say, "you can't allow prejudice or

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sympathy to impact you or your decision." However, if you don't identify the emotional aspect of the sexual assault case and develop a strategy to attempt to minimize it as best you can, you have not engaged in proper case analysis.

Torry Johnson: From a prosecutor's stand point, these cases fall into two big categories: one involves cases the Title IX Coordinators have to deal with in a campus situation where consent is a question. In that situation, there is a lot of gray; it is a difficult concept. And that goes double for a criminal case, where we are not operating under a preponderance; we are operating on proof beyond a reasonable doubt. Those cases require one type of analysis to determine whether or not it is a prosecutable case, a case we think we can actually take to court and get a conviction. Then we have the other category of cases where consent is not the issue and those take on a whole different approach. Usually, the question is more of identification. Do we have the right person in the courtroom? Our offices intersected a little with Title IX in the Vanderbilt Rape Case[1] where we really had aspects of both Title IX process as an on-campus issue, but it was not a question of whether consent was at issue, so it did have aspects of both.

Richard McGee: Another issue you are going to start facing in the real world is comfort dogs. What's the responsibility of prosecution as it relates to ensure it's necessary? What's the responsibility of defense counsel to raise the proper objection? And what's the responsibility of the court to try and determine if the comfort dog should be permitted to be in the courtroom? How are you going to be able to ensure seeing a comfort dog does not adversely impact the jury? Now we did have a guy in the courthouse recently who tried to bring in his comfort goat. It was actually in a shirt and tie, and a diaper, and he could not get past security. They would not allow the defendant to bring in his comfort goat into the courtroom.

Moderator: Let's start in terms of the investigative process. Let's start off with cases with investigations that do occur on campus that don't involve Title IX. What are some of the challenges from a defense attorney perspective in investigating a sexual assault?

Richard McGee: You better get on Facebook as soon as possible, and every other social media that is available. In fact, the ethical rules now mandate that an attorney engage in social media investigation and failure to do so could actually open you up to a claim for ineffective assistance of counsel because you have not properly investigated the case.[2] The reality is, people

1. *Tenn. v. Vandenburg*, No. 2013-C-2199, 2015 Tenn. Crim. LEXIS 1 (Crim. Ct. for Davidson County, Tenn. Jan. 28, 2015).

2. Meritorious Claims and Contentions, Ann. Mod. Rules Prof. Cond. § 3.1; Fed. R. Civ. P. 11.

say the darnedest things online. We all know that, everyone in this room knows somebody who has posted something, or even ourselves, that sometimes you really wish you could delete. Some years ago, I was on a mayoral commission for a month working on amending the Metro Code. Anybody who was on any of these commissions had to go to some kind of session dealing with sensitivity training. I had to go, and the lady started, and she said, "If you don't remember anything else, don't forget this: Delete doesn't equal delete." And she's right. We were involved in a case a couple of years ago where we turned the case completely around with social media information. When you start investigating, get on social media, talk to people who received information because you will find all kinds of helpful stuff there.

Torry Johnson: I think on the prosecution, easily, time is of the essence. And this is the one issue that there are some complications with Title IX, because sometimes there's a delay in process a little bit. There are a lot of very important investigation techniques that police need to use, but they have to use them as soon as they possibly can. But, if a complaint is delayed, not only by hours, but particularly days or weeks, it makes a lot of these cases drastically more difficult. Not only for some investigative techniques they could use, but also going after the social media and electronic digital finger prints that are out there that you'd like to get to before somebody wises up and tries to get rid of them.

Richard McGee: And that's probably one of the biggest things we have seen change in our career. We started 40 years ago. Social media came along, and it changed a lot. If you are in private practice and a client comes in with a case, and you think social media is going to be an issue, you better be thinking about what motions you need to file immediately.

I am involved in a case with a former Tennessee State University student and we are addressing some of this. One of the things we did is filed a motion to preserve the videotape that we have reason to believe existed. I sent a letter to the President of the University, as well as the Head of Counsel, along with General Funk, saying, "We're putting you on notice, we want this preserved." The police department was involved in this case as well, so it created a scenario where the District Attorney's Office was more hands-on than they might have been if it was given to them six, seven, eight months ago. But you have got to be conscious of what type of evidence will potentially be destroyed – not only in sex cases, but when you have somebody who is charged with something as simple as shoplifting, or a serious as armed robbery. What do we know?

I had a lady who was charged with assault with a vehicle. She stopped after work and had a couple drinks and was heading home, and somebody that was

drunk stepped off the curb, and she hit him. She got charged with assault. We knew that there were cameras, because it was Lower Broadway. So, we immediately reached out and contacted the Precinct Commander of the Downtown precinct and put him on notice and I copied the Chief of Police on the email.

Moderator: Are you seeing an effect in terms of victims reaching out to law enforcement reporting sexual assault based upon concerns about becoming fodder on social media? Or are victims more reluctant to come forward because they're concerned about what is going to be said on social media and how that information is going to be disseminated? Is that having any impact from your perspectives?

Torry Johnson: I don't know. I am not sure I can say. Social media has just changed the landscape so dramatically. But I do not know how it has really affected the behavior of people coming forward or being reluctant to come forward.

Richard McGee: I think it is going to be a case-by-case, individual person, and as part of your case analysis you have got to do witness analysis and need to be asking five questions. Who is this person? Who is this person really? What is this person going to add to this case? What will this person never add in this case? And finally, is this person scared of somebody who is involved in the case? And that's all part of the witness analysis that we engage in all of our cases.

I am not so sure with the young people that were dealing with that they really care what they put out there. I think it is going to be fascinating in twenty years with social sciences to address the issues of increase of narcissism that we have had. You have to wonder if sticking cameras in three-year olds' faces has an effect on whether they're running around taking selfies and pictures of anything and everything later in life. What's going to be the result? I don't know.

Moderator: Now, let's move to the university setting. In a case that was not first reported to a police officer, it was instead first reported to a professor, and that professor took it to a Title IX Coordinator. What are the challenges in defending from that underlying Title IX process from a defense attorney prospective and what are the challenges from a prosecutorial perspective?

Richard McGee: One problem from the defense perspective is they are not going to allow you to be a lawyer. Let's say a young man comes to me and says, "The university has brought me up on these charges what do I do?" The first question you ask is, "Have you already talked to somebody?" And many times, they have, and that can create a problem. Then you get into issues of

what constitutional rights, if any, are applicable in the setting. If the Title IX person goes to little Johnny and says, "You've been accused of date rape," and he makes some statements that are potentially incriminating, maybe they are admissions, maybe they're inconsistent with other statements. So, there is a real problem any time a university gets involved because they will not let you do your job in the university setting. I was at a hearing where I was specifically told, "You cannot ask any questions. You cannot open your mouth." Which for most you who know me, is difficult. It was absurd. It got to the point where I'm doing this [*motions to stop with hands*]. I mean, it was ridiculous, but it was the rules governing that particular setting. It was a real problem. And then I would say to my client, "You have a choice: Do you want to answer these questions, or do you want to get kicked out of school? If you don't cooperate they're going to kick you out of school. If you do cooperate the State can potentially use this information." I was told, "We don't give it to the state, but if they ask for it we will."

Torry Johnson: I think on the criminal prosecution side, again, it is the delay issue. Oftentimes it takes a while to go through the process before we may even become involved. In which case, a lot of potentially good investigative avenues have been foreclosed simply because of the passage of time. But we also have the same concerns of repeated statements. The victim has given a statement, the victim maybe gives more than one statement before the police are involved, and then they take yet another statement.

Let's just talk about the victim's statement. The Title IX Coordinators are trained in issues related to Title IX, they are not necessarily trained in criminal investigation. Their questions and their concerns are different, so consequently, the statements they take may not be terribly helpful or useful to those of us on the criminal side, so you have to take them over again. But then we've got two or three or four statements floating around, which makes it difficult. But Rich is right, too; the respondent or potential defendant is potentially in the same boat as well, having made multiple statements.

Moderator: What are the discovery opportunities that are presented in going on the offense as a defense attorney with a case arising out of the university setting?

Richard McGee: Preservation of information is critical. You have got to do whatever you can to preserve all of the information that the university gathers. File motions in criminal court, send letters to the university that you're demanding the information be kept, and notify the district attorney, notify the police department that you are doing this. Your position is, "All I want is to preserve." I don't want evidence lost, I don't want to be in a situation six-months from now when we're saying, "Sorry we didn't keep the

audio recoded statement of either the accused or the alleged victim. We just have the investigator's notes." So, preservation is key.

Torry Johnson: Again, referring a little bit to the Vanderbilt Case,[3] because it's the one that took us four or five years to deal with but in several situations, issues cropped up there. One, the police weren't really too sure of the role of the Title IX investigator. Consequently, they assumed that the Title IX person and the criminal investigator were moving down the same path. So, the criminal investigator shared information about the ongoing criminal investigation with the Title IX investigator, and the Title IX investigator dutifully wrote it all down and put it in their file. Eventually it was subpoenaed and turned over to the defense, and they got a lot of information that they would not have otherwise been entitled to.

We also had situations where some things were given to the Title IX investigator with the tacit understanding, or the express understanding, that it was confidential. It was not confidential though, so then it was later again subpoenaed and produced. It was not that there was anything exculpatory there, but it caused some issues and risks between some of the witnesses because of things that they thought were done in confidence.

Richard McGee: If a student comes to you who is charged with sexual assault, then don't think for a second that the only issue is whether or not the person is going to get convicted in a criminal setting and whether or not they are going to get kicked out of school. You want to talk about the big scarlet letter? I happen to know a friend of mine who is going through a situation where their son has been accused. I can tell you that it has completely wrecked the family of both sides. It is all over this kid's academic records. Until the case is finalized, he cannot go to another university. He cannot get any student aid. He is frozen in place, and the university in that case basically has taken the position that it is not going to do anything until the criminal case is over because it doesn't want to interfere with the criminal case. So, for eighteen months this kid was frozen in place.

It is interesting in the case that we have talked about today, *John Doe v. University of Cincinnati*, which was decided in September of 2017 and is the most recent case from the Sixth Circuit.[4] In that case, the graduate student went into federal court and got an injunction to keep from being suspended.[5] Now, assuming that the District Judge allowed him to continue, the good news for him is that he will graduate school by the time the lawsuit is over.

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3. *Tenn. v. Vandenburg*, No. 2013-C-2199, 2015 Tenn. Crim. LEXIS 1 (Crim. Ct. for Davidson County, Tenn. Jan. 28, 2015).

4. *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017).

5. *Id.*

Moderator: Talking about officers perhaps misunderstanding the role of Title IX Coordinator, what type of interaction is there between prosecutors, ADA's, elected district attorney, defense attorneys, and Title IX Coordinators? Is there communication in a case that is running on parallel tracks? What type of communication, if any, is going on between the Title IX Coordinator and attorneys on the prosecution side or the defense side?

Torry Johnson: If it is a major case, there is probably eventually some communication between the investigating detectives and the Title IX investigator. Again, during the Vanderbilt Case, I had a number of conversations with Vanderbilt's General Counsel. Most of that was to make sure that we were both on the same page and Vanderbilt assured us, and they did, give the police department complete cooperation at a very early stage.[6] There was a lot of communication to make sure that they understand what we were doing or why we needed them to not do something that they were scheduled to do or vice-versa. There were some hiccups and a few little glitches, but by and large, going from the top down, Vanderbilt was very insistent that the criminal investigation went forward and that they did not want to interfere with it. Vanderbilt wanted to cooperate on that. But, I do think that there was some communication at least between Title IX and the investigator, but probably not all that much.

Richard McGee: Another big change from when Torry and I first started until now, is that the level of professionalism within the universities with their police. It was not long ago, that Barney Fife is what you were dealing with. That's not the case anymore. Are not all the universities' officers now post certified?

Torry Johnson: Well, I can't answer that. But, that is a big Title IX issue that needs to be understood. Vanderbilt has a rather large, sophisticated police department. It is called the Vanderbilt University Police Department. Most, or a lot, of colleges and universities have security forces. They are not investigators. They provide security. They make sure that if someone late at night wants to be escorted across the campus, they will see that that happens. But, it's a leap to say that they are trained investigators. In the Vanderbilt situation, we were fortunate and they quickly realized that this was the makings of a real live criminal case and they had policies in place that said, "when you see this, you need to contact the police department," which they did and the police department responded appropriately by sending some investigators immediately to start an investigation. But, to Rich's point, those of us in an urban area like this are getting the benefit of much more highly trained campus police officers. But, there are hundreds if not thousands of

6. *Tenn. v. Vandenburg*, No. 2013-C-2199, 2015 Tenn. Crim. LEXIS 1 (Crim. Ct. for Davidson County, Tenn. Jan. 28, 2015).

colleges in other places across the country where that is not the case and the problem is often compounded by the fact that often they are in small area college towns where the police department is not much better. Consequently, it makes those kinds of cases and investigations much more difficult.

Richard McGee: If you get one of these cases, what you need to do is request for the policies and procedures of the particular police department. You want their manuals, the same way that you get the manuals on the criminal side with the police departments. You want their manuals. You want to do an investigation into the officers. You want to find out what the officer's background is. At Vanderbilt, a number of them are former Metro officers. I can tell you, some of them are Vanderbilt officers because they left the Metropolitan Police Department on not such good terms. You would be surprised how many folks were leaving Metro and going to various university police departments. So, investigation, investigation, investigation. You have got to get the material on the individual department and the information on the individual officer.

Moderator: Professor Johnson was talking about working with the Title IX Coordinator as a prosecuting attorney. What about from the defense attorney perspective? Is there that level of cooperation between Title IX Coordinators and defense attorneys?

Richard McGee: No.

Moderator: Is there any cooperation between Title IX Coordinators?

Richard McGee: I have limited experience in dealing with them, and every time I have, I have basically had a door slammed in my face.

Moderator: What challenges does that create for you as a defense attorney in handling a case?

Richard McGee: Again, it is the preservation of evidence. That is the reason why you have got to put the university on notice and put them in the scenario where you very nicely let them know that if they start losing evidence, I will see you in court.

Moderator: In terms of going before a jury, in a case involving an assault on campus at a university involving students, are there any additional challenges in presenting your case as a prosecutor or as a defense attorney than we would see in another type of sexual assault case?

Torry Johnson: No, I think that only those that are brought on by the fact that there is a parallel investigation that has gone on create the most

challenges. So, you run the risk of the complicating factors: multiple statements; potentially lost evidence; sharing of evidence that has to go from the university to the police department; and different fact-finding processes and so forth. It is a more cumbersome process. The more people that you get involved, the more questions that get raised that the defense can use effectively and that can make it difficult for the prosecution, and so on and so forth.

Richard McGee: A date rape case is a date rape case if it is on a college campus or if it is two people who meet in a bar. That is the kind of case that it is. A misidentification case on 21st Avenue South is no different than a misidentification case that occurs in the middle of a university. Those are probably the two types of cases that you see the most. Some kind of consent premised upon some kind of relationship. It could be a Tinder pickup that night, which creates issues for both sides, or it could be an identification issue.

Moderator: Is there any sort of common recurring keys to persuading a jury to see the case in favor of the state or in favor of the defense in these "he said, she said" cases? We have heard a lot about these cases in terms of being resolved in a Title IX perspective. In terms of resolving them from a criminal law perspective, are there any consistent keys to try to get the jury to see it your way?

Torry Johnson: Obviously, just like Rich mentioned earlier, a lot of it is looking at who the victim is and who the witnesses are. Are they persuasive? From a prosecutor's standpoint, you are looking for anything that corroborates what the victim says. Any little scrap of information. That is where social media can come in, good or bad. It can totally change the case when, for example, the defense comes in and says that this puts a different spin on things because of what we found on social media with regard to the victim. And vice versa. "Look at what we found about what your client was saying." I think probably today, we have greater possibility of finding relevant evidence on social media in these types of cases than we did before social media was so prevalent. Before, there was not a lot. If it was a consent case or a date rape case, it was whether there were some physical witnesses who may have seen something or some acquaintances that the victim may have talked to right after. There is something powerful about finding stuff in social media, as they say pro or con.

Richard McGee: At the end of the day, credibility is credibility. You have a story to tell from the defense perspective. You are telling your story and explaining how it establishes innocence. The state is doing the opposite. The good news is, tattoos don't make anybody guilty anymore. More for that matter, tattoos don't say to the jury, "Well, we aren't going to believe

anything this person says because they have tats." There was a time that was the case, but now the cops have tattoos too.

Moderator: Are there any closing thoughts that you would like to offer in terms of the complexities or challenges with this intersection of Title IX coming together with the criminal law and criminal justice system in terms of addressing sexual assault cases that arise on campuses or universities?

Richard McGee: I want to talk about collateral consequences. You may represent someone and they get accused of any kind of crime, certainly sexual crimes, and you win and get the case dismissed. You get your expungement order signed, and you know what happens? Your client applies for a job somewhere down the line and the private services find it. There are background location services, and it's scary. It's scary, which means that if you have someone come to you who has not been charged but is under investigation, your number one job is to keep him or her from ever being charged. If there is any way you can do it, keep them from being charged because an expungement is not an expungement. It is always going to be out there in the public domain. Needless to say, there are ramifications of a conviction. The sex offender registry is a beast. I'm not certain that for most people, being dead wouldn't be better than being on the registry. I say that very seriously because the registry is awful. There are collateral consequences for not only the accused, but the accused's family as well.

Torry Johnson: For our purposes, most of these cases are the date rape or consent issues. You are hoping that the campus process is giving the victim the correct information and not forcing the victim, unintentionally or intentionally, to either report it to the police or not report it to the police. Giving them adequate information and understanding that they may be very upset and distraught is different than simply telling them one time, "Oh by the way, you can report this to the police." That may not really sink in. Sometimes they think that, because they reported it to the university that there is in fact an automatic report to the police, which is not the case. I think that the prosecutor's and police's concern; that victims are not unwittingly being shunted out of the system or away from the system, but also getting them to understand that if they go the criminal route that it is not just some little affair that stays on campus. It has collateral impact on the victims as well. Believe me, the Vanderbilt victim knows quite well what the collateral impact has been. Were she not as strong as she was, there are few people that could have been, even in a case where there was substantial proof. She still signed up for four years of litigation.